Stanbic Bank Limited v Commissioner of Domestic Taxes (Tax Appeal E156 of 2020 & E018 of 2021 (Consolidated)) [2022] KEHC 13457 (KLR) (Commercial and Tax) (23 September 2022) (Judgment)

Neutral citation: [2022] KEHC 13457 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

TAX APPEAL E156 OF 2020 & E018 OF 2021 (CONSOLIDATED)

EC MWITA, J

SEPTEMBER 23, 2022

BETWEEN

STANBIC BANK LIMITED ..... APPELLANT

AND

COMMISSIONER OF DOMESTIC TAXES ..... RESPONDENT

(Appeal from the Decision of the Tax Appeals Tribunal dated 18th December 2020 in Tax Appeal No. 176 of 2016)

JUDGMENT

Background

1. The Commissioner of Domestic Taxes (The Commissioner) conducted an audit on Stanbic Bank Limited's business (Stanbic) for the period January 2013-July 2013 and issued a tax demanded for Kshs. 643,775,786 in respect of Excise duty for amounts from exempt customers; Share of profits from Stanbic Investment Management Services ("SIMS"); Suspense account reconciliations; Exported services; Loan administration fees; Derived commissions; and Shortfall penalty amounts under section 84 of the *Tax Procedures Act*.

2. Stanbic objected to the tax demand in letter dated August 25, 2016. The Commissioner communicated its objection decision in a letter dated October 14, 2015 on some items and requested some feedback with regard to other items within 7 days (on or before October 27, 2016) so as to finalize the matter. Stanbic took the view that the letter was not an objection decision and argued that its objection was deemed allowed by operation of the law under section 51(11) of the *Tax Procedures Act*. Stanbic further argued that the letter did not meet the requirements of an objection decision. The Commissioner maintained that the letter was an objection decision.

3. Following this disagreement, Stanbic filed an appeal before the Tax Appeals Tribunal (TAT) and the TAT rendered a decision on December 18, 2020, partially allowing the appeal. The TAT held that the objection was valid and upheld assessment in relation to excise duty on derived commission fees from money transfer and visa fees. The TAT however allowed the appeal and set aside excise duty assessment on loan administration fees, share of profit from SIMS, derived commission fees from ATMs and the tax shortfall penalty.

Appeals to this court

4. Both parties were dissatisfied with either part of the decision and each filed an appeal to this Court. Stanbic lodged Income Tax Appeal (ITA No. E156 of 2020 (the first appeal) through a memorandum of appeal dated 30th February 2020, raising 16 grounds of appeal, that:

    1. The Tribunal erred in law and in fact in finding that the letter of October 14, 2016 was a valid objection when the said letter did not comply with the provisions of section 51 of the *Tax Procedures Act*.

    2. The Tribunal erred in not finding that the letter of 14th October 2016 from the respondent was merely a request for feedback and not a valid objection decision.

    3. The Tribunal erred in failing to find that the letter of October 14, 2016 only addressed two of the issues raised in the Appellant's objection and as such the Tribunal had no jurisdiction to deal with issues not contained in the letter of October 14, 2016.

    4. The Tribunal erred in law in failing to find that for the issues where no finding or decision was made in the letter of October 14, 2016, when the statutory period of 60 days for making a decision lapsed, the objection with respect to those matters were automatically allowed by operation of law as provided by section 51 (11) of the *Tax Procedures Act*.

    5. The Tribunal erred in law in upholding the Respondent's assessment on exported services, derived commissions and excise duty for the period January 2013 to July 2013, despite the fact that the Respondent did not issue a finding on those issues in his letter of October 14, 2016. In the circumstances the Appellant's objection on those issues was allowed by operation of the law.

    6. The Tribunal erred in law in upholding the assessment of excise duty for the period January 2013 to July 2013 which was the subject of an ongoing dispute at the High Court between the Kenya Revenue Authority and the Kenya Bankers Association representing its member banks which include Stanbic Bank (Kenya Bankers Association v the Attorney General and the Kenya Revenue Authority, High Court Petition No. 124 of 2013). The Honourable Tribunal failed to consider that the dispute was subsequently settled through a consent where the Respondent agreed not to pursue excise duty from banks for the period prior to 1 September 2013.

    7. The Tribunal erred in law in upholding the assessment of excise duty for the period January 2013 to July 2013 despite the fact that the High Court in Petition No. 124 of 2013 had issued a conservatory order precluding the Appellant from charging excise duty for the said period and as a result arrived at a wrong decision.

