**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & ADMIRALTY DIVISON**

**INCOME TAX APPEAL NO.272 OF 2015**

**COMMISSIONER OF INCOME TAX.....APPELLANT**

**VERSUS**

**KENCELL COMMUNICATIONS LIMITED**

**(NOW AIRTEL KENYA LIMITED).....RESPONDENT**

**JUDGEMENT**

1. The singular issue raised by this Appeal is whether the Licence fee of Us Dollars 55 million made by Kencell Communications Limited (now Airtel Networks Kenya Limited) (**hereinafter Kencell**) upon it being granted a GSM Licence should be treated as Capital or Revenue Expenditure for determining its Tax Liability.

2. Kencel started its operations in the year 2000 after its bid for a GSM Licence was accepted by Communications Commission of Kenya (and now Communications Authority of Kenya)(**herein after The Commission**). The Court is told that the procedure for awarding such Licences pursuant to a bidding process is an accepted practice worldwide.

3. In its books of Account Kencell deducted the payment of the initial Licence Fee as Revenue Expenditure. The Appellant disallowed the deductions and issued additional assessment on 24th July, 2003 and 5th August 2003 treating the fee as Capital Expenditure not deductable as Revenue Expenditure. The basis of that assessment is set out in the letter dated 31st March 2003 from the Appellant to Price Water House Coopers, the Tax Consultants for Kencell. The Commissioner stated,

> Mobile Licence premium
>
> "The payment made in acquisition of this Licence is capital in nature, due to the fact that it was a one off payment made to secure an advantage of an enduring nature in the form of the right to access the Kenyan Mobile Market. Writing it off over the period of fifteen years is therefore not allowable and as a result this expense will be brought to charge".

4. Kencell, unhappy with the Commissioner's decision, lodged an appeal against it to the Local Committee of Nairobi South on 4thMarch 2005. A Local Committee is established under Section 82 of The Income Tax Act. The Committee delivered its decision on 16th March 2005 and agreed with Kencell's contention that the Licence fee is not a Capital cost but a Revenue Expenditure. Hence this Appeal.

5. The Memorandum of Appeal raises the following Grounds:-

> 1. The Local Committee in Law and in fact in holding that a one-off payment for a fifteen year licence fee is a revenue expenditure deductible.
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> 2. That the Local Committee erred in Law and in fact in failing to take into account that the license fee was for the purchase of a right to access the Kenya Telecommunication market through allocation of a GSM spectrum or a band which is equivalent to the purchase of a right.
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> 3. That the Local Committee erred in Law and fact in not examining all the material and evidence presented to it.
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> Pursuant to Rule 5 of the Income Tax (Appeals to the High Court) Rules the Appellant.
>
> a. A copy of the Notice of the decision of the Local Committee dated 8th March 2005 marked "A".
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> b. A copy of Notice of Intention to Appeal to the High Court dated 29th March 2005 marked "B"
>
> c. Statements of facts marked "C".

And as is required in this type of Appeals, both the Appellant and Respondent filed Statement of facts.

6. The jurisdiction of this Court to hear and determine this Appeal is derived from Section 86(2) of The Income Tax Act which reads:-

> "(2) Any party to an appeal under subsection (1) of this section or under section 89(1) of this Act who is dissatisfied with the decision thereon may appeal to the Court against that decision upon giving notice of appeal to the other party or parties to the original appeal within fifteen days after the date on which a notice of such decision has been served upon him:
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> Provided that an appeal to the Court under this subsection may be made only on a question of law or of mixed law and fact".

In this Section the word Court refers to the High Court. The primary question raised by the Appeal herein is whether the Licence Fee should be treated as Capital or Revenue Expenditure. The Appeal is on the legal principles to be applied in ascertaining the nature of the expenditure. This may be a question of mixed law and fact and undoubtedly this Court would be properly seized of it.

