REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

INCOME TAX APPEAL NO. 17 OF 2017

THE COMMISSIONER OF DOMESTIC TAXES….....APPELLANT

VERSUS

LEWA WILDLIFE CONSERVANCY LIMITED.....RESPONDENT

JUDGMENT

(Being an appeal against the judgment of the Tax Appeal Tribunal delivered on 7th December, 2016 in Tax Appeal No. 58 of 2016)

1. This is an appeal, filed by The Commissioner of Domestic Taxes (Appellant) against the judgment of the Tax Appeal Tribunal, being Tax Appeal No. 58 of 2016, at Nairobi, on 7th December 2016. The Respondent in this appeal is Lewa Wildlife Conservancy Limited.

2. The Appellant is a Government Agency established under the Kenya Revenue Authority Act, Cap 49 and is charged with the duty of assessing and collecting taxes.

3. The Respondent is a Limited Liability Company, Limited by guarantee, and incorporated in Kenya in 1995. It was established by a few members who owned various plots of Land in Isiolo area, who came together to consolidate their land under Lewa Conservancy. The appellant is responsible for managing and conserving wildlife resources on that land in close liaison with the Kenya Wildlife Services. Entry into the Respondent's conservancy is by a visitor paying park entry fees. It is that park entry fee which is in contention in this matter.

BACK GROUND

4. The Appellant conducted a comprehensive tax audit, in 2014, on the Respondent's operations. In that audit it found that the Respondent had not accounted for Value Added Tax (VAT) on park entry fees for the period 2009 to December 2013. On that finding the Appellant raised an assessment seeking inter alia to recover VAT on park entry fees charged by the Respondent on the basis that between the years 2009 and 2013 park entry fees were neither listed under the Third Schedule (Exempt Services) nor under the Fifth Schedule (Zero-rated Supplies) of the now repealed VAT Act Cap 476.

5. The Respondent's position, before the Tribunal, and in this appeal is that that its VAT treatment of Park entry fee was based on the Appellant's private Ruling. Respondent submitted that being keen to comply with the Kenyan Law it sought clarity, from the Appellant, on the VAT treatment of its park entry fees. In its response the appellant wrote the letter dated 16th February, 2001.

6. Because the content of the letter is central to the determination of this appeal it is reproduced herein under, thus:

> **Kenya Revenue Authority**
>
> Value Added Tax Department
>
> 16th February, 2001
>
> **VAT/ADM/72/L/VOL.II/(19)**
>
> The Finance Manger,
>
> The Lewa Wildlife Conservancy

P. O. Box 49918

NAIROBI

Dear Sir,

RE: GAME PARK ENTRY FEES AND OTHER VAT ISSUES

We are in receipt of your letter dated 8th February, 2000 and hereby advise that the VAT status on the issues raised in the said letter is clarified as follows:

The following activities are not taxable:

· Game Park Entry Fees

· Livestock grazing

· Thatch Sales

· Hire of aircraft by staff

The following activities are taxable:

· Hotel services such as game drives, sightseeing tours, transfers to and from airports/railway stations, nature walks.

· Filming by foreigners is a taxable activity but where the invoice is in the name of a foreign company, no tax shall be charged.

· Camping fees

· Complimentaries

The input tax on the following shall be apportioned.

· Vehicle spare, fuels and oils for tractors and graders

· Fixed assets acquisition

· Workshop tools

The input tax on the following shall be deducted in full

· Hotel and Restaurant supplies especially drinks (wines and spirits, beer and soft drinks)

· Vehicles used for Game Drives sightseeing tours.

Yours faithfully.

B.N NYONGESA (MRS)

ASSISTANT COMMISSIONER

7. The Appellant, after discussions, issued an assessment of Ksh 88,590,236 on park entry fees. The Respondent objected by letter dated 31st March 2016 on the basis that the Appellant's letter dated 16th February 2001 had indicated the game park entry fees were not taxable. The Appellant on issuing its objection Decision confirming the assessment, the Respondent filed on Appeal to the Tax Appeals Tribunal. The Tribunal Ruled in favour of the Respondent on 7th December 2016.

THE APPEAL

8. The Appellant filed 6 grounds of appeal as follows:

"1. The tribunal erred in law in finding that the VAT ACT CAP 476 of the laws of Kenya (now repealed) was not expressly clear as to what constituted "tour operator services";

2. The Tribunal erred in law and fact in finding that the appellant did not demand for the taxes for close to a period of twelve year

until the VAT Act, 2013 which came into operation on 2nd day of September, 2013 which expressly excluded tour operator services and these reinforced the fact the VAT Act, Cap 476 was indeed not very express as to what constitutes tour operator services.