    8. The Tribunal erred in disregarding and/or failing to consider its judgements on the same issue in *Co-operative Bank of Kenya Limited v Commissioner of Domestic Taxes* (Tax Appeal No. 45 of 2017) where the Tribunal ruled that due to ambiguities in the relevant legislation, excise duty was not due for the period January 2013 to July 2013.

9. By the improper interpretation of the conservatory order and the Finance Bill 2012, the Tribunal, interfered with, and violated the Appellants' fundamental right to property under Article 40 of *the Constitution*.

10. The Tribunal erred in fact and in law in finding that Excise Duty is due and payable on Derived Commission fees from money transfer and Visa fees.

11. The Tribunal erred in law and in fact in finding that Excise Duty is due and payable on services exported by the Appellant.

12. The Tribunal erred in fact and in law in confirming excise duty on exported services as it failed to consider the fact that levying excise duty on exported services is contrary to Government tax policy on the exemption of exports from customs duty, excise duty and value added tax.

13. The Tribunal failed to consider that when the *Finance Act* 2012 made changes to the *Customs and Excise Act* to introduce excise duty on services, it did not make appropriate changes to taxing provisions to provide for taxation of services and as a result the legislation was unclear and ambiguous.

14. The Tribunal erred in fact and in law in confirming excise duty on money transfers into Kenya from other countries as it failed to appreciate the fact that the money the Appellant receives from corresponding bank outside Kenya arises from a transaction that is outside the ambit of excise duty.

15. The Tribunal erred in law by failing to consider its decision in the case of Co-operative Bank of Kenya Limited v Commissioner of Domestic Taxes (Tax Appeal No. 45 of 2017) where it held that agency fees that the bank received from outside Kenya are outside the excise duty ambit.

16. The decision appealed against is to the extent set out herein wrong in law and under the Constitutional principles and unjust in effect and it therefore ought to be set aside.

5. Stanbic prayed that the first appeal be allowed with costs and the decision of the TAT upholding excise duty tax assessment be set aside.

6. The Commissioner opposed the first appeal through a statement of facts dated March 1, 2021.

7. On the other hand, the Commissioner lodged Income Tax Appeal (ITA) No. E018 of 2021, (the second appeal), through a memorandum of appeal dated March 5, 2021, raising 6 grounds of appeal, as follows:

    1. That the Honourable Tribunal erred in law and fact by setting aside confirmed assessments with regard to Excise Duty on loan administration fees terming it as interest

    2. That the Honourable Tribunal erred in law and fact by setting aside Excise Duty on SIMS fees

    3. That the Honourable Tribunal erred in law and fact by setting aside Excise Duty on derived commissions fees from ATMS

    4. That the Honourable Tribunal erred in law and fact by setting aside shortfall penalty contrary to the provisions of section 84 of the *Tax Procedures Act*.

    5. That the Honourable Tribunal erred in law and fact by finding that the appellant had collected Corporation Tax from the respondent.

6. That the Honourable Tribunal erred in law and fact by disregarding the appellant' statement of facts, evidence and submissions thereby arriving at an absurd finding.

8. The Commissioner prayed that the second appeal be allowed with costs and part of the decision by TAT setting aside confirmed assessments on excise duty on loan administration fees, excise duty SMIS fees, excise duty on derived commission fees from ATMs and shortfall penalty be set aside and the objection decision dated October 14, 2016 be upheld. Stanbic filed a statement of facts dated May 17, 2021 opposing the appeal.

9. The two appeals were consolidated by consent on May 6, 2021 were disposed of through written submissions with oral highlights. Stanbic filed written submissions dated June 28, 2021, supplementary submissions dated November 2, 2021, list and bundle of authorities and a further supplementary lists of authorities dated June 28, 2021 and February 16, 2022. The Commissioner filed written submissions dated October 8, 2021.

First appeal

Submissions by Stanbic

10. Stanbic asserted that the TAT erred by failing to find that the objection had been allowed by operation of law under section 51 (11) of the *Tax Procedures Act*. The section states that "where the Commissioner has not made an objection decision within sixty days from the date that the taxpayer lodged a notice of the objection, the objection shall be allowed." Stanbic argued that even though the letter of November 2, 2016 was sent to the Commissioner, the Commissioner did not communicate on the rest of the items in the objection as promised and the 60 days within which a decision was to be made having lapsed regarding the rest of the items, the objection thereto was deemed to have been allowed by operation of the law.