7. An issue that may have first bothered the Appellant was whether the Appeal was incompetent. In paragraph 2 of the Respondents Statement of Facts, Kencell asserts:-

> 2. Notwithstanding and without prejudice to the facts set out herein below, the Respondent at the hearing of the Appeal intends to raise a preliminary objection to the effect that the Appeal is defective and an abuse of the process of this Honourable Court as the Memorandum of Appeal and Statement of Facts was not served upon the Respondent within the time prescribed by the Income Tax (Appeals to the High Court) Rules.

As it turned out, however, no Preliminary Objection was taken up and the matter was not pressed by Kencell in both its written or oral submissions. The Court takes it that the challenge was abandoned and proceeds on the footing that the Appeal is properly before Court. And it must be said that if there was insistence on the Preliminary Objection, the Court would be inclined to hear this matter on merit as it has not been demonstrated that late service of the Memorandum of Appeal and Statement of Facts prejudiced Kencell in any way. At any rate under Rule 3 of The Income Tax (Appeals to the High Court) Rules, the Court may, where good cause is demonstrated, extend the period for service of the Memorandum of Appeal.

8. The starting point to this matter would be the provisions of Sections 15(1) and 16(1) of the Income Tax Act. The two, must necessarily be read together:-

> "15. (1)For the purpose of ascertaining the total income of a person for a year of income there shall, subject to section 16, be deducted all expenditure incurred in that year of income which is expenditure wholly and exclusively incurred by him in the production of that income, and where under section 27 any income of an accounting period ending on some day other the last day of that year of income is, for the purpose of ascertaining total income for a year of income, taken to be income for a year of income, then the expenditure incurred during that period shall be treated as having been incurred during that year of income.

16. (1) Save as otherwise expressly provided, for purposes of ascertaining the total income of a person for a year of income, no deduction shall be allowed in respect of-

(a) expenditure or loss which is not wholly and exclusively incurred by him in the production of the income;

(b) capital expenditure or any loss, diminution or exhaustion of capital."

It is submitted by Kencell, and accepted by Court, that the a reading of these provisions lends itself to a conclusion that Tax should be imposed on profits as opposed to Gross Income earned by the Tax Payer. Whether this argument, in the end, aids the case for Kencell is another matter.

9. At the hearing of the Appeal, Ms. Malik for Kencell emphasized that the controversial assessment was on the basis that the Appellant took the license premium as a one off payment. The communication dated 31st March 2003 from the Appellant is as follows on that payment,

> "The payment made in acquisition of this license is capital in nature, due to the fact that it was a one off payment made to secure an advantage of an enduring nature in the form of right to access the Kenyan Mobile Market. Writing it off over the period of fifteen years is therefore not allowable and as a result this expense will be brought to charge".

10. It is submitted by Kencell that this assertion is factually incorrect for two reasons. The first is that Kencell makes annual payments of 0.5.% of the annual audited Grosss Revenue. These annual payments, it was argued, are made under the Licence and cannot be separated from the other payments under the Licence. I propose to return to this argument later.

11. The other is that after the expiry of the 15 year period, Kencell would have to apply for renewal of its Licence. That it is now a fact that the Communication Authority of Kenya has demanded Us$ 20,025,000.00 as fees for the renewal of the spectrum Licence for a 10 year period. This, it is submitted, is a clear demonstration that initial payment for the Licence was not a one-off payment.

12. The Court understood Kencell to be arguing that the entire assessment was based on an incorrect (call it false) premise and so the Appeal should collapse at once and without much ado. But it may not be so. The Decision of **Regent Oil Co. Ltd vs. Strich(Inspector of Taxes)**[1966]AC 295 cited to me by Kencell in support of a different argument has this important statement at page 317,

> "I would regard a payment which has to be made every three years to retain an advantage as a recurrent payment, whereas for practical purposes I would not think that the fact that another payment will have to be made after 20 years if the situation does not change in that time would prevent the first payment from being regarded as made once and for all".

Drawing from this holding, it seems to me that just because there is now a demand for fees for renewal does not in itself debunk the Appellants argument that the initial fees should, for all practical purposes including of the assessment, be treated as a one-off payment.