3. The tribunal erred in law and fact in finding that the Appellant did not provide an alternative opinion as to what constitutes tour operator services during the period prior to audit, which Tribunal could avail itself to.

4. The tribunal erred in law and fact in finding that the Appellant's letter dated 16th February, 2001 is explicit in its content and the Respondent acted on it over a period of twelve years.

5. The tribunal erred in law and fact in finding that the Respondent took no action for a period of over twelve years to address the collection of VAT taxes on game park entry fees and the law could not aid the indolence; and

6. The tribunal erred in law and fact in finding that the Appellant's letter dated 16th February, 2001 created a legitimate expectation on the Respondent that the taxes were not payable."

9. The issues that fall for determination in this appeal are:

a. Whether there was provision for VAT on park entry fee in the VAT Act 476 (now repealed)

b. Whether the Appellant's letter dated 16th February 2001 created a legitimate expectation; and

c. Whether the appellant's failure to demand taxes for nearly 12 years prevented them from making that demand.

10. ISSUE (a) whether there was provision for VAT on park entry fee in the VAT Act 476 (now repealed)

11. The tribunal in its considered judgment, after noting that the VAT ACT of 2013, which commenced operation on 2nd September 2013, expressly excluded tour operators services, stated:

> ***"This reinforces the fact that VAT ACT Cap 476 of the Laws of Kenya (now repealed), was indeed not very express as to what constitutes tour operator services.....The Tribunal states that VAT was possibly payable but in the absence of clear interpretation of what constitutes tour operator services the Tribunal's hands are tied. The Respondent (KRA) has not provided an alternative opinion as to what constitutes tour operator services during the period prior to audit, which the Tribunal can avail itself to."***

12. It will be noted that the Tribunal was of the view that there was no clear interpretation, presented before it, on what constitutes **'tour operator'**.

13. The exempt services are set out in the Third Schedule of the VAT Act Cap 476 (now repealed) (hereinafter the repealed Act). Paragraph 15 of the repealed Act provides the exempt services are:

> ***"Tour operation and travel agency services including travel, hotel, holiday and other supplies made to travellers but excluding in-house supplies and services provided for commission other than commission earned on air ticket."***

14. What the issue, under consideration, calls upon this court to determine is whether the park entry fees are exempt under paragraph 15 of the Third Schedule of the repealed Act. To reiterate, the said paragraph refers to **"Tour Operations".** Does this term cover park entry fees?

15. The appellant submitted that the park entry fees was VAT chargeable, under the repealed Act, because it was neither listed as exempt under the Third Schedule and was also not zero rated in the fifth schedule of the repealed Act. The appellant referred to Section 1 of the VAT Act which provides **"taxable services"** to mean any services not specified in the Third Schedule. In the appellant's view the park entry fees was not listed in the Third Schedule of the repealed Act.

16. The appellant erred to submit that the Tribunal interpreted park entry fee as part of tour operators. The Tribunal did not, as the part of its judgment reproduced above will show, interpret the term tour operator.

17. The appellant submitted that interpretation of Tour Operator would show that there was no correlation between that term and park entry fees. Appellant relied on the case **LAW SOCIETY OF KENYA –V- KENYA REVENUE AUTHORITY & ANOTHER (2017) eKLR** where the court discussed interpretation of statute thus:

> ***"The starting point of interpreting a statute is the language itself. In the absence of an expressed legislative intention to the contrary, the language must ordinarily be taken as conclusive. Thus, when the words of a statute are unambiguous, then this first canon is also the last, judicial inquiry is complete.***
>
> ***In my view, it is not the duty of the Court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. The Court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the courts. The Court cannot add words to a statute or read words into it which are not there. Assuming there is a defect or an omission in the words used by the legislature the court cannot not go to its aid to correct or make up the deficiency. Courts decide what the law is and not what it***

should be. The Court of course adopts a construction which will carry out the obvious intention of the legislature but cannot not legislate itself."

18. Appellant submitted that the ordinary meaning of the term 'Tour Operator' includes organizing excursions (short journey trip) and that that plain meaning should not include the term park entry fee.

19. In the respondent's view the repealed Act did not define 'tour operations', 'travel agency services' and 'other supplies made to travellers'. It is because of lack definition that the respondent submitted it sought the appellants clarification. That clarification was made by the Appellant by its letter of 16th February 2001, reproduced.