11. Stanbic took the view that letter dated November 14, 2016 was the objection decision to objection on tax assessment(s) and fell outside the 60 days allowed by law. Stanbic relied on *Vivo Energy Kenya Ltd v Commissioner of Customs and Border Control, Kenya Revenue Authority & another* (JR Appl. No. 346 of 2019) [2020] eKLR, for the proposition that where the Commissioner fails to make a decision in 60 days, the objection should be allowed.

12. Stanbic again asserted that the TAT erred in upholding excise duty assessment for the period January 2013 to July 2013 when conservatory orders given on February 20, 2013 in *Kenya Bankers Association (KBA) v Attorney General (AG) and Kenya Revenue Authority (KRA)*, (Petition No. 124 of 2013.) were in still force. Those orders were subsequently extended and remained in force until April 12, 2017 when the matter was withdrawn by consent.

13. Stanbic posited that excise duty assessment during the period when conservatory orders were in force, was illegal as it went against express court orders. Stanbic relied on *Republic v Attorney General & another ex parte Council of Legal Education* (Misc. Civil Appl. No. 315 of 2016) [2017] eKLR, to the effect that an action taken in breach of a court order is a nullity and of no effect. Stanbic added that at the material time, (April 12, 2017), the Commissioner was in communication with Kenya Bankers Association (KBA) and one of the conditions agreed on for the withdrawal of the petition was that Kenya Revenue Authority (KRA) would not take action against any of KBA's members in respect of excise duty for the period prior to September 1, 2013.

14. According to Stanbic, on June 5, 2017, KRA acknowledged the letter from KBA and executed a consent for withdrawal of the petition, thus accepted the conditions on which the petition was

withdrawn. By letter dated 2nd September 2016, KBA members were to comply with excise duty obligation with effect from 1st August 2013.

15. Stanbic maintained that the letter dated September 2, 2016 created a legitimate expectation that KRA would not demand excise duty prior to August 1, 2013. Stanbic relied on *Commissioner of Domestic Taxes v Mennonite Board of East Africa t/a Rosslyn Academy*, ITA E041 of 2020.

16. Stanbic went on to argue that excise duty is a consumptive tax charged on customers at the time of consumption and, for that reason, no excise duty could be collected when conservatory orders were in force. The demand by the Commissioner could not act retrospectively. Stanbic relied on *Kenya Bankers Association v Attorney General & another* (Petition 353 of 2018) [2020] eKLR in this respect.

17. Stanbic faulted the TAT for upholding excise duty on export services given that there was no express provision requiring excise duty to be charged on an export service. According to Stanbic, under the repealed section 2 of *Customs and Excise Act*, excise duty was only chargeable on goods manufactured in Kenya or imported into Kenya, a definition that did not include exported services. "Tax could only be charged where the law expressly allowed and in case of silence or ambiguity, the benefit should have been in favour of a tax payer." Stanbic argued. In this regard, Stanbic relied on Article 210 of *the Constitution* and the decision in *Mount Kenya Bottlers Ltd & 3 others v Attorney General & 3 others* (CA No. 164 of 2013) [2019] eKLR.

18. Stanbic took the view, that excise duty was a territorial tax under section 2 of the repealed *Excise Duty Act* and that section 7 (1) of the *Excise Duty Act*, 2015 is clear that exported service is not liable to excise duty, which is in line with international best practices/standards. Stanbic argued, therefore, that the TAT fell into error in upholding excise duty assessment on derived commission fees from Visa/MasterCard fees and money transfers. Stanbic maintained that the TAT wrongly assumed that services had been rendered to Visa and MasterCard which was not the case.

19. Clarifying the position, Stanbic explained that in a card payment transaction, the parties involved are the acquiring bank, issuing bank and card company such as Visa or MasterCard. There is usually no service rendered to the card company but to the customers. In such a scenario, Stanbic pays income tax on the commission earned but does not offer service to Visa or MasterCard that would be subject to excise duty.

20. Stanbic again argued that excise duty on derived commission from inbound money transfer is an exported service that is not subject to excise duty in Kenya. Stanbic maintained that the TAT having identified the consumer of the service as the London Bank, the commission earned from the London Bank, which consumed exported service was not subject to excise duty in Kenya. It was Stanbic's case, therefore, that Excise duty being a consumptive tax charged on the customer, the London bank being the consumer of the service no excise duty could be charged on the derived commission.

21. Stanbic relied on *Co-operative Bank of Kenya Limited v Commissioner for Domestic Taxes*, TAT No. 45 of 2017, where the TAT considered a similar issue and determined that excise duty could not be charged on Co-operative Bank Limited. Stanbic argued, therefore, that the TAT was wrong in shifting from its earlier position on export services with regard to inbound money transfer.

The Commissioner's submissions

22. The Commissioner opposed this appeal and supported the TAT decision with regard to the findings the subject of this appeal. The Commissioner argued that the dispute arose following the amendments introduced through the *Finance Act*, 2012, so that excise duty was to be levied on other fees charged by banks.

23. Although the Commissioner admitted that the Finance Act, 2012 was challenged and conservatory orders issued restraining KRA from collecting excise duty from KBA members pending the hearing of the petition, the Commissioner's position negotiations led to concessions between the parties that excise duty would still be accounted for notwithstanding what was before the Court.

24. The Commissioner asserted that after the assessment was issued on July 4, 2016, the Stanbic did not pay the undisputed taxes of Kshs. 38,247,505 as required by the law thus rendered the objection null and void. The Commissioner also took the view that the objection could not be deemed to have been allowed by operation of the law since parties were in active negotiations.

25. On the validity of the objection decision, the Commissioner supported the TAT's holding that the objection decision made on October 14, 2016 was proper since there was not format an objection decision must take. According to the Commissioner, the letter dated November 14, 2016 that Stanbic argued was the objection decision, was a response to Stanbic's letter dated November 2, 2016. The letter dated October 14, 2016 answered some issues while other issues were left pending subject to supply of further documents. The Commissioner urged the Court to uphold the finding by the TAT on this issue.

26. regarding legitimate expectation, the Commissioner argued that there can be legitimate expectation against provisions of the law. The Commissioner relied on *Association of Kenya Insurers v Kenya Revenue Authority*, (Petition 383 of 2013) where the Court stated that the commencement date of the Finance Act 2013 was stipulated by the Act itself and the Commissioner had no powers to vary that date. The Commissioner urged the Court to find that Article 210 of *the Constitution* had not been violated because the Finance Act, 2012 allowed levying of the tax by providing that excise duty was payable on all other fees except interest.

27. On the argument that excise duty could not be paid on export services, the Commissioner contended that the service was rendered locally and, therefore, attracted excise duty. It was the Commissioner assertion, that even though section 57 of the *Customs and Excise* still exists, the services rendered by Stanbic were consumed locally and paid for in Kenya. For that reason, once a commission is paid, the bank has to pay excise duty.

28. The Commissioner maintained that the decision in Co-operative Bank of Kenya Ltd v Commissioner of Domestic Taxes, (TAT No. 45 of 2017) was by a different panel of the TAT and is not binding on this Court. The Commissioner urged the Court to dismiss the first appeal with costs

Stanbic's rejoinder

29. In a rejoinder, Stanbic maintained that the letter dated October 14, 2016 was not an objection decision and that it did not address some of the objections raised. Stanbic relied on section 51 (4) of the *Tax Procedures Act* which places an obligation on the Commissioner to inform a taxpayer that an objection had not been validly filed.

30. Stanbic asserted that although it was true that the services were performed locally, it agreed with the TAT's finding that the consumer of the services was the London Bank. Stanbic relied on *Commissioner of Domestic Taxes v Total Touch Cargo Holland* (ITA No. 17 of 2013) [2015] eKLR, where the Court held that an exported service is one which is provided for use or consumption outside Kenya and that the determining factor is the location where that service is to be finally consumed, whether performed in or outside Kenya.

Second appeal

Commissioner's submissions

31. The Commissioner abandoned grounds 2, 3, 4 and 5 in this appeal leaving grounds 1 and 6 only for determination. The Commissioner submitted that the TAT was wrong in the part of the decision that set aside the objection decision confirming excise duty assessment on loan administration fees by terming it interest payments and urged this Court to set aside that part of the decision.