13. The mainstay of the Appellants case is that the Licence is an asset, falling within the definition of the word asset found in the System of National Accounting (SNA) which is :-

> "an entity over which ownership rights are enforced and from which economic benefits may be derived by their owners holding them, or using them over a long period of time"

14. It was argued by the Appellant that the Licence under discussion authorized Kencell to use a certain part of the radio frequency spectrum to provide services such as mobile phone services. In the report on the Inter Secretarial Working Group on National Accounts (ISWGNA) Spectrum is treated as a tangible non-production asset and the Licence as an intangible non-production assets.

15. Kencell asked this Court not to put much weight on ISWGNA Report noting that it was merely a working paper and there is no evidence that it had been universally adopted.

16. Instead, this Court was asked to apply a common sense approach that was advocated in **Regent Oil co. Ltd** (supra) where the court held,

> "So it is no surprising that on one test or principle or rule of thumb is paramount. The question is ultimately a question of law for the court but it is a question which must be answered in light of all the circumstances which it is reasonable to take into account, and weight which must be given to a particular circumstance in a particular case must depend rather on common sense than on strict application of any single legal principle".

17. Through its own industry, the Court was glad to find a decision from the common law jurisdiction which it considers extremely useful in resolving this matter. The decision is useful not only because it determined a similar question that confronts this Court but also because of the comprehensive manner in which the Court dealt with the matter.

18. In **BFHvs. Comptroller of Income Tax** [2013]SGHC 161, the Singapore High Court had to determine the Tax treatment of a $100m lump sum payment by BFH for a 20 year licence to provide certain Telecommunications services and the right to use a particular Bandwidth of the Electromagnetic Spectrum. The Court saw the case as one that,

> "..stands or falls on a single issue, *viz*, whether the $100m expenditure was capital or revenue in nature. With reference to the Income Tax Act (Cap 134, 2008 Rev Ed) ("the Act") the key issue is thus whether the $100m expenditure is:
>
> a. of a revenue and deductible in the ascertainment of income under s 14(1) of the Act;
>
> or
>
> b. capital in nature and disallowed deduction by s 15(1) (c ) of the Act."

19. The Decision reiterated the approach to take in differentiating between Capital and Revenue Expenses and the following passage is invaluable:-

> "More importantly, Phang JA endeavoured to lay down a composite and integrated approach in this area of the law comprising two related principles which may be summarized as follows (ABD v CIT at [71]-[75]:
>
> a. First, the general principle is that the Court must look closely at the purpose of the expenditure and ascertain whether or not such expenditure created a new asset, strengthened an existing asset or opened new fields of trading not hitherto available to the taxpayer, in which case such expenditure would be capital and not revenue in nature. (I venture to suggest that although Phang JA referred to 'trading', he probably meant "business" which is wider in scope that "trading" per se. In common parlance, the expressions are sometimes used interchangeably).

b. Second, the Court looks at specific guidelines which elaborate on the first principle. In other words, the Court now looks at the various tests to determine whether or not an item of expenditure has created a new asset, strengthenedan existing asset, or opened new fields of trading. In particular, the Court should have regard to the following guidelines (bearing in mind that the categories or guidelines are not closed):

i. The manner of the expenditure: a one-time expenditure, as opposed to recurrent expenditures, would tend to suggest that the expenditure is capital in nature, although this factor is not conclusive; and

ii. The consequence or result of the expenditure: if the expenditure strengthens or adds to the taxpayer's existing core business structure, it is morelikely to be capital in nature. The concept of a "core business structure" refers to the permanent (but not necessarily perpetual) structure of the taxpayer's business which is utilized for the generation of profits. However, where the expenditure is for "assets" which are themselves the stock-in-trade of the business (or which comprise the cost of earning that income itself), such expenditure is more likely to be revenue in nature.

Phang JA further cautioned that while the specific facts are important in applying the various guidelines under the second principle, the underlying principle remains the purpose of the expenditure (detailed in the first principle above), viz, that the expenditure must have either created a new asset, strengthened an existing asset, or opened new fields of trading for the taxpayer (ABD v CIT at [75 (b)]). In other words, the categorization of an expenditure as being of capital or income nature is not just a factual inquiry but an integrated one whereby the applicable legal rules and principles are applied to the facts as hand (ABD v CIT at [7] and [38].