20. Respondent made reference to definition in Halbury's Laws of England, Fifth Edition Volume 99 page 358, defining Tour operator as:

"For these purposes 'tour operator' include a travel agent acting as principal and any other person providing for the benefit of travellers services of any kind commonly provided by tour operators or travel agents."

21. The respondent argued that bearing in mind the above definition it shows that the definition of tour operator is not restricted to persons who are traditionally tour operators. That it covers other persons who provide services that are commonly provided by tour operators. The Respondent submitted that the term used in the repealed Act 'Tour operation' was "the catch all phrase", which was clarified by the Finance Act 2016 which exempted

"Entry fees into the national parks and national reserves." And "The services of tour operators, excluding in-house supplies."

ANALYSIS OF ISSUE (a)

22. As I begin my analysis of this issue I will go to the source of the contention that is the Third Schedule of the repealed Act. As stated before that Third Schedule, at paragraph 15, provides that 'Tour Operations' amongst others are exempt from VAT tax. This I believe is where the Appellant by its submission has erred. It consistently submitted in this appeal that the park entry fees were not included in the term tour operator, when infact the Third Schedule referred to tour operations as the exempt services.

23. I am well guided by the holding in the case above Law Society of Kenya (supra) where the court stated that in interpreting statute and in the absence of express legislative intention the language must be taken as conclusive. The term 'Tour Operation' cannot be taken to mean or restrictively to refer only to tour operators. In my humble view it includes other operations one of which is the park entry fees. It cannot be any other way, in my view. Had the legislature intended it any other way it would have had the term 'tour operator'. It instead had the term tour operations in the third schedule.

24. I find and I hold that the park entry fees were exempt under the Third Schedule of the repealed Act where it exempted tour operations.

ISSUE (b) whether the Appellant's letter dated 16th February 2001 created legitimate expectation.

25. The Tribunal after reproducing the Appellant's letter of 6th February 2001, in its judgment, stated:

"The tribunal is of the considered view that the Respondent's (*here the Appellant****) letter is explicit in its contents and the Appellant (****here the Respondent****) acted on it for over a period of twelve years. The Respondent does not deny its existence.....The Respondent has capacity and the required expertise to interpret tax legislation and advise the taxpayer on the same. In any event the Tribunal notes that the Respondent did not repudiate the said letter for the said period of twelve years. It acted with indolence in respect with its letter of advise dated the 16th day of February 2001. The respondent took no action for a period of over twelve years to address the collection of VAT taxes on game park entry fees. In the circumstances of this Appeal, the Respondent's letter of 16th February 2001 is the genesis of the principle of legitimate expectation. The same created an expectation on the Appellant that the taxes were not payable."***

26. The Appellant, before me, submitted that it cannot be stopped from performing its statutory duty of collecting duty on the basis of legitimate expectation. It submitted that it has a statutory duty to collect tax to be known as value added tax on goods delivered in, or imported into Kenya; and on certain services supplied in Kenya and for connected purposes, as provided in the repealed Act. Appellant in that regard referred to the case of **AKABA INVESTMENTS LIMITED VS KENYA REVENUE AUTHORITY [2007] eKLR**.

27. The Appellant referring to the case **REPUBLIC VS KENYA REVENUE AUTHORITY & ANOTHER ex parte KRONE LCS CENTRE EAST AFRICA LIMITED [2012] eKLR**, thus:

"Legitimate expectation can only operate inside and not outside the law. One can only rely on legitimate expectation when the law has been complied with. Where taxes have not been paid then the applicant cannot rely on the principle of legitimate expectation to avoid payment of taxes."

28. The Respondent made reference to the Supreme Court decision, namely **COMMUNICATION OF KENYA & 5 OTHERS VS ROYAL MEDIA SERVICES LIMITED & 5 OTHERS [2014] eKLR** where it was held that a public body can create legitimate expectation and set out the following principles:

"The emerging principles may be succinctly set out as follows:

· ***there must be an express, clear and unambiguous promise given by a public authority;***

· ***the expectation itself must be reasonable;***

· ***the representation must be one which it was competent and lawful for the decision-maker to make; and***

(d) there cannot be a legitimate expectation against clear provisions of the law or the Constitution."

29. Respondent submitted that the Appellant's letter of 6th February 2001 was express and unambiguous in its interpretation of the law. That under section 5 of the KRA Act the appellant being an agent of the government for collection and receipt of revenue had the mandate to administer and enforce the repealed Act. That with that mandate the Appellant had responsibility to provide clarity to taxpayers. It was therefore reasonable for the Respondent to request the Appellant for clarity on park entry fees and it was reasonable for the Respondent to expect the appellant to interpret the law as it did by its letter of 16th February 2001. Having given that clarity the Appellant could not 12 years later review the provision and reach a different conclusion.

