



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO 46 OF 2013

REPUBLIC.....APPLICANT

VERSUS

THE COMMISSIONER OF DOMESTIC TAXES

(Large Taxpayers Office).....RESPONDENT

EX-PARTE BARCLAYS BANK OF KENYA LIMITED

JUDGMENT

Introduction

1. By a Notice of Motion dated the 18th February, 2013 the Applicant herein, **Barclays Bank of Kenya Limited**, seeks the following orders:

- a. **An Order of Certiorari to remove into the High Court for purposes of it being quashed the decisions and orders of the Commissioner of Domestic Taxes dated 27th December, 2012 and 21st January, 2013 in so far as he has invoked the provisions of section 35 of the Income Tax Act to demand payment of withholding tax from the Applicant on payments made to Card Companies namely VISA International Services Association, MasterCard Inc. and American Express Limited and payments made by the Applicant as an Interchange Fee to other Banks referred to as the Issuers.**
- b. **An order of Prohibition to prohibit the Commissioner of Income Tax from demanding withholding tax on the payments made by the Applicant to Card Companies namely VISA International Services Association, MasterCard Inc. and American Express Limited and payments made by the Applicant to other Banks referred to as the Issuers known as interchange fees.**
- c. **An Order that the Respondent do pay the cost of the proceedings.**

Applicant's Case

2. The Applicant through its Tax Manager, **Beatrice Mwhia**, swore a verifying affidavit on the 7th February, 2013 in which she deposed that Visa International Services Association, MasterCard Inc. and American Express Limited (hereinafter referred to as “the Card Companies”) are companies incorporated

in the United States of America. However in some instances the Applicant contracts with a member of the group based outside USA for example it contracts with VISA in the United Kingdom. The deponent however affirmed that majority of the transactions are with Visa.

3. The deponent attested that the Card Companies primary purpose is to administer a worldwide consumer payment system for its members that would enable its members to provide their customers with the means of making payments for purchases of goods and services with the use of credit cards, travellers' cheques and debit cards, conveniently and securely and that in order to provide the consumer payment system set out hereinabove the Card Companies operate networks that link all their members around the world.

4. It was averred that the networks for all the Card Companies provide for two types of members, an Issuer and an Acquirer. According to the deponent, an Issuer is a financial institution that issues a credit card to its customer while an Acquirer is an institution that honours payments to a merchant based on the credit transactions of a customer made with a credit card and a Merchant is any establishment that allows payment for goods or services with the use of a credit card, for example supermarkets and restaurants. The deponent also attested that a member can be both an Issuer and an Acquirer in respect of systems operated by the Card Companies.

5. It was the deponent's case that the Applicant is both an Issuer and an Acquirer in networks operated by the card companies respectively and with which it has agreements and that in Kenya there are three main Acquirers, the Applicant and Kenya Commercial Bank and Equity Bank and it is these three Acquirers that have agreements with Merchants.

6. The deponent proceeded to elaborate the sequence of steps that are followed in a typical credit card transaction as hereunder:

a. A customer applies to an Issuer for a credit card and the Issuer issues a VISA, American Express or MasterCard to its customer depending on which card the customer holds.

b. The card holder goes to a merchant and uses the card to make a purchase. The merchant swipes the card on a machine configured to accept a VISA card or MasterCard. An American Express card is swiped manually. By swiping the card, the Merchant seeks authorisation through the Acquirer who then seeks authorisation through for example Visanet if the card is a VISA card or MIP if it is a MasterCard. Since it is only the Acquirer that has an Agreement with the Merchant, once the Merchant seeks authorisation, the network switches the transactions from the Acquirer to the Issuer in order to enable the latter to verify the Card Holder's data and credit status before issuing an authorisation message back through to the Acquirer. The acquirer sends authorisation to the Merchant and once the Merchant receives authorisation, a charge slip is generated in duplicate and the customer signs the slip and thereafter takes possession of the goods and leaves with a copy of the slip.

c. The Merchant then initiates banking by uploading the transactions to the Acquirer who pays the Merchant.

d. The Acquirer then sends the transaction details to Visanet or another network depending on which card has been utilised. The information is then transmitted by the network to the Issuer who sends a statement to the Card Holder.

e. The Card Holder makes a payment to the Issuer who then pays the Acquirer through Visanet or another network depending on the card used.

7. According to the deponent, the networks enable the flow of the transaction described above by enabling a settlement and clearing process such that Visa and the other card companies ensure that the network is secure and reliable to enable efficient authorisation and switching and for the settlement and clearing operations between its members.

8. The deponent expounded that in order to access and use the networks operated by the Card Companies, the Applicant pays the Card Companies transaction fees which falls into numerous sub-categories and that for VISA, the sub-categories include access fees, authorisation fees, switching fees, PIN verification fees, clearing and settlement fees etc.

9. It was deposed that the Respondent carried out an audit on the Applicant for the years of income 2007 to 2011 and pursuant thereto, the Respondent took the view that withholding tax was payable on the fees paid to the card companies for use of their systems, for facilitating transactions on behalf of the Applicant, for royalties and interchange fees. However, in the deponent's view, the interchange fee is a payment effected between an Acquirer and an Issuer in respect of transactions involving the use of a system's card. She adds that it is an inter-bank remittance which is paid by an Acquirer to the Issuer to subsidise the cost of issuing the card. It is the deponent's view that this fee is designed to compensate a member for costs incurred as a result of the transaction and that the amount is not paid to VISA or any of the other card companies, but merely effected through Visanet and the other networks.