20. The gist of this approach seems to be that while the approach is integrated in that various facts are taken into account, the primal inquiry is the purpose of expenditure so as to ascertain whether that expenditure created a new asset, strengthened an existing asset or opened new fields of business for the taxpayers. Needless to say the inquiry as to purpose must be objective as the tax collector and the tax payer may take subjective but opposed positions.

21. And it must be said that this is the nature of inquiry that the IndianTax Appellate Tribunal made in the case of **Vodaphone Essar (Gujarat) vs. The Department of Income Tax** cited to this Court by Kencell when it held,

"In Bombay Steam Navigation's Co, 1953 Ltd's case, it was held that the question whether a particular expenditure is revenue expenditure incurred for the purpose of business must be viewed in the larger context of business necessity or expediency. It was held that if the outgoing or expenditure is so related to the carrying on or the conduct of the business, that it may be regarded as an integral part of the profit earning process and not for acquisition of an asset or a right of a permanent character, the possession of which is a condition to the carrying on of the business, the expenditure may be regarded as revenue expenditure. The payment made by the assesse in the present case satisfies this test. The payment is related to the carrying on or of the conduct of the business. Unless the network is utilized by the assessee, the assesse, in turn cannot provide the telecommunication services to the publice at large. Thus, the utilization of the network of the DOT is closely related to the actual carrying on or the conduct of the business. The payment does not secure for the assesse any asset or right of a permanent character. The license, in our opinion, does not confer any such enduring advantage because under section no. 15 of the schedule B, the license granted under section 4 can be revoked on the breach of any of the conditions subject to which it was issued or any default of payment of any consideration payable for the license. Further, the license is a non-exclusive license and it is open to the Government of India to grant similar licenses to other persons as well by virtue of powers conferred upon it under section 4 of the Telegraph Act. Thus, there is no monopoly right conferred upon the assesse." *(my emphasis)*

22. This Court now turns to make this inquiry. The Court has already observed that for all practical

purposes (and in particular for the purpose of determining this matter) the initial payment for the Licence was a 'one off' payment because it was made once for 15 years. Unlike a recurrent payment, a lump sum payment tends to suggest that the expenditure is Capital in nature. However as correctly argued by Kencell, the fact that the payment is lump sum is relevant but not determinative (**Vodaphone Cellular Ltd Vs. G. Shaw** (**Her majesty Inspector of Taxes** [1997] qwcACiv 1297).It is nevertheless a factor to be considered alongside others.

23. Not to be considered at all, it was submitted by Malik for Kencell, was the quantum of fee paid. It can hardly be disputed that the fee of US$55 million is substantial by Kenyan standards. But it was argued that this figure was derived from the highest bid and not a value ascribed to the licence by the government of Kenya.There is no evidence of the bidding process and this Court may not be able to tell whether the price was purely as a result of the forces of competition or was partly influenced by a reserve price fixed by the Government of Kenya. In the face of insufficient evidence, this Court will not consider the price of the licence as a factor one way or other.

24. The stated purpose of the Licence is to be found in the licence document which reads:-

> "The Communications Commission of Kenya (the "Commission"),in accordance with Section 25 and 36 of the Kenya Communications Act of 1998 (the "Act"), herby authorizes KENCELL COMMUNICATIONS LIMITED) (the "Licensee') to operate the telecommunications systems as described herein within Kenya (the 'Licensed Systems"), to provide the telecommunication services as described herein (the "Licensed Services") and connect the Licensed Systems to telecommunication systems and telecommunication apparatus as specified herein in accordance with the conditions set out in this License".

These are three, but related, purposes:-

i. To operate telecommunication systems.

ii. To provide certain Licenced services set out in the Licence.

iii. To connect the Licenced systems to specified Telecommunication Systems and Telecommunication apparatus.