ANALYSIS OF ISSUE (b)

30. I will begin by considering the principles set out by the supreme court in the case **COMMUNICATION COMMISSION OF KENYA** (*supra*). Bearing those in mind I do find that the Appellant gave the Respondent a clear and unambiguous promise that the gate entry fees were not subject to VAT. In view of the mandate given to Kenya Revenue Authority (KRA) (the Appellant) it is reasonable to expect that the said promise was unambiguous and was lawful.

31. The Appellant referred to Article 210 of the Constitution which provides:

"(1) No tax or licensing fee may be imposed, waived or varied except provided by Legislation."

32. In making reference to that provision the Appellant argued that the letter of 16th February 2001 could not waive or vary the provisions of the Third Schedule.

33. In my view the Appellant is correct. Yes there cannot be waiver of tax, bearing that provision in mind, except as provided in legislation. But where I differ with the Appellant's submission is where it implied that the letter was either a waiver or variation. Not at all. The letter was giving interpretation of the provision of the Third Schedule. The letter therefore was not contra Article 210 of the Constitution.

34. It is my finding that indeed the Appellant's letter of 16th February 2001 created a legitimate expectation of the interpretation of Third Schedule of the repealed Act. Having created that expectation the Appellant was not permitted, 12 years later, to give a contrary interpretation of that schedule.

ISSUE (c) whether the Appellant's failure to demand taxes for nearly 12 years prevented them from making demand.

35. The Tribunal was of the view that content of the Appellant's letter and the passage of time had created a legitimate expectation for the Respondent.

36. The Appellant is of the view that the period when no tax is demanded is not a reason for the Appellant not to demand taxes.

37. The Respondent submitted that legitimate expectation can be created either by conduct or express stipulation. That the Appellant by its letter confirming that VAT was not payable for game entry fees alongside its passive conduct of 12 years created a legitimate expectation in the Respondent.

ANALYSIS OF ISSUE (c)

38. I take a middle view of both parties submissions. I am of the view that in case of passage of time each case ought to be considered on the basis of its perculia circumstances. There cannot be a blanket application.

39. Regarding the perculia facts of this case I am persuaded by the holding in the case **ECOBANK KENYA LIMITED VS COMMISSIONER OF DOMESTIC TAXES (2012) eKLR**. In that case the **Justice E.K.O. Ogola** had this to say:

"In the English decision of **COUNCIL OF CIVIL SERVICES UNIONS V MINISTER FOR CIVIL SERVICE 1985 AC 374** Lord Fraser stated as follows:-

"a legitimate expectation may arise -either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue."

In the instant case, the waiver was expressly given on behalf of a public authority, which is the Kenya Revenue Authority, by the

Respondent herein. Furthermore, for over 25 years, the Respondent did not raise an issue with the Appellant as regards the preparation of sub accounts or computing rental income for tax separately. Therefore, the Appellant was entitled to reasonably expect that the practice would continue until communicated otherwise. In the circumstances, it is clear that there was a legitimate expectation on the Appellant's part as a result of the waiver set out in the letter dated **7th February 1979**.

I would add that the expectation herein is not just a legitimate expectation. It is an expectation backed by a written express waiver and a passive conduct in relation thereto for a period of twenty five years."

40. Indeed in that case of EcoBank the learned judge found that the legitimate expectation was so strongly grounded that it had established an economic right.

41. That finding is applicable in this case. The Respondent rightly submitted that it would be impossible for it to recover the VAT from all the visitors to its conservancy, for those 12 years, in order to get them to pay VAT for their gate entry fees. This is made impossible because the Appellant wrote and informed it that the gate entry fees were exempt of VAT. The same Appellant 12 years later changes its interpretation and seeks to recover VAT. The Appellant to be permitted to recover VAT as it seeks would be unfair and unjust. The Appellant, after all, seeks to recover the VAT because it now has changed its view on the provision of the Third Schedule.

42. The issue (c) is found in favour of the Respondent.

CONCLUSION

43. The Respondent succeeds in this appeal. It is therefore entitled to the costs of this appeal.

44. This appeal is dismissed with costs to the Respondent.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **26th day** of **September,** 2019.

M. KASANGO

JUDGE

Ruling read in open court in the presence of

Sophie ..... Court clerk.

..... FOR THE RESPONDENT

.....FOR THE APPELLANT