



KCB Insurance Agency Limited v Commissioner of Domestic Taxes (Income Tax Appeal E087 of 2021) [2022] KEHC 16061 (KLR) (Commercial and Tax) (24 November 2022) (Judgment)

Neutral citation: [2022] KEHC 16061 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E087 OF 2021
WA OKWANY, J
NOVEMBER 24, 2022**

BETWEEN

KCB INSURANCE AGENCY LIMITED APPELLANT

AND

COMMISSIONER OF DOMESTIC TAXES RESPONDENT

(Being an appeal from the judgment of the Tax Appeals Tribunal at Nairobi delivered on 28th May 2021 in Tax Appeals Tribunal Appeal No. 430 of 2020)

JUDGMENT

1. The Appellant herein is a limited liability company providing insurance agency services.
2. The Respondent is a principal officer appointed under Section 3 of the [Kenya Revenue Authority Act](#) charged with the mandate of assessing, collecting and accounting for Government revenue.
3. The Respondent carried out a compliance check of the Appellant's tax records from January 2015 to December 2018 and issued the Appellant with assessment of Excise Duty and Value Added Tax (VAT) for the sum of Kshs 110,084,888.00. The said assessment was inclusive of penalties and interest from income allegedly earned on Administration fees charged for provision of insurance agency services in respect to KCB Bank Kenya Limited Risk Margin Fund (RMF) and Administration of KCB Bank Group's Medical Scheme.
4. The Appellant objected to the assessment. After consultative meetings, the Respondent rendered its Objection Decision on 5th August 2020 wherein he amended the original assessments to Kshs 107,046,316.00.
5. Dissatisfied with the Objection Decision, the Appellant lodged an Appeal with the Tax Appeals Tribunal through a Notice of Appeal dated 4th September.



6. The Tribunal delivered its verdict on 28th May 2021 in which it upheld the respondent's VAT assessment of Kshs 60,065,117 and Excise Duty of Kshs 46,981,199 on services provided and fees earned by the appellant for the administration of KCB Bank Kenya Limited's ('KCB Bank's') Risk Margin Fund ('RMF') and KCB Group's Medical Scheme.
7. Aggrieved by the decision of the Tribunal, the Appellant filed the instant appeal in which it listed the following Grounds of Appeal: -
 - a. The Tribunal erred in failing to find that the administration services provided by the appellant in respect of the KCB Risk Margin Fund in its capacity as a licensed insurance agent and as a medical insurance intermediary were exempt from VAT pursuant to Paragraph 10 of Part II of the First Schedule to the Value Added Tax Act, 2013 (now repealed) which provided an absolute exemption on all insurance agency services.
 - b. The Tribunal erred in failing to find that the medical administration services provided by the Appellant in respect of KCB Group's medical scheme in its capacity as a licensed insurance agent and as a medical insurance intermediary were exempt from VAT pursuant to Paragraph 10 of Part II of the First Schedule to the Value Added Tax Act, 2013 (now repealed) which provided an absolute exemption on all insurance services.
 - c. The Tribunal erred in finding that the fees charged by the Appellant for the administration of KCB Bank Kenya Limited's Risk Margin Medical Scheme and KCB Group's Medical Scheme were subject to Excise Duty on the basis that they amounted to management and consultancy fees falling within the definition of 'other fees' under Part III of the First Schedule of the Excise Duty Act 2015.
 - d. The Tribunal erred in failing to find that the Respondent's demand for late payment penalty for the period pre-dating 1st July 2018, which was the effective date of the Finance Act, 2018 that introduced the late payment penalty under Section 83A of the Tax Procedures Act was erroneous.
8. Parties canvassed the appeal by way of written submissions.

The Appellant's Submissions

9. The appellant submitted that it is a limited liability company licensed and regulated by the Insurance Regulatory Authority ('IRA') as an insurance agent whose principal business activity is to provide insurance agency services. The Appellant's case is that it provided insurance agency services to KCB Bank and the KCB Group in respect to the administration of the Bank's RMF and Group's Medical Scheme for which it charged commissions.
10. The Appellant faulted the Tribunal for finding that the administration services it provided to the Bank were management and consultancy services that were not VAT exempt. It argued that the Tribunal relied on the wrong law and erroneously considered an exemption applicable to insurance and re-insurance companies as opposed to the specific exemption applicable to insurance agency services provided by insurance agencies such as the Appellant.
11. The Appellant argued that had the Tribunal relied on the applicable law, it would have found that the services provided by the appellant in respect of the RMF and Medical Scheme were VAT exempt since they were provided in the ordinary course of the appellant's business as a registered insurance agent. It was submitted that had the Tribunal applied a strict interpretation of the tax statutes, it would



have found that the services provided by a registered insurance agent in the course of its business were exempt from VAT.