25. Paragraph 2, 3 and 4 elaborates the telecommunications systems, the licensed services, and the telecommunicate systems and apparitus for communication as follows:-

> 2. The Licensed Systems are Mobile Radio-Communication Systems and such other telecommunication systems as are agreed between the Licensee and the Commission.
>
> 3. The Licensed Services are the provision by means of the Licensed Systems of:
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> (a) Mobile Radio-Communication Services as described in Annex A:
>
> (b) Public Pay Phone Services; and
>
> (c) any such other telecommunication services which the Licensee is under an obligation to provide under this Licence.
>
> 4. The Licensee is authorized to connect the Licensed Systems to:
>
> (a) any other telecommunication system run under a Licence granted by the Commission in accordance with Section 25 and Section 36 of the Act:
>
> (b) any telecommunication apparatus which is approved for connection by the Commission.

26. A consequence of the payment of the Licence Fee was that Kencell had a right to access the Kenya Telecommunication market through allocation of GSM spectrum or Band. But Kencell contends that to gain access to the telecommunication market it also requires other Licences such as a Frequency Licence. What Kencell may not be able to argue against is that, whether on its own or in addition to payment of other Licences, the Licence gave it a right to access the Kenya Telecommunications Market for 15 years. Indeed it may have been the Primary Licence in that respect. The Licence enabled Kencell to provide a Mobile Radio-Communication Service and Public Pay Phone Services. And as submitted by its own Counsel:-

> "Kencell started its operations in the year 2000 after its bid for GSM Licence was accepted by the Telecommunication Commission of Kenya".(*my emphasis)*

27. There would be no doubt therefore that the expenditure on the Licence gave Kencell lawful authority to commence operations in Mobile Radio Communication Services and Public Pay Phone Services. In that sense, it created a new asset or in the very least opened new fields of business hitherto not available to Kencell in the Country.

28. Critical, nevertheless, is whether the advantage or benefit to Kencell was of an enduring nature. The advantage or benefit obtained by Kencell would be for the term of the Licence, that is 15 years. Although Kencell submits that 15 years is a very short period in business terms and given that the investment is substantial, approximately Kshs.21 Billion, an almost similar period has elsewhere been considered not to be so short a period. What amounts to enduring benefit was considered in BFH (*supra*) where the Courtheld:-

> "It is clear that in order for an expense to be properly characterized as capital in nature, it should bring into existence an asset or an advantage of a permanent (but not necessarily perpetual) character. "Enduring" or "permanent" merely means that the asset or advantage acquired must have "enough durability to justify its being treated as a capital asset", "permanent" is not synonymous with "everlasting" (Henriksen (Inspector of Taxes) v Grafton Hotel, Limited [1942] 2 KB 184 at 196) The rights conferred upon the Appellant by virtue of the Relevant Expenditure in this case, being valid for 20 years, are of a permanent character capable of giving rise to an enduring benefit of the trade".

A position of the Appellant is that the advantage obtained by Kencell which lasted for 15 years was sufficiently enduring. However, Kencell argues that one other factor makes the Licence impermanent. This would be in clause 6 of the Licence which provided:-

> "6. Notwithstanding paragraph 5 of this Licence, the Commission may at any time revoke this Licence by giving SIX (6) months' notice in writing in any of the following circumstances;
>
> (a) If the Licensee agrees in writing with the Commission that this Licence should be revoked:
>
> (b) If any amount payable under Condition 24 is unpaid FORTY-FIVE (45) days after the Commission notifies the Licensee that the payment is overdue, such notification not to be given earlier than FOURTEEN (14) days after the date on which the payment is due:
>
> (c) If the Licensee has breached a condition in this Licence and the breach is serious breach of a material nature, and the Licensee has failed to comply with any notice issued by the Commission under Section 26 of the Act or any other notice provided in this licence and thereafter has been given by the Commission a further SIXTY (60) days in which to make representations in relation to the matters set out in the notice which the Commission has taken into account or matters which the Licensee believes are relevant and the Commission appears not to have taken into account.

(d)If the Licensee is dissolved or enters liquidation, bankruptcy or equivalent proceeding or makes a general assignment for the benefit of creditors: and

(e) If the Licensee fails to notify the Commission of any of the events specified in Condition 22 or 23 and the Commission has given written notice to the Licensee that the Commission intends to revoke the License on the grounds set out in condition 22 or 23 respectively.

29. Kencell's view is that the Licence can easily be revoked for breach of a condition or the law and therefore lacks permanency. But is that so? Reading clause 6, the Licence cannot be revoked willy nilly or at the will of the Commissioner. If Kencell were to breach a condition or the law which attracts the drastic sanction of revocation, then it would be Kencell to blame and not because the Licence is of a temporary nature. While Kencell argues that there are 24 conditions in the Licence as a demonstration of how tenuous the Licence is, it has not been argued or established that any of those conditions are frivolous or unnecessary or unattainable. For the fact that the Commission cannot call off the Licence at will, this Court is not persuaded that the Licence lacks permanency. Perhaps I also need to observe that at the date of hearing of this Appeal, the Licence had ran its full life without suffering revocation. A testimony of its durability!

30. It was also pointed out by Kencell that payment for the Licence should not be treated as Capital Expenditure because the Licence cannot be assigned, delegated or transferred without prior consent of the Commission. It was then speculated, in my view, by Kencell that there are legal and practical difficulties associated with the assignment, delegation or transfer because before consent is given, the intended new 'owners' would have to satisfy the same stringent and vigorous conditions that were set out at the tendering stage. Kencell then concluded that it was inconceivable that the Commission would ever allow the transfer or assignment of a Licence purely as a matter of course. That assumption, in my view, ignores or overlooks the important rider in clause 11 of the Licence that consent cannot be unreasonably withheld or delayed. Clause 11 reads as follows:-

> "The Licensee shall not assign, delegate, transfer or encumber in any manner the rights, interests or obligations under this Licence without the prior, express and written consent of the Commission, such consent not to be unreasonably withheld or delayed".

The Licence Holders right to assign, delegate, transfer or encumber is protected by this proviso.

31. Whilst still on clause 11, it assumes that the Licence can be used as a collateral and can be encumbered. Kencell is of a different view. The Court was told that an encumbrance is defined '**as a claim or liability that is attached to property or some other right that may lessen its value, such as a lien or mortgage**' (Blacks Law Dictionary). It was then argued that, in the light that the Licence can be revoked, it is unsuitable to be used as collateral. That may be so but as this Court has pointed out earlier revocation can only happen at the behest of the licensee or upon it committing certain breaches. It is not a call to be made whimsically or capriciously.

32. In the preceding paragraphs the Court has examined arguments made by Kencell against holding that the Fee for the Licence is an expenditure on Capital. This Court has not found any plausible reason that shakes the proposition that, on the fundamental test of purpose, the initial expenditure on the Licence Fee created a new asset or opened new fields of business for Kencell in Kenya. A proposition that is supported by the fact that payment was for all practical purposes a '**one off'** payment.

33. However before concluding the matter, this Court will address two other issues. First, it was submitted that there was no justification in differentiating the initial license fee of US$ 55 million from the Annual Fee of 0.5.% of the annual Audit Gross Revenue. Clause 24.1 of the Licence provides;-

> '(a) an initial license fee of Fifty Five Million US Dollars (US$ 55,000,000/=) upon grant of this Licence.
>
> (b)an annual operating fee in the amount of HALF (0.5) PERCENT of the audited annual gross

revenues billed by the Licensee for the Licensed Services during the prior calendar year(or at the grant of the License, Ksh.5,000,000/= commencing 1st February 2000".

34. But that distinction is justified. It may not be difficult to see why the Annual Fee should be treated as an expenditure on revenue. The Annual Fee is a fee that allows the Tax Payer to perform its Income earning operation and is made annually. It is not one that is made so as to give it an enduring benefit. It is so intimately related to profit earning process of the Tax Payer, it is little wonder that it is worked as a percentage of the Audited Annual Gross Revenues billed by the licensee for the license.

35. Second, the invitation by both sides that this matter be given a global perspective was quickly embraced by Court and on this, the Court identifies with the view of Visram J. (as he then was) **in Unilever Kenya Ltd v. The Commissioner of Income Tax** when he held that:-

> "We live in what is now referred to as a 'global village'. We cannot overlook or sideline what has come out of the wisdom of the tax payers and tax collectors in other countries. And especially because of the absence of any such guidelines in Kenya, we must look elsewhere. We must be prepared to innovate, and to apply creative solutions based on lessons and best practices available to us. That is indeed how our law will develop and our jurisprudence will be enhanced. And that is also how we shall encourage business to thrive in our country."

36. This Court has, in determining this matter, borrowed heavily from the foreign Decision of **BFH**(*supra*). In concluding that Decision, the Singapore Court had this to say about tax treatment of cellular licence fees in other jurisdictions,

> "60.It is instructive to see how other tax jurisdictions have dealt with similar expenditure. In the United Kingdom, s 146(a) of the Income Tax (Trading and Other Income) Act 2005 (c 5) had to be specifically amended so that, pursuant to s 147 of the Income Tax (Trading and Other Income) Act 2005, expenditure incurred for the acquisition of 3G Licences was treated as revenue in nature. In other words, but for such amendment no deduction was allowable.
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> 61. In Australia, s 40.30 (2) (f) of the Income Tax Assessment Act 1997 had to be enacted to provide that 'Spectrum Licences" were depreciating assets; the notional decline in value of spectrum Licences thus became allowable depreciation pursuant to s 40.25 of the same. It goes without saying that if the expenditure was deductible as being of a revenue nature, there would have been no need for such new statutory provision.
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> 62. In Malaysia, r 4 of the Income Tax (Deduction for Cost of Spectrum Assignment) Rules 2007 also had to specifically provide that 'the cost of spectrum assignment" was deductible (albeit amortised over 12 year).
>
> 63. The common thread throughout these three common law jurisdictions (with tax laws similar to ours) is that specific legislation was needed to make clear that expenditure relating to 3G Licences was deductible either as a revenue expense or as depreciation allowances."

This Court has verified the accuracy of the above survey by the Singapore Court and observes that the material part of Sections 14 (1) and 15(1) (c) of the Singapore Income Tax Act is similar to the corresponding provisions of the Kenyan statute.

37. A South African Court has reached a similar conclusion as that reached in **BFH**. In Income Tax case NO.1726 South African Tax case Reports Vol. 64 part 4 2002 quoted in case **No.10699 Appellant vs. The Commissioner for South African Revenue Services,** the South African court held,

> "It is clear that the R100 million based Licence fee has not been routinely incurred in the running of appellant's business. It constitutes expenditure that was incurred to found and lawfully commenced the operation of appellant's income earning structure. The cost was not a cost incurred in the actual performance of the appellant's income earning operation but a cost in acquiring the right to perform

these operations. That being so the R100 million Licence fee is of a capital nature and is not deductible in terms of section 11(a) of the Act"

38. It is therefore of some comfort that the view this Court has taken is in line with other Countries which, like Kenya, do not have legislation that clarifies that, not withstanding its nature, payment for the Licences such as that granted to Kencell on 28th January 2000 be treated as Revenue Expenditure.

39. The result is that I allow the Appeal and set aside the Decision of the Local Committee for Nairobi South made on 10th March, 2005.

40. Although Ms. Malik had told the Court of Appeal (**Civil Appeal No. 84 of 2007 A Commissioner of Income Tax v. Kencell Communications Limited**) that this matter is daily fare being a dispute on whether the sum was capital or expenditure, it might turn out to be a matter of general public interest. For this reason I make no order as to costs in respect to this Appeal.

**Dated, Signed and Delivered in Court at Nairobi this 17th Day of November, 2016.**

**F. TUIYOTT**

**JUDGE**

***PRESENT;***

Alamadi for Ontweka for Appellant

Malik for Defendants

Alex - Court clerk