32. The Commissioner also submitted that the TAT was wrong in holding that the *Income Tax Act* is closely related to *Excise Duty Act* so that they can be considered to be *pari materia*. The Commissioner pointed out that section 2 of the *Income Tax Act* is clear on what is meant by interest, and that the *Finance Act, 2012* defined other fees to include other fees charged by financial institutions, excluding interest. The Commissioner urged that the second appeal be allowed with costs.

Stanbic's submissions

33. Stanbic supported the decision by the TAT and urged the court to dismiss this appeal.

Determination

34. I have considered these consolidated appeals, submissions and the decisions relied on by the parties. The consolidated appeals arise from a single decision by the TAT dated December 18, 2020. The first appeal is by Stanbic while the second appeal is by the Commissioner, each party appealing against part only of the TAT's decision. For convenience, I will deal with the appeals sequentially, starting with the first appeal.

First appeal

35. The first appeal raises 16 grounds of appeal. Having considered the arguments by parties the court has distilled the following issues for determination, namely; whether the letter dated October 14, 2016 was a valid objection decision; whether excise duty could be charged when conservatory orders were in force; and depending on the answer to this issue, whether excise duty could be paid on export services derived commissions and on derived commissions on transfer and visa fees.

Letter of 14th October 2016

36. Stanbic attacked the validity of the objection decision dated October 14, 2016 maintaining that the letter only addressed two issues and not all the issues that were raised in the objection. Stanbic also took the view that the letter was a request for feedback and, therefore, could not be an objection decision. If it was, Stanbic argued, the decision was not only made after sixty days, but also that the TAT could not then deal with any other issue that had not been addressed in the impugned letter. Stanbic further argued that the objection on the other issues that were not covered in the letter dated October 14, 2016 were deemed allowed by operation of the law (section 51(11) of the *Tax Procedures Act*.)

37. The Commissioner on its part argued that the letter dated October 14, 2016 was a valid objection decision, complied with section 51(3) of the *Tax Procedures Act* and answered some issues while other issues were left pending supply of further documents. The Commissioner supported the holding by the TAT that the letter was a valid objection decision since there is no format an objection decision must take. The Commissioner also asserted that negotiations were ongoing and had sought more documents in that letter to finalize other issues. The Commissioner argued, therefore, that the objection could not be deemed to have been allowed by operation of the law as parties were actively engaged in negotiations.

38. I have perused the record and the decision by the TAT on this issue. In the impugned decision, the TAT considered the relevant section (s.51) of the *Tax Procedures Act* on the objection decision and stated:

> (99) the above section does not provide a format that an objection decision must follow. It simply requires that the Objection Decision include a statement of findings on the material facts, the decision of the Commissioner and the reasons for the decision. The Tribunal reviewed the letter of October 14, 2016 and found that it met these requirements.

The TAT concluded that the impugned letter (of October 14, 2016) was a valid objection decision.

39. Section 51 (8) states that where a notice of objection has been lodged within time, the Commissioner should consider the objection and decide either to allow that objection in whole, in part or disallow it. Subsection 9 requires the Commissioner to notify the tax payer in writing of the objection decision and to take all necessary steps to give effect to the decision, including an objection to an assessment, or making an amended assessment.

40. The argument by Stanbic is that the letter dated 14th October was not an objection decision. This view was informed by the fact that the letter did not address all the issues raised in the objection and, therefore, could not be deemed a valid objection decision. Stanbic reasoned that since the letter sought further clarification on some issues, and in respect of the issues that were not addressed in the impugned letter, the objection in relation thereto was allowed. Stanbic appeared to admit, though not expressly, that the impugned letter was a partial decision.

41. I have perused the Commissioner's letter dated October 14, 2016, which was captioned "Cfc Stanbic Bank Ltd: Excise Duty Audit Tax Assessment of Kshs. 643,775,786 & Section 90 Application", and referred to the letter by Stanbic dated September 26, 2016. The Commissioner stated that the "position" on the outstanding issues after perusal of the record forwarded by Stanbic. The Commissioner then went on to state the position on each of the issues raised in the objection.

42. On item 1, Excise Duty on fees from exempt customers, the letter stated that the matter had been dropped after a review of the details provided in the schedule. That was clearly a decision.

43. On item 2, share of profit from SIMS, the letter stated that after a perusal of the profit share agreement, it was determined that fees received from SIMS was subject to excise duty, which was again was a decision.

44. Regarding issue 3, Suspense account reconciliation, the letter stated that after perusing the table, there was need to verify the contents and Stanbic was required to provide supporting documents within seven days for review. It is not clear whether documents were provided and, if so, when. If documents were provided, then the Commissioner should have made a final decision. If, however, no documents were provided, then that amounted to a decision since assessment had been done and a review could only be made if supporting documents had been supplied as requested. Only then could there be necessity to change the position that had been taken in the assessment, if there was reason to. That was a decision unless more documents were submitted that would have necessitated change or review of the decision.

45. With regard to item 5, section 84 tax shortfall penalty, the letter was clear that internal consultations were ongoing and Stanbic would be "notified of the position in due course." On this, the letter was clear that no decision had been made and once made, Stanbic would be informed at a later date.

46. On utilization of overpayments of Kshs. 196,708,160, the letter stated that Stanbic had been informed by the KRA team that application had not been up loading on the i-Tax since it had to undergo

necessary approval. This, in my view, was a decision. The Commissioner position was that the application had not been loading on the i-Tax since it had to undergo necessary approval. Although the Commissioner did not come out clearly to state who was responsible for none uploading of the application and lack of approval, the letter was nonetheless clear that the KRA team had informed Stanbic and Stanbic did not seem to question what that team had said. Stanbic did not also seem to blame the Commissioner for lack of approval. The view I take is that a decision has been made with regard to that aspect of the objection.

47. Flowing from the above analysis, it is clear to this court that the Commissioner expressed a decision on some only of the issues that were under consideration in the objection. In that respect, there can be no doubt that the impugned letter amounted to a decision on the items that were finally determined. What is plain from the letter of October 14, 2016 is that it was a valid but partial decision. In the circumstances, I agree with the TAT, that the letter was a valid objection decision with qualification, however, that it was a valid partial decision.

Period January–July 2013

48. Stanbic blamed the TAT for upholding assessment on excise duty for the period January 2013 to July 2013 when conservatory orders issued in *Kenya Bankers Association (KBA) v Attorney General (AG) and Kenya Revenue Authority (KRA)*, (Petition No. 124 of 2013.), were still in force. Stanbic asserted that assessment on excise duty during that period was illegal, null and void as it was against express court orders. Stanbic relied on *Republic v Attorney General & another ex parte Council of Legal Education* (Misc. Civil Appl. No. 315 of 2016) [2017] eKLR, for the proposition that any action taken in breach of a court order is a nullity and of no effect.

49. Stanbic further asserted that parties were negotiating and that one of the conditions agreed on for the withdrawing the petition, was that KRA would not take any action against any of the KBA members in respect of excise duty for the period prior to September 1, 2013. Stanbic took the view that the letter dated September 2, 2016 created a legitimate expectation that KRA would not demand excise duty prior to August 1, 2013, and relied on *Commissioner of Domestic Taxes v Mennonite Board of East Africa t/a Rosslyn Academy*, ITA E041 of 2020 to that end.

50. Stanbic maintained that excise duty is a consumptive tax charged on customers at the period of consumption and for that reason, no excise duty could be charged on customers while orders were in place. The demand by the Commissioner could not act also retrospectively. In this regard, Stanbic relied on *Kenya Bankers Association v Attorney General & another* (Petition 353 of 2018) [2020] eKLR.

51. The Commissioner admitted that conservatory orders were issued restraining KRA from charging excise duty on KBA members pending hearing and determination of the petition. The Commissioner's position was, however, that even though there were negotiations and concessions between the parties during that period, it was mutually agreed that excise duty would still be accounted for notwithstanding what was before the Court. The Commissioner further argued that the effective date of the law was clear and it had no power to change the date.

52. The Commissioner again asserted that the objection by Stanbic was rendered null since Stanbic did not pay the undisputed taxes as required by law. The record shows that the TAT made a finding of fact that there was no unequivocal admission of outstanding tax and, therefore, the issue of payment of admitted tax did not arise. This court also noted during the hearing of this appeal, that the undisputed tax had been paid and acknowledged by the Commissioner, a fact counsel for the Commissioner also conceded.

53. I have considered respective parties' arguments on this issue. There was no dispute that the Finance Act 2012 was challenged in *Kenya Bankers Association (KBA) v Attorney General (AG) and Kenya Revenue Authority (KRA)*, (Petition No. 124 of 2013). Conservatory orders were issued restraining KRA from levying the introduced excise duty until determination of that petition. The orders remained in force until sometime in April 2017 when the matter was withdrawn by consent.

54. This issue was raised before the TAT and the TAT acknowledged at Paragraph 103 of its decision that indeed conservatory orders had been issued restraining KRA from collecting excise duty pending the hearing and determination of that petition. However, the TAT took the view that "the essence of the order was not to vacate the obligation but to merely place it in abeyance until it was determined whether Excise Duty was in fact due...without a determination by the court that Excise Duty is not due, the tax remains due and payable."

55. Whereas the TAT was correct that the orders put collection of excise duty in abeyance, I do not agree with the TAT's conclusion that excise duty could still be collected for the period January 2013 and July 2013. The orders restrained KRA from collecting excise duty and, as Stanbic correctly argued, excise duty being a consumptive tax charged at the time of consumption, the moment collection of excise duty was suspended by a lawful court order, that tax could not be levied and the Commissioner could not lawfully claim from Stanbic what KRA had been restrained from collecting. In other words, the order was directed at KRA and, therefore, Stanbic could not collect excise duty from customers on behalf of KRA, which would have violated the court order, demeaned the dignity and authority of the court and interfered with administration of justice and the rule of law.

56. Court orders bind all persons and organs to whom they are directed. They must be obeyed until either vacated or set aside and a party has no choice to make whether or not to obey the court order. Obedience to Court orders is the only way courts can guarantee the rule of law and maintain proper administration of justice.

57. In *Dr. Christopher Ndarathi Murungaru v Kenya Anti-Corruption Commission & another* [2006] eKLR, the Court of Appeal observed that Kenya had opted for the rule of law which implies due process and courts must stick to that path even if the public may in any particular case want a contrary thing.

58. In *Nthabiseng Pheko v Ekurhuleni Metropolitan Municipality & another* CCT 19/11(75/2015). Nkabinde, J. writing for the Constitutional Court of South Africa, observed that:

> The rule of law, a foundational value of *the constitution*, requires that the dignity and authority of the courts be upheld. This is crucial, as the capacity of courts to carry out their functions depends upon it. As *the constitution* commands, orders and decisions issued by a court bind all persons to whom and organs of state to which they apply, and no person or organ of state may interfere in any matter, with the functioning of the courts. It follows from this that disobedience towards courts orders or decisions risks rendering our courts impotent and judicial authority a mere mockery. The effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced.

59. In *Canadian Metal Co. Ltd v Canadian Broadcasting Corp*(N0.2) [1975] 48 D.LR (30), the court emphasised as follows:

> To allow court orders to be disobeyed would be to tread the road toward anarchy. If orders of the court can be treated with disrespect, the whole administration of justice is brought into scorn... if the remedies that the courts grant to correct...wrongs can be ignored, then

there will be nothing left for each person but to take the law into his own hands. Loss of respect for the courts will quickly result into the destruction of our society.

60. In *Republic v Attorney General & another ex parte Council of Legal Education* (Misc. Civil Appl. No. 315 of 2016) [2017] eKLR, citing the Court of Appeal decision in C*entral Bank of Kenya & Another v Ratilal Automobiles Limited & Others* (Civil Application No. Nai. 247 of 2006), the Court stated that the consequence of failure to obey court orders is that any action taken in breach of the court order is a nullity and of no effect.

61. In *Hon. Martin Nyaga Wambora and Another v Justus Kariuki Mate & Another* [2014] eKLR, the Court of Appeal again stated that the duty to obey the law (including court orders) by all individuals and institutions is cardinal in the maintenance of rule law and administration of justice. (See also *Kenya Human Rights Commission v Attorney General & another* [2018] eKLR.)

62. The jurisprudence emerging from the decisions referred to above, is that obedience to court orders is a cardinal principle in the administration of justice and maintenance of the rule of law. KRA, as the principal, was restrained from collecting excise duty from KBA members pending determination of the petition. That being the case, the Commissioner could not turn around and demand that Stanbic, (an agent of KRA), pays or even accounts for Excise duty for the period January 2013 and July 2013 when the conservatory orders were in force.

63. The argument by the Commissioner that parties had agreed that an account for excise duty for that period be given, would suggest one thing: that Stanbic was still to collect the tax the court had restrained KRA from collecting, an action that would clearly violate the court order. It must be clear that it was KRA and not Stanbic that had been restrained from collecting excise duty, a consumptive tax collected at the point and time of consumption of service or product. Stanbic could not, therefore, be asked to pay what KRA could not lawfully collect at the time.

64. Furthermore, demanding that Stanbic pays the assessed excise duty would amount to punishing Stanbic for not collecting a tax that KRA had been restrained from collecting. Stanbic was only an agent and once the principal was restrained from collecting excise duty, the principal could not call on the agent to account for what the principle could not collect by virtue of the conservatory order. In that respect, any action that Stanbic would have taken to collect excise duty for the period January–July 2013 would have been an illegality null and void. This is so, because court orders must be obeyed notwithstanding the inconvenience they may cause to those they are directed to.

65. For that reason, there was no legally justifiable reason for the Commissioner to demand that Stanbic pay excise duty for the period January–July 2013 when the court had restrained KRA from collecting that tax. I agree with Stanbic that the TAT fell into error when it upheld excise duty tax assessment for that respect.

Excise on export services derived commissions and on derived commissions on transfer and visa fees.

66. The other issue is whether the commissioner could demand excise duty on derived commissions from export services and transfer and visa fees from inbound money transfer for the same period January-July 2013. Having come to the conclusion that excise duty could not be lawfully collected for the period January to July 2013 while conservatory orders were in force, this issue becomes moot and need not engage the court's precious judicial time. I say so because there were conservatory orders in force and excise duty being a consumptive tax that Stanbic could only collected at the time the service was rendered, Stanbic as an agent, could not collect what the principle (KRA) had been restrained from collecting.

Second appeal

67. In this second appeal, the Commissioner had initially raised 6 grounds of appeal but abandoned grounds 2,3, 4 and 5 leaving grounds 1 and 6 only for determination. In ground 1, the Commissioner complained that the TAT erred in setting aside confirmed assessments with regard to excise duty on loan administration fees, terming it interest. In ground 6, the Commissioner blamed the TAT for failing to consider its statement of facts, evidence and submissions thereby arrived at wrong decision. Stanbic on its part, argued through the statement of facts and written submissions that the TAT's decision was correct.

68. I have considered the arguments by both parties on this appeal. The Commissioner's argument that the TAT did not consider its statement of facts and submissions cannot be correct. I have carefully gone through the record and the decision by the TAT. It is clear from that decision that the TAT elaborately considered submissions by both sides on each issue before arriving at its decision on the issues. I do not therefore agree that the TAT failed to consider materials placed before it by the Commissioner.

69. Regarding the Commissioner's complaint that the TAT erred in setting aside confirmed assessments on excise duty on loan administration fees, I have again read the impugned decision on the issue. At paragraph 126 of the decision, the TAT was of the view that the *Income Tax Act* is closely related to the *Excise Duty Act* and, therefore, the definition of "interest" in the *Income Tax Act* can be used to define "interest" under the *Excise Duty Act* under the principle of pari materia. Applying this doctrine, the TAT held that loan administration fees fell within the ambit of the definition of fees, thus not subject to excise duty.

70. I have perused the two Acts and I am in agreement with the conclusion reached by the TAT, that loan administration fee could not be subject to excise duty as the Commissioner argued. As correctly observed by the TAT, the doctrine of pari materia requires that statues on the same subject matter be construed together. The TAT correctly, in my view, applied this doctrine and construed the two tax regimes so as to arrive at the conclusion that loan administration fees was interest and, therefore, not subject to excise duty.

71. Even if one were to be thought to be wrong on this, which I do not thing is the case, the appeal on this issue would still fail because the excise duty was being demanded for the period when conservatory orders restraining KRA and, by extension, the Commissioner, from collecting excise duty were in force. The commissioner could not demand what KRA had been restrained from lawfully collecting. I do not agree with the Commissioner that the TAT was in error in this respect.

Conclusion

72. Having considered the appeal, submissions and decisions relied on by parties, and having carefully read the record and the decision by the TAT, the conclusion I come to is that the TAT fell into error in holding that excise duty could be collected during the period January 2013 and July 2013 when conservatory orders were in place. I also find that the TAT did not err when it set aside the confirmed assessments on excise duty on loan administration fee which it correctly found to be interest.

73. For the above reasons, I find that the first appeal (ITA No. E156 of 2020) has merit and is allowed. The second appeal (ITA No. E018 of 2021) has no merit and is dismissed. Each party will bear own costs of these appeals.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER 2022

E C MWITA

JUDGE