12. The Appellant contended that having determined that there were premiums charged in respect of the RMF in a separate decision issued on 4th June 2021 in the case of *KCB Bank Kenya Limited v Commissioner of Domestic Taxes*, TAT Appeal No 251 of 2019, which decision has not been challenged, the Tribunal misdirected itself in holding that administration fees earned by the appellant could not be deemed to be commission fees based on insurance premiums.
13. The Appellant further submitted that the fees that it charged were commission based and were therefore not subject to excise duty. The Appellant faulted the Tribunal for finding that that the compensation it received for the services provided to the Bank were classified under 'other fees' and therefore subject to excise duty assessment.
14. The Appellant maintained that it is a licensed, regulated insurance agent which, under the law, is compensated by way of commissions as was correctly held in *KCB Bank Kenya Limited v Commissioner of Domestic Taxes*, TAT Appeal No 251 of 2019 where the Appellant received premiums.
15. Regarding fees earned from the administration of KCB Group's Medical Scheme, the Appellant submitted that based on the definition of 'agent' under section 2(1) of the *Insurance Act*, such fees was commission based within the meaning of the phrase 'related commissions'. According to the Appellant, the definition of 'other fees' is broad and would include commissions charged by an insurance agent within the context of administration of a medical insurance scheme. The Appellant therefore argued that it would suffice that the commissions it charged for administering the KCB Group's Medical Scheme were related commissions excluded from the ambit of 'other fees' and are therefore not excisable.
16. The Appellant argued that the definition of 'other fees' offered no distinction between premiums charged in respect of self-insurance and those ceded to an underwriter. It was submitted that the attempted distinction, by the Tribunal, was contrived thereby contravening the principle of strict interpretation of tax statutes adopted by the courts in various cases. The Appellant faulted the Tribunal for failing to apply the established principle of strict interpretation of tax statutes. For this argument, the Appellant referred to the decision in *Mount Kenya Bottlers Ltd & 3 others v Attorney General & 3 others* [2019] eKLR where the Court of Appeal held that: -

“The norm is that a taxing legislation must be construed with perfect strictness whether or not such construction is against the State or against the person sought to be taxed. If however there is any real ambiguity in a taxing Act, such ambiguity may be resolved in favour of the taxpayer, or, as it is sometimes stated: *contra fiscum*.”

Respondent's Submissions

17. The Respondent submitted that neither the Bank nor the Appellant are underwriters and that even though some of the payments made were called premiums, they cannot be expressly termed as premiums. It was the Respondent's case that the management services offered by the Appellant to KCB in relation to the Risk Margin Fund are in the nature of insurance consultancy services and are therefore vatable.
18. The Respondent noted that the fees paid to the Appellant are not listed in the zero or exempt Schedules and are not part of insurance and reinsurance services which are exempt from VAT under Paragraph 2



of Part II of the First Schedule under the [Value Added Tax Act](#) which exempts the same and provides for exclusions as follows:-

“Insurance and reinsurance services excluding the following=

- a. Management and related insurance consultancy services.
- b. Actuarial services; and
- c. Services of insurance assessors and loss adjusters. ”

19. The Respondent argued that the services offered to KCB by the Appellant with respect to the Risk Margin Fund are in the nature of insurance consultancy services and therefore fall within the ambit of management and related insurance consultancy services that are vatable under the [Value Added Tax Act](#).
20. Regarding the administration of the Bank’s medical scheme, the Respondent submitted that upon carrying out the compliance check, it discovered that the Appellant earns a standard fee for carrying out such services which cannot be said to premium based commission as they fall under the administrative component excluded from exemption under the First Schedule, Part II, Paragraph 2 (a) to [Value Added Tax Act](#).
21. On whether the Bank’s Risk Margin Fund and Medical Scheme were subject to Excise Duty on the basis that they amounted to management and consultancy fees falling within the definition of 'other fees', Respondent contended that it realized that the Appellant received payment in return for its services which include receiving, vetting, approving and rejecting claims. According to the Respondent, such administration fees constitute other fees chargeable to Excise Duty in line with the provisions of Paragraph 8 of Part III of the Fifth Schedule to the Customs and [Excise Duty Act](#).
22. The Respondent maintained that the fund and monies paid to the Appellant for the management of the RMF is a normal business charge for which any losses thereon are allowable reductions. It maintained that the balance forms normal margin in the business of loan advances and cannot therefore be said to be premium based.
23. On late payment penalty, the Respondent submitted that the taxes in question were charged in line with the provisions of Section 38 of the [Tax Procedures Act](#) 2015.

Analysis and Determination.

24. I have carefully considered the Record of Appeal and the parties’ respective submissions. It is trite that the court’s jurisdiction, in determining this appeal, is circumscribed under Section 56(2) of the [Tax Procedures Act](#), 2015 which provides that “An appeal to the High Court or to the Court of Appeal shall be on a question of law only”.
25. [Black’s Law Dictionary](#) 11th Ed. defines a ‘matter of law’ to be “A matter involving a judicial inquiry into the applicable law.”
26. The issues for determination in this appeal are as follows: -
 1. Whether the Appellant is a licensed insurance agent.
 2. Whether the services provided by the Appellant in respect to the Bank’s RMF and KCB Group’s medical scheme were VAT exempt.



3. Whether the fees charged by the Appellant were commission based and hence not subject to excise duty.
4. Whether late payment penalty was applicable during the assessment period.

Insurance Agency

27. The Appellant's case was that its main business activity was to provide insurance agency services. It was not disputed that the Appellant is a limited liability company licensed by the Insurance Regulatory Authority as an insurance agent. I note that the Respondent acknowledged the Appellant's agency status in its submissions wherein it stated that; "the Appellant provides an extensive range of insurance agency services and is regulated by the Insurance Regulatory Authority "the IRA" as an insurance agent."
28. The Tribunal also noted that the Appellant is an insurance agent in the opening paragraph of its judgment. It was therefore not disputed that the Appellant is an insurance agent. The issue in contention, however, was whether the services rendered by the Appellant were commission based and thus listed in the zero or exempt Schedules of the Value Added Tax Act.

VAT Exemption

29. The Appellant argued that Paragraph 10 of Part II of the First Schedule to the Value Added Tax Act, 2013 was the provision applicable to the period covered by the assessment. According to the Appellant, this is the specific provision of the Value Added Tax Act that the Tribunal should have found to be applicable to the Appellant as an insurance agent. The provision stipulates that: -

The supply of the following services shall be exempt supplies...

10. insurance agency, insurance brokerage, securities brokerage services and tea and brokerage services.
30. The Appellant therefore faulted the Tribunal for finding that the administration services that it provided to the Bank were management and consultancy services that were not VAT exempt.
 31. The Respondent, on the other hand, argued that the services offered by the Appellant were insurance consultancy services that are vatable under the Value Added Tax Act because the Appellant was not an agent of any disclosed insurance underwriter. The Respondent was of the view that the applicable provision of the Value Added Tax Act is Paragraph 2 of Part II of the First Schedule thereof which stipulates that insurance and reinsurance services are exempt from VAT, but excludes: -
 - a. management and related insurance consultancy services.
 - b. Actuarial services; and
 - c. services of insurance assessors and loss adjusters.
 32. The respondent noted that its review of the Service Level Agreements between the Appellant and KCB revealed that the Appellant administered the Risk Margin Fund and that its functions were to receive, vet claims and approve or reject as appropriate, receive and vet claims for refunds arising from erroneous payments, loans and cancellations. The Respondent also found that "premiums" paid for unsecured loans are held in a fund by KCB and managed by the Appellant with regards to any claims made. It was the Respondent's case that the services offered by the Appellant to KCB in relation to the Risk Margin Fund are in the nature of insurance consultancy services and are therefore vatable.



33. Black's Law dictionary Tenth Edition defines an insurance agent as; "A person authorized by an insurance company to sell its insurance policies."

34. Section 2(1) of the *Insurance Act* defines an agent as follows: -

"agent" means a person, not being a salaried employee of an insurer who, in consideration of a commission..."

35. My understanding of the above definitions of the term "insurance Agent" is that it primarily presupposes the existence of an insurer or an insurance company on whose behalf the agent operates and that such an agent is paid a commission. In the instant case however, it was not disputed that the Appellant was not working on behalf of any insurance company or underwriter for that matter.

36. The Tribunal observed and held as follows over the issue of agency and the nature of services that the Appellant offered to the Bank: -

"87. The Appellant's witness to wit Evelyn Bosibori Nyankabara who is the underwriting and Claims Manager within KCB Group unequivocally indicated under paragraph 7 of her witness statement dated 1st day of March 2021 that the services ordinarily offered by the Appellant in relation to this appeal constitute the following: -

d. Administration of medical claims on behalf of the KCB Group;
and

e. The provision of insurance agency services with regards to the Risk Margin Fund (RMF) premium which services include the following:-

Handling paperwork in relation to the RMF
Reviewing and vetting all claims submitted to check if any are supported
Maintaining a register of all claims
Providing KCB with a schedule of all paid loan claims; and
Monitoring any activities relating to the RMF

88. The Appellant's witness further indicated in her witness statement that the Appellant earns a fee known as administration fees for rendering the services above.

89. The material fact that came out during the hearing of the matter and more particularly from the evidence adduced by the separate witnesses was that as relates to the services offered by the Appellant to KCB Kenya Ltd and now KCB Group there is no third party underwriter that assumes the risk either for the fund or the medical scheme. The RMF is maintained by KCB Bank Kenya Limited while the KCB Group maintains an in-house medical cover for its employees and staff.

90. The customers taking unsecured loans with KCB Bank Kenya limited pay a premium fee to secure the bank against any risk arising from any default in full discharge of the loan as a consequence of death or illness. The amount is retained by the bank in what has been termed as a Risk Margin Fund that is administered by the Appellant for a fee."



37. From the statement submitted by the Appellant's witness, Ms. Bosibori, it is clear that besides the insurance agency services, the Appellant also provided administration services in respect to the bank's medical scheme. I therefore find that while it is not in doubt that the Appellant was registered by the Insurance Regulatory Authority as an insurance agency and that it operated under the name and style of KCB Insurance Agency, the services that it offered were not limited to insurance agency per se. In the circumstances of this case, I find that the Appellant cannot be said to have been exclusively an insurance agent in the strict meaning of the word.
38. It is also instructive to note that the Appellant's witness testified that the Appellant earned administration fees for the services that it rendered to KCB. It is therefore clear that, contrary to the Appellant's assertion that it earned commissions for the services that it offered to the bank, which commissions are zero or VAT exempt, the evidence on record showed that the Appellant received administration fees, thus justifying the Tribunal's finding that the services offered by the Appellant were in the nature of consultancy services.
39. Considering the nature of services that the Appellant offered to KCB and the fact that it received payment/administration fees in return for the said services, I find that the Tribunal made the correct finding when it held that the Appellant offered consultancy and administration services that are not VAT exempt.

Excise Duty

40. The appellant argued that the Tribunal erred in finding that the fees charged by the Appellant for the administration of the RMF and the KCB Group's Medical Scheme were subject to Excise Duty on the basis that they amounted to management and consultancy fees falling within the definition of 'other fees' under Part III of the First Schedule of the *Excise Duty Act* 2015. It was the Appellant's case that the fees that it charged were commission based and were therefore not subject to excise duty.
41. The respondent, on the other hand, contended that it noted that the Appellant received payment in return for its services that included receiving, vetting, approving and rejecting claims. According to the Respondent, such administration fees constitute other fees chargeable to Excise Duty in line with the provisions of Paragraph 8 of Part III of the Fifth Schedule to the Customs and *Excise Duty Act*.
42. I have already noted in this judgment, under the definition of an 'insurance agent', that the agent sells insurance policies on behalf of an insurer/underwriter who pays commissions as a consideration. This means that one cannot claim to be an insurance agent without identifying the insurance company that he works for. In the instant case, it was not disputed that the Appellant was not acting on behalf of any insurance company. Indeed, the Tribunal was not informed of the underwriter that the Appellant sold policies for. The evidence availed before the Tribunal revealed that the Appellant rendered services to the bank in consideration for a standard fee. The Tribunal held as follows on this issue: -

“On the basis of the foregoing analysis as to the nature of the services rendered by the Appellant in relation to the administration of the Risk Management Fund and the KCB Group Medical Scheme that were considered to be management and consultancy fees that are not based on any premiums deemed payable to any underwriter, the Tribunal agrees with the Respondent that the Appellant earns a management fee. The contract indicated to have been executed between the parties that provides for the manner in which the fee payable to the Appellant was determined was not made available in evidence to the Tribunal and to that extent, the Tribunal has not had the benefit to properly ascertain the manner and parameters informing the management fee payable to the Appellant for its services.”



43. My finding is that since the Appellant was not an agent of any disclosed insurance company in relation to the services that it rendered to the bank, the Respondent was justified in its position that the services that the Appellant offered were in the nature of management and consultancy services. It is also noteworthy that the Appellant did not tender any evidence to show how the fee that it received from the bank was arrived at. I also note that it was not disputed that KCB has an In-House medical scheme which the Appellant administered and for which it was paid a standard fee.
44. In my considered view, the nature of the services offered by the Appellant and the fact that a standard fee was paid to the Appellant remove the payments from the purview of premium based commissions payable to an insurance agent. I therefore find that the administration fees paid to the Appellant cannot therefore be deemed commissions fees based on insurance premiums that are excluded from excise duty payment under Part III of the First Schedule to the [Excise Duty Act](#).

Late Payment Penalty

45. On whether late payment penalty, the Respondent argued that the taxes in question were found to be owing and therefore charged interest and penalties in line with the provisions of the [Tax Procedures Act 2015 \(TPA\)](#).
46. The Appellant, on its part, argued that late payment penalty was not applicable during the assessment period pre-dating 1st July 2018, which was the effective date of the [Finance Act, 2018](#) that introduced the late payment penalty under Section 83A thereof. The Appellant faulted the Tribunal for relying on a non-existent provision on late submission of returns in upholding the said penalty.
47. The Appellant noted that the Tribunal relied on Section 83 of the [TPA](#), 2015 that provides for a late submission penalty in the event of the late filing of a tax return by a taxpayer. It was the appellant's case that it had duly filed all the necessary tax returns as required by law and that there was therefore no legal basis for the late filing penalty. Section 83 of [TPA](#) stipulates as follows: -
1. A person who submits a tax return after the due date shall be liable to a penalty-
48. The Appellant contended that Section 83A of the [TPA](#), 2015, which the respondent relied on in imposing the 5% late payment penalty, was not in existence during the assessment period.
49. The Tribunal upheld the late payment penalty and held as follows: -
- “ 106. In pursuant to Section 83 of the [Tax Procedures Act](#) provides that any late submission of a tax return attracts a late submission penalty.
 107. The Respondent was in the premises enjoined by statute to demand and charge penalty and interest on the VAT and excise duty not timeously remitted by the Appellant.”
50. It was not disputed that the said Section 83 was amended in 2018 by the introduction of Section 45 of the [Finance Act, 2018](#) which provides as follows:-
- The [Tax Procedures Act](#), 2015 is amended by inserting the following new section immediately after section 83-
- 83A. A person who fails to pay tax on the due date shall be liable to pay a late payment penalty of five percent of the tax due and payable.



51. My finding is that submission of tax returns, as envisaged under Section 83 of the *TPA* 2015 is completely different from the late payment of tax as stipulated under Section 83A of the same Act. It was not disputed that the Appellant duly submitted its tax returns for the period under scrutiny and had therefore complied with the then Section 83 of the Act. I therefore agree with the Appellant's position that the Tribunal erred in applying the new Section 83A that came in force in 2018 to the period that is in dispute. I find that the Tribunal erred in upholding the retrospective application of Section 83A of the *TPA* 2015.
52. It was also not disputed that even though Section 1 (c) of the Finance Act, 2018 set the effective date of Section 83A of the *TPA*, 2015 as 1st July 2018, the decision of this court in *Okiya Omtatah Okiiti v Cabinet Secretary, National Treasury & 3 others* (2018] eKLR, found that the retrospective application of the Section unconstitutional. The Court found that the *Finance Act, 2018* was assented to on 21st September 2018 which was the effective date of section 83A of the *TPA*, 2015.
53. Having regard to the observations and findings that I have made in this judgment, I find that the instant appeal is merited, albeit only partly, in respect to the aspect of the late payment penalty. I find that the penalty should be imposed from 21st September 2018 at the rate of 5%.
54. Consequently, while I uphold the findings of the Tribunal on the aspect of VAT and Excise duty, I set aside the findings on the issue of late payment penalty. I award half of the costs of the appeal to the Appellant.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF NOVEMBER 2022.

W. A. OKWANY

JUDGE

In the presence of: -

Mr. Ruto for Kiragu for the appellant.

No appearance for respondent.

Court Assistant- Sylvia