10. The deponent clarified that once a transaction is effected and the Merchant presents the bills to the Acquirer, the Acquirer settles the bill less the agreed Merchant's commissions for running the merchant's account after which the Acquirer then presents the bill for settlement by the Issuer and the payments are cleared and settled as follows:

- a. **The Issuer is debited with the transaction amount and the amount is credited to the Acquirer who has paid the amount.**
- b. **The Acquirer is debited with the Interchange Fee that is credited to the Issuer.**
- c. **Both the Acquirer and the Issuer are debited with the transaction fees payable to VISA or another card company for the use of Visanet or other networks.**
- d. **Accounts are prepared, invoices issued and settlement effected.**

11. It was the deponent's position that the Interchange paid by the Acquirer to the Issuer is not paid out of the Merchant Commissions earned by the Acquirer and because the Acquirer is at liberty to set the rate for the Merchant Commissions, in some instances it may even set the rate for Merchant Commissions at a level that is lower than the Interchange rate. As a credit card system, it was deposed, for example VISA is a four party system involving the Card Holder, the Issuer, the Acquirer and the Merchant, and the interchange fee performs a balancing act and seeks to influence Acquirers' and Issuers' decisions so that they contribute more than they would otherwise do in achieving the full potential of the credit card system. The deponent contended that the collective setting of the Interchange Fee aims at promoting the coordination of the decision and the activities of the Issuers and Acquirers in a four party system to ensure maximum benefit for the system.

12. The deponent averred that in the Applicant's letter dated 2nd August 2012 the Applicant explained to the Respondent that interchange is not a payment in respect of any service provided by the issuers but is paid by acquirers to subsidize the cost of issuing the cards. It was the deponent's position that the interchange is a balancing mechanism which operates to the benefit of the VISA system as a whole. It was deposed that the bank also clarified that there is no agency relationship between the acquirers and issuers and VISA, each of whom act independently and carry on their business in their own right and for their own benefit. The deponent asserted that the bank explained that the question of interchange being an agency fee should not therefore arise and that the bank reiterated that the issues raised in the assessment were pending determination before the High Court and that the Respondent should await the said court ruling.

13. It was the deponent's contention that in its letter dated 27th December 2012, the Respondent incorrectly stated that the payments were for services provided by the card companies and further incorrectly stated that the payments were based on the volume of transactions and that the assessment was based on section 35(3)(f) as the said fees were professional or management fees. The deponent added that

the Respondent stated that interchange fees are basically a balancing mechanism through which some of the costs on the issuing side are covered by the acquiring side. The Respondent, according to the deponent, stated that according to the **Income Tax Act** the interchange fee amounted to a payment for services offered in channelling payments from the cardholders to the acquirer who then remits to the merchant and that it had no doubt that the payment of interchange fees is in respect of a service provided.

14. In the deponent's view, however, the Interchange Fee is based on the value of each individual transaction itself and not on the volume of transactions and it is not a payment for services provided by the Card Companies which is why it is not paid to the Card Companies. In her view, the Issuer does not perform any acts on behalf of the Acquirer because the Acquirer has no control over the Issuer's activities. Relying on advice from the Applicant's counsel, the deponent averred that because the Applicant has no control over the Issuers, it cannot assume legal liability for the acts for the Issuers and therefore no agency relationship can arise in law or fact.

15. The deponent was apprehensive that despite the fact that the High Court had previously ruled on this issue and given guidelines to the Respondent in respect of the same issue of interchanges fees, the fresh assessments by the Respondent were contrary to the **Honourable Justice Majanja's** decision dated 8th October 2012 in **Misc Application No.1223 of 2007, R vs. The Commissioner of Domestic Taxes ex-parte Barclays Bank of Kenya Ltd.** It was the deponent's position that in that decision, the court indicated that the Respondent had a duty to clarify and point out what the exact professional and management fees are so as to fall within the definition set out under Section 2 of the **Income Tax Act (ITA)** and that must determine whether the payments sufficiently defined constitute consideration for management, technical, consultancy or agency services.

16. In the deponent's view, with respect to the very same issue before this court, the said Court noted that the Respondent's impugned decision did not make any reference or establish whether the payments termed as interchange fees are managerial, technical, contractual, and professional or consultancy fees and that the nature of the services rendered to the bank was not clear. With respect of the assessment of royalties relating to the card business it was the deponent's view that the Applicant as an Acquirer merely configures its own computers and systems to enable it to access Visanet and the networks for the other card companies such that the Applicant has no control over Visanet Computers or systems nor does it have control over the computers and systems of the other card companies.

17. The deponent contended that the Applicant did not at any time have access to VISA's software and does not use VISA's software or the software for any of the other card companies to process the payments. According to the deponent, the Applicant does not buy the software of VISA or other card companies or sell it to anyone else so the payments to the card companies cannot be defined as a royalty or royalties. Based on legal advice, she deposed that the term "royalty" is specifically defined in the **Income Tax Act** and payment for software licences does not constitute a royalty and that the Respondent's contention that fees payable to the Card Companies to access information and facilitate communication between the various operators does not fall within the specific definition of "royalty" as defined in the **Income Tax Act**.

18. According to the deponent, in the letter dated 5th July 2012 from the Respondent and addressed to the Applicant, the Respondent claimed that payments were made to the card companies (Visa, MasterCard & American Express) for use of their systems, for facilitating transactions on behalf of the Applicant and for royalties. Further, the deponent averred that in the Applicant's letter dated 2nd August 2012, the Applicant indicated *inter alia* that payments to VISA did not fall within the definition of royalty under the **Income Tax Act** and that the Applicant also indicated that as a principal member of VISA, the Applicant had direct access to VISANET which is achieved by the configuration of the Applicant's computers and internal network to be able to access VISANET. The Applicant further indicated that VISA did not provide the Applicant with any software and the Applicant has not been issued with any software license for use.

19. It was disclosed that in the letter dated 27th December 2012, the Respondent indicated that the Applicant paid for the facility to access to the VISANET network through its systems and that thus the

Applicant was granted access to know how, formula or process by which it carries out its own business transactions and as such that the payment for the access amounted to a royalty and was thus subject to withholding tax. It was the Applicant's view that the Respondent's decision is clearly in contravention of the Court's ruling dated 8th October 2012 on the same issues as the court ruled *inter alia* that no software was provided for use by the Applicant in respect of VISA and that the payment of access and authorisation fees by the bank clearly negated any intention by VISA International to provide software or equipment to the Bank and that the claim based on facility fees such as access fee, authorization fees and membership fees did not fall within the definition of a royalty.

20. The Applicant's position was that credit card services have a direct impact on the economy and are a powerful engine for driving economic growth and development because the transactions are more efficient than paper based ones, they stimulate consumer spending and act as a gateway to draw people into the banking system and the transactions are also clearly recorded thus making government revenues more secure and transparent.

21. The Applicant was therefore apprehensive that it stood to suffer irreparable harm should the Respondent proceed to recover the amount allegedly owed by the Applicant not only in terms of the amount claimed but also in terms of the negative impact that the imposition of withholding tax is likely to have on credit card services. The deponent averred that if the said withholding tax is deemed deductible then the credit card services will cease to be cost effective in Kenya with the result that VISA and the other card companies may cease operations in Kenya and this will have a direct negative impact on the tourism industry which is heavily reliant on credit card services.

22. The deponent further disclosed that she had conferred with members of VISA and the other card companies in different parts of the world and was informed, that withholding tax is not deducted on transaction fees in any jurisdiction.

23. It was submitted on behalf of the Applicant that the general principle is that the onus is on the Tax Authority to show that a taxing statute clearly imposes a charge on the person sought to be taxed and relied on **Adamson vs. Attorney General (1933) AC 257**, a decision relied upon in **R vs. The Commissioner of Domestic Taxes ex-parte Barclays Bank of Kenya Ltd** (supra) where it was held that:

“The section is one that imposes a tax upon the subject, and it is well settled law that in such cases it is incumbent (emphasis mine) on the Crown to establish that its claim comes within the very words used, and if there is there is any doubt or ambiguity this defect, if it be in view of the Crown a defect, can only be remedied by legislation,”

24. The Applicants therefore asserted that the onus was therefore on the Respondent to prove that the payments were indeed royalties and that withholding tax was deductible pursuant to s. 35(1) (b) of the *Income Tax Act*, which provides:

A person shall, upon payment of an amount of non-resident person not having a permanent establishment in Kenya in respect of

(b) a royalty; which is chargeable to tax, deduct therefrom tax at the appropriate non-resident rate.

25. It was the Applicant's submission that the word “**Royalties**” are defined in s.2 of the *Income Tax Act* as:

“royalty” means a payment made as a consideration for the use of or the right use-

a. the copyright of a literary, artistic or scientific work; or

b. a cinematograph film, including film or tape for radio or television broadcasting; or

c. a patent, trade mark, design or model, plan, formula or process; or

d. any industrial, commercial or scientific equipment, or for information concerning industrial, commercial or scientific equipment or experience, and gains derived from the sale or exchange of any right or property giving rise to that royalty;

26. The Applicant submitted that in its decision dated 27th December 2012, the Respondent stated that the Applicant is granted access to know how, formula or process by which it carries out its own business transactions and that the payment for this access therefore amounts to a royalty and is subject to withholding tax. The Applicant further submitted that the Respondent then categorically stated “*it does not require a transfer of equipment or software in order to qualify as a royalty provided that BBK is provided with access to a process or formula by which it makes use of to arrive at a product of its own making.*”

27. It was the contention of the Applicant that the word “**formula**” is defined in the *Concise Oxford Dictionary* “**a set of chemical symbols showing the constituents of a substance and their relative proportions, a mathematical rule expressed in symbols**” and as such a formula is therefore a tangible thing and if the Card Companies had given the Applicant a formula, then the formula would be easily identifiable.

28. To the applicant, in order to substantiate its claim, it was incumbent on the Respondent to firstly identify the formula (which is a tangible thing) and identify the product that the Applicant makes as a result of using this formula. However, the Respondent neither identified the formula nor the product under the guise that had the Applicant been granted access to such a formula or process, the Applicant would be able to manipulate or control the network. However, it was the applicant’s case that the Respondent failed to demonstrate that the Applicant was able to manipulate or control the network.

29. To the Applicant, the Respondent contradicted itself variously in its replying affidavit. In the applicant’s view, the definition of “**royalty**” as set out in s.2 of the *Income Tax Act* presupposes that a person has been given a right to use a copyright, design, model or plan or industrial equipment as if it belonged to the person himself and that once the right is given by the person to whom the royalty is paid, the person who gives the right no longer plays any role save to ensure that the person is using the right in a manner consistent with the terms of any licence granted in respect of the right. Therefore the Applicants argued that if indeed the Applicant was using a process or formula to arrive at a product of its own making, then there would be no need for the Card Companies to play any part in the process and the Card Companies would not be paid for carrying out functions such as clearing and settlement because in this instance, it is clear that the Card companies carry out all the functions of the networks themselves and receive payment for carrying out the functions such as settlement and clearing fees.

30. In support of its submission, the applicant relied on **R vs. The Commissioner of Domestic Taxes ex-parte Barclays Bank of Kenya Ltd.** (supra) where it was held that:

“VISA International operates in international network which facilitates credit card transactions. What the bank has is access over a network where it pays a fee to access the network and the process of clearing and settlement is carried out by the network itself.”

31. The Applicants also refer to the case of **R vs. the Commissioner of Income Tax Ex Parte SDV Transami, Civil Application No.212 of 2004**, where it was held that “**...royalty as defined refers to some device, formula or contraption which the user applies to make something else and in return for that advantage, the user must pay the original creator of the capital asset**”, a dicta approved and applied in **R vs. The Commissioner of Domestic Taxes ex-parte Barclays Bank of Kenya Ltd** (supra) where the learned Judge stated that:

“It is my understanding that a royalty is a payment made to the creator of an industrial or artistic work or design or contraption which bears a certain “capital” quality and which will serve intellectual or reproduction or entertainment purposes. It is for the clear benefits

flowing from such works that their authors or creators are paid royalties.”

32. The Applicants also argued that as the Respondent did not demonstrate why royalties are payable in respect of payments made by the Applicant to the Card Companies, the Respondent failed to achieve the clarity required and relied on **R vs. the Commissioner of Income Tax Ex Parte SDV Transami, Civil Application no.212 of 2004**, (supra) where it was held that:

“In the Commissioner’s present demand, he has not achieved the clarity required and consequently has caused confusion and anxiety to the Applicant and this amounts to a misapplication of the discretions entrusted to the Commissioner by law.”

33. The Applicants further relied **R vs. The Commissioner of Domestic Taxes ex-parte Barclays Bank of Kenya Ltd** (supra) in which it was held:

“The bank has demonstrated the nature of services it pays for and indeed the respondent had the opportunity to identify the specific payments made to VISA during audit. I therefore agree with the bank that the VISA fee guide cannot be used as a guide for establishing tax liability but rather specific evidence and payments identified during the audit to the respondent. It is the duty of taxing liability and the fee guide of itself is only evidence of the kind of payment made by the bank.”

34. It was submitted by the Applicants that the VISA monthly statements attached by the Applicant and the Respondent do not raise any charge in respect of software licence fees and it is clear that the Applicant did not pay the same as no software was provided, on-line or otherwise, to the Applicant.

35. With respect to royalties allegedly paid to the Card Companies by the applicant for use of the card companies’ trademarks, it was the applicant’s position that in its decision dated 27th December 2012 under challenge, the Respondent did not make any claim whatsoever for the payment of royalties for use of trademarks and therefore the inclusion of this claim is an afterthought and the Respondent ought to be strictly confined to its decision as it would be unfair to allow the Respondent to introduce claims that were not in its decision, by way of a Replying Affidavit. Further, the Trademark Licence Agreements annexed by the Respondent do not contain any clause for payment of royalties for use of a trademark and neither did Respondent exhibit any invoices from VISA or MasterCard to prove that the Applicant was paying royalties for use of a trademark. The Applicant argued that the only invoices attached by the Respondent were the American Express invoices which however could not have been royalties for use of a trademark because the Trademark Licence Agreement which the Respondent itself attached to the Replying Affidavit stated that it was royalty free and therefore no royalties were payable. It was submitted that the nature of a royalty is that it is a one off payment and cannot be paid on a monthly basis or a regular basis such that the upshot of the foregoing is that the Respondent completely failed to prove that the payments made by the Applicant were royalties within the meaning of s.2 of the ***Income Tax Act***.

36. The applicant’s position was that though the onus was not on it to explain or demonstrate the nature of the payment made to the Card Companies, it ably demonstrated in the Verifying Affidavit that the payment made by it to the Card Companies was a transaction fees which fell into various subcategories such as access fees and authorization fees in accordance with the transaction that the Applicant was paying for. The Applicant also contended that it had explained the sequence of steps in a typical credit card transaction in the Verifying Affidavit and it was clear that the payment made by the Applicant to the Credit Card Companies were to enable the Applicant to access the safe and reliable network operated by the Credit Card Companies. The Applicants therefore submitted that the network provides settlement and clearing operations for its members and in doing so, it acts in the same way that Central Bank of Kenya acts as a clearing house for clearing and settling cheques. The Applicant concluded that it therefore demonstrated that the transaction payment was not a royalty within the meaning of s.2 of the ***Income Tax Act***.

37. On the issue whether the payments made by the Applicant to the card companies were subject to withholding tax under s.35(1)(b) of the ***Income Tax Act*** and whether the Respondent had jurisdiction to

demand payment of the same, the Applicants submitted that it is well settled law as stated in **Adamson vs Attorney General** (supra) that the Respondent had to establish that the payments made by the Applicant to the Card Companies were Royalties within the definition of s.2 of the ***Income Tax Act*** and having failed to do so. In support of this position, the Applicant relied on **T.M Bell vs. Commissioner of Income Tax (1960) EALR 224** where the Judge in applying the holding of **Rowland, J in Cape Brandy Syndicate vs. Inland Revenue Commissioners (1920) 1 KB 64** stated at page 240:

“...in a taxing Act, one has to look merely at what is clearly said. There is no room for intendment as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used...If a person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be.”

38. Further reliance was placed on **R vs. The Commissioner of Domestic Taxes ex-parte Barclays Bank of Kenya Ltd**, (supra) where it was held at paragraph 25 that:

“In its written submissions the respondent attempted to make its claim under the section 35(1)(a) but the demand for withholding tax payments made by the bank to VISA International and the decision was on the basis of section 35(1)(b) of the Income Tax Act and it is on this basis that this case must be considered. The respondent’s claim for withholding tax on the basis that the payments constituted royalties must fail for the following reasons; First, VISA International through the affidavit of Jabula Basopo, disclaims the fact that it charged any software fees. The purpose of the audit was to enable the respondent identify the specific payments made by the bank and the respondent after conducting an extensive audit could have simply pointed to a specific payment or payments for such software licence fees but it did not find any. Secondly, I am satisfied on the basis of the material before the court that no software was provided for use by the bank. The payment of access and authorization fees by the bank clearly negates any intention by VISA International to provide software or equipment to the bank. Thirdly, there was no plan, design, formula or industrial, commercial or scientific equipment identified to place the payments within the statutory provision. Fourthly, the claim based on facility fees such as access fee, authorization fees and membership fees do not fall within the definition of a royalty as claimed by the respondent in its decision...Payment of the kind made by the bank to Visa International, and referred to in the decision, cannot constitute royalties and it was wrong in law to require the bank to make deductions of withholding tax. The decision in this respect falls outside the language of section 2 as read with section 35(1)(b) of the Income Tax Act and is thus amenable to an order of certiorari.”

39. It was the Applicants position that the Respondent failed to bring the Applicant within the letter of the law and therefore has no jurisdiction to claim payment of withholding tax in respect of the payments that were made to the Card Companies and as such this claim must therefore fail.

40. On the issue whether the Respondent in its decision dated 27th December 2012 specified why the interchange fees paid by the Applicant to Issuers fell within the definition of “management or professional fees”, the applicant submitted that section 2 of the ***Income Tax Act*** defines professional or management fees as ***“management or professional fee” means a payment made to a person, other than a payment made to an employee by his employer, as consideration for managerial, technical, agency, contractual, professional or consultancy services however calculated***”. To the Applicant, this definition therefore falls into various categories of services that is technical, professional, managerial, agency, contractual and it is therefore incumbent on the Respondent to state in its decision which category of service was allegedly provided by the Issuing banks or Issuers and it was not sufficient for the Respondent to broadly state that the payments amounted to professional or management fees. However, in its decision dated 27th December 2012 on page 5, the Respondent stated ***“KRA assessment for local interchange commissions to issuing banks is based on Section 35(3)(f) on the basis that the***

interchange fees paid by BBK as an acquirer to local issuer banks are professional or management fees and applied the rates in accordance with 3rd Schedule Paragraph 5(f)(i),...we are in no doubt that the payment of interchange fees is in respect of a service provided". The Applicants submit that the Respondent raised the same in respect of both local and international interchange payments.

41. The applicant however relied in the sentiments of the Court in **R vs. The Commissioner of Domestic Taxes ex-parte Barclays Bank of Kenya Ltd**, (supra) where it was held at paragraph 34 that:

"Section 2 of the Income Tax Act defined what is a "professional and management fee" and in making its decision the taxing authority must sufficiently define or point to the transaction and payment that falls within the definition of the statute. So that the question for consideration would be whether these payments sufficiently defined constitute consideration for management, technical, consultancy or agency services? Casting a broad net on a series of transactions and payments lacks clarity and is to be frowned upon."

42. The applicant further relied on **Republic vs. Commissioner of Income Tax ex-parte SDV Transami (Kenya) Limited** (supra).

43. The Applicant complained that in defiance of the decision, the Respondent once again raised a claim for payment of withholding tax in respect of interchange fees without bothering to specify in its decision whether the payments constituted technical, agency, management, professional or consultancy services. It was therefore the applicant's case that the mere reference to management and professional fees in its decision dated 27th December 2012 does not suffice because the Respondent has completely failed in its decision to specify which category of service was allegedly provided by the issuing banks and because the Respondent's decision lacks clarity, this Court is entitled to quash the decision on this ground alone.

44. Whereas the Respondent, in the Replying Affidavit claimed that the issuing banks provided management services to the Applicant, it was the applicant's case that since in its said decision, the Respondent did not specify that the issuing banks provided management services to the Applicant, the Respondent must be confined to its decision and cannot cure the lack of clarity in its decision by way of a Replying Affidavit as to allow the Respondent to do so would set a very dangerous precedent. It was however the applicant's position that even if this court were to allow the Respondent to claim that the issuing bank provided managerial services to the Applicant, this claim cannot be sustained in fact or law. As an Acquirer, the applicant submitted that it pays the Issuers a fee known as an interchange fee which is meant to act as an incentive to the Issuer and to subsidise the cost of issuing the card incurred by the Issuer. Based on the definition of the words "manage" and "management" it was submitted that it would mean that that the Issuers did not have any control over the Applicant's business nor were they responsible for the Applicant's operation; in which case for the Respondent's claim that the fees paid to the Issuing Banks was management fees, to succeed, it must demonstrate that the Issuing Banks had control over the Applicant's business operations. It was however, the case of the Applicant that the issuing banks only managed their own operations by managing their own customers' accounts as stated in the Respondent's own Replying Affidavit and such management cannot be extended to the Applicant either in fact or law. The Applicant however insisted that the interchange payment is paid by acquirers to subsidize the cost of issuing the cards hence is a balancing mechanism which operates for the benefit of the VISA system and also acts as an incentive for the issuers as demonstrated by ***Interchange Fees in the Courts and Regulatory Authorities by Howard D. Chang***, a paper exhibited by the Respondent in which it is stated:

"It agreed with a lower court, which had ruled that Visa's interchange fee permitted the system to operate more efficiently by eliminating costly negotiations among individual members and helped to solve imbalances between costs and revenues on the two sides of the system...Such an interchange fee clearly placed a relatively greater incentive on card-holder versus merchant acquisition. On a transaction involving different banks, the acquirer would receive no net revenues to cover its costs. However, given that most transactions in those days were "on-us" (the issuer was also the acquirer), a bank still had significant incentives to sign up merchants, as it would keep the entire merchant discount for "on-us" transactions...The

interchange fee was thus designed to perform a balancing function, “bringing the costs of the system of the role it plays, either merchant or issuer, in the VISA system. The fee was initially based on costs but now depends significantly on demand factors as well...The interchange fee is the only mechanism available to the card associations to determine the pricing structure collectively, and is the analogue to the proprietary system’s ability to directly set cardholder and merchant prices to balance demand. Individual association members determine all other prices for cardholders and merchants. Competition among these members tends to drive these prices down to marginal cost. Thus, the higher the interchange fee paid by acquiring banks to issuing banks, the greater the incentives for issuers to distribute cards and to lower prices to cardholders. By the same token, a lower interchange fee gives acquiring banks incentives to lower their merchant discounts, thereby increasing the number of merchants willing to accept the card. The interchange fee also provides an efficient mechanism for implementing association-wide marketing policies-for example, to increase...”

45. The Applicants therefore argued that the interchange fees cannot be for management services as the Issuing bank would be entitled to set its own fees for management services unilaterally and that the Respondent failed to demonstrate that the interchange fees were for management services. The applicant relied on **R vs. The Commissioner of Domestic Taxes ex-parte Barclays Bank of Kenya Ltd**, (supra) where in was held:

“My conclusion is that the respondent’s decision to claim withholding tax on the basis of the interchange fee lacks a legal footing as the Commissioner failed to identify the specific facts or transactions that form the basis of the application of tax.”

46. To buttress its point, the applicant submitted that whereas in its letter which is annexed at page 212 of the Verifying Affidavit, the Respondent claimed that interchange fees was agency fees, during a meeting with the Applicant which was reflected in a letter annexed at page 94 of the annexures to the Verifying Affidavit, the Respondent insinuated that the payments were for technical services; yet in these proceedings the Respondent claimed in its Replying Affidavit that the interchange payments were for managerial services. The Applicants therefore argued that it was very apparent that the Respondent’s position regarding the nature and purpose of the interchange payments lacked clarity and consistency.

47. The Applicant noted that the Respondent averred in its Replying Affidavit that it had lodged an appeal against the decision in **R vs. The Commissioner of Domestic Taxes ex-parte Barclays Bank of Kenya Ltd** (supra) in which case the Respondent had claimed that the interchange fees were agency fees. As it has appealed against the decision, the Respondent will be urging the Court of Appeal to agree with its position that interchange fees is payment for agency services yet, in the same breath, the Respondent is urging the Court in the instant proceedings to hold that interchange fees is payment for managerial services which are quite different from agency services. It was therefore the applicant’s view that the Respondent was trying to obtain conflicting decisions from various Courts, a course which ought to be allowed.

48. It was however the applicant’s case that as the payments made as interchange fees were not payments for management services and therefore did not fall within the definition of “management or professional fees” under s.2 of the ***Income Tax Act***, as such withholding tax was not deductible under the provisions of Income Tax Act just as was held in **R vs. The Commissioner of Domestic Taxes ex-parte Barclays Bank of Kenya Ltd** (supra). The Applicant concluded that the Respondent therefore had no jurisdiction to demand payment of withholding tax in respect of the same under the provisions of s.35 of the ***Income Tax Act***.

49. To the applicant, **Majanja, J** in his decision in **R vs. The Commissioner of Domestic Taxes ex-parte Barclays Bank of Kenya Ltd** (supra) prohibited the Respondent from demanding withholding tax on the basis that the payments made to the card companies were royalties and that interchange fees fell within the definition of “professional or management fees. Despite that the Respondent raised the same claim again which in the applicant’s contention amounts to an abuse of power and results in uncertainty.

50. To support this submission, the applicant relied on **R vs. KRA and Consolidated Bank ex parte**

Tradewise Agencies in which the dicta in Keroche Industries Limited vs. Kenya Revenue Authority was applied in holding:

“Parliament did not confer and cannot reasonably be said to have conferred power in any of the taxing Acts so that the same powers are abused by the decision making bodies. In such situations even in the face of express provision of an empowering statute appropriate judicial orders must issue to stop the abuse of power. A court of law should never sanction abuse of power, whether arising from statute or discretion...From the above analysis this is a case which has given rise to nearly all the known grounds for intervention in judicial review, that is almost the entire spectrum of existing grounds in judicial review. It seems apt to state that public authorities must constantly be reminded that ours is a limited government – that is a government limited by law – this in turn is the meaning of constitutionalism. Certainty of law is a major requirement to business and investors.”

The Respondent’s Case

51. **Phillip Munyao**, a Revenue Officer in the Large Tax Payer’s Office of the Domestic Tax Department of the Respondent herein swore a replying affidavit on the 14th of June, 2013.

52. According to the deponent, the Respondent conducted an in-depth audit on the taxpayer covering the following tax heads and periods; Accounts Audit (Corporation Tax) 2007-2010; PAYE January 2007 to September 2011; Withholding Income Tax January 2007 to September 2011; VAT January 2007 to September 2011. It was disclosed that the audit commenced on 23rd May 2011 and was undertaken over a period of three months and that after several meetings, exchange of communications and various deliberations on the issues raised, principal tax was settled on agreed items and the non – agreed issues were on Card Business, VAT and Withholding Income Tax wherein the final assessments were confirmed on 27th December 2012.

53. According to the deponent, the following are the withholding tax issues objected to by the Applicant; **Whether payments (called Interchange fees) made by the Applicant to other banks, which issue credit cards (issuers), are subject to withholding tax under section 35(1)(a) and 35(3)(f) of the Income tax Act as professional or management fees; Whether payments made by the Applicant, to card companies, to facilitate a debit/credit card transactions, are royalties and subject to Withholding Tax under section 35(1)(b) and 35(3)(g) of the Income tax Act as Royalties.**

54. To the deponent, it is not disputed that the Applicant offers credit/debit card services through a number of international credit and debit card schemes operated by international card companies such as VISA, MasterCard Inc. and American Express Limited (AMEX) and that the Applicant operates both as an Issuer and an Acquirer in the market.

55. According to the Respondent, Issuers are banks which are authorized to issue credit/debit cards to their customers thereby agreeing to provide their customers with credit facilities up to a certain limit and assume the risk of the bad debt while Acquirers are banks which are authorized to enter agreements with merchants for the acquisition of credit/debit card transactions. The Respondent adopted the view that these banks provide the merchants with their point of sale swipe machine and will authorize the merchants to accept and honour such cards (such as a VISA card) issued by any member. According to the Respondent a Merchant is a business that has contracted with an Acquirer for card processing services and accepts credit cards as a method of payment for goods or services e.g. Supermarkets

56. It was the Respondent’s case that their audit findings confirmed that payments (called Interchange fees) made by the Applicant to other banks, which issue credit cards (issuers), are subject to Withholding Tax because these payments are made in consideration of professional or management services undertaken by the issuer banks for the Applicant/Acquirer.

57. According to the Respondent, the Applicant receives revenues from a broad spectrum of services that they provide such as installing terminals, sending out statements, operating help desk hotlines, and most

important, processing transactions. The Respondent held the view that the fee associated with transaction processing is called the merchant discount and is usually 1.5 to 3.5 percent of the purchase amount and this rate is a percentage of sales that the merchant pays the acquiring bank to cover the cost of the transactions.

58. To the Respondent, there are three distinct fee components that make up the merchant discount namely; Interchange fees which the Respondents allege is revenue to Issuer; Dues and assessment fees which the Respondent allude is revenue to VISA/Card company and processing fee which the Respondent insists is revenue to the Acquirer.

59. In order to make the court understand their case better, the Respondent provided the following illustration: **“Suppose a credit card is used to purchase a Kshs 100 jacket at a merchant location; as mentioned earlier, the merchant will authorize the transaction and typically send the information to the acquirer at the end of the day. That Kshs 100 transaction request will be sent to the issuer from the acquirer through the payment network. Finally, the merchant receives the payment from the issuer through the acquirer. All three entities — the issuer, the acquirer, and the payment network — will be paid for their services. For simplicity, in this example, let us say that the interchange rate is 1.5 percent, generating Kshs 1.50 for the issuer. The issuer will send the remainder, Kshs 98.50, back to the acquirer through the payment network.** It was the Respondent’s view that the interchange fee is paid by the acquirer to the card-issuing bank and the Interchange rates are set by the networks. The Respondent asserted that the interchange fee is by far the largest portion of the merchant discount rate and is what attracts withholding taxes for Management and Professional fees.

60. The Respondent then proceed to elaborate that the payment network receives the second fee, called the dues and assessments fee and the card companies collect this fee for the use of their network, authorization expenses which are sub-categorized into Access fees, switching fees, PIN verification fees, royalty and so on. The Respondent disclosed that this fee is much smaller than the interchange fee; it is approximately 0.10 percent. With reference to the example given in the transaction for the sale of the jacket hereinabove, the Respondents stated that, Kshs 0.10 would be the payment network’s revenue, made by the Acquirer to the card companies. It was the Respondent’s position that the dues an assessment fees is what attracts Royalty. Finally, the Respondent concluded its illustration of the jacket purchase by averring that the Acquirer nets out its processing fee of Kshs. 0.40 percent, or Kshs 0.40, before remitting a final net of Kshs 98 to the merchant’s account.

61. It was the position of the Respondents that from its audit the interchange fee is payment for management services provided by the issuing banks to the acquiring banks in accordance with section 35(1) and 35(3) of the **Income Tax Act**. The Respondent was of the view that the issuing bank provides management services by sourcing card holders, keeping their accounts, and confirming to the acquiring bank of the credit worthiness of the cardholder and in return for this service, the acquiring bank pays the issuer bank the interchange fees.

62. The Respondent’s position was therefore that the view held by the Applicant that an interchange fee is an inter-bank remittance which is paid by an Acquirer to the Issuer to subsidise the cost of issuing the card and is designed to compensate a member for costs incurred as a result of the transaction, hence merely an incentive to the Issuer and does not constitute remuneration, as no service is provided by the Issuer to the Acquirer, was a misrepresentation of facts in view of the services performed by the Issuer for the Acquirer.

63. According to the Respondent, the Applicant bank has to engage the issuing bank to manage the issuing banks customer accounts by ultimately advising the Applicant banks and by sending a confirmation that the card holder is in a good financial position to be allowed to settle their bills via the card and this is the point at which the issuer earns the interchange fee.

64. The Respondent contends that the Applicants’ assertion that the interchange fee is used to reduce the cost of issuing cards to the issuing banks customers does not support their argument that the interchange fee is not taxable because what is relevant is that the fee in issue is in the nature of income and regardless

of whatever costs and expenses the income will meet, the taxes arising therefrom must be paid. The Respondents allege that the cost of the card are born by the cardholder who purchases it and pays an annual service charge fee for the card and the merchants bear most of the cost of the entire transaction. The Respondents also hold that withholding tax is based on the payment side of a transaction rather than the intentions of how the payee will utilise their income.

65. According to the Respondents, in the clearing and settlement process, the interchange fee is earned from the Acquirer and the issuer is deemed to be **“paid”** according to the definition of **“paid”** under **Sec. 2 of the Income Tax Act, “paid”** includes **distributed, credited, dealt with or deemed to have been paid in the interest or on behalf of a person;**

66. It was the Respondents case that a **“Royalty”** is defined in the *Income Tax Act* as: - ‘a payment made as a consideration to use or the right to use:

a) The copyright of a literary, artistic or scientific work; or

b).....

c) A patent, trademark, design or model, plan, formula or process; or

d); for information concerning industrial, commercial or scientific equipment or experience, and gains derived from the sale or exchange of any right or property giving rise to that royalty.

67. It was its position that payments made by the Applicant to the card companies include software license fees, trademark licensing and service fees, which the Respondent averred are payments for the right to use the global network services for the purposes of linking the services to users as such these payments therefore fall within the above meaning of the term royalty. The Respondent contended that a licence is defined to mean to give permission and that in some instances a license may be issued by the Licensor, to allow an activity that would otherwise be forbidden. However to the Respondent, all these payments are in respect of various rights to use the licensor’s trademarks and payments functions performed by the card companies through the global network systems.

68. It was the Respondent’s allegation that their audit revealed that the payments to Card Companies were for Royalties because the clearing and settlement costs which attract Royalties were the costs incurred for use of the trademark, such as ‘VISA, MasterCard or Amex’. The Respondents reiterated that the permission to access and use specialized online software to facilitate payment/expenditure between the card companies and the applicant and clearing and settlement between the issuer and the acquirers are what is paid for and the said payment is a Royalty subject to withholding tax while the sub-categories of payments include clearing and settlement fees, returned items fees, risk monitoring non-compliance fees.

69. According to the Respondent, at Page 110 of the same bundle, the Applicants provided proof that they do pay for “software licence fees”. The Respondents added that they relied on the same document to demonstrate that taxation on Royalties was recognised and payments were being made towards software licence fees.

70. It was the Respondent’s case that at Page 96 of the Bundle, there is a **“Taxation Note”**, under which, there is a provision that **“taxes imposed from time to time by any taxing authority however designated or levied, “such taxes shall be payable by the Member in addition to amounts payable under this Fee guide.”** The Respondents averred that the Taxation Note recognises that there will be taxes on these transactions and that Withholding Taxes are probable.

71. It was the Respondent’s case that at Page 162- 181 of the Applicant’s Affidavit is produced invoices evidencing the payments made to Visa towards various fees which in the Respondent’s view supported its assessment as contained in its demand letters.

72. With respect to **R vs. The Commissioner of Domestic Taxes ex-parte Barclays Bank of Kenya Ltd** (supra) in which it was held that **“Payment of the kind made by the bank to VISA International...cannot constitute royalties...”**, the Respondent contended that the said judgement was based on the failure by KRA to clearly bring out the law and support the facts because throughout the running of the Judgement, it states in part that, **“it is not clear which payments fall within the statutory definition...”** However, in the instant case, it was the Respondent’s view that it had remedied the situation by providing the Applicant and the court with sufficient evidence in support of its case, by way of production of the Agreements between the parties involved in the transactions in issue.

73. The Respondent disclosed that the Applicant, Barclays Bank of Kenya, (BBK), made a payment of Kshs. 10,332,431.00 towards Card business-Royalties Withholding Tax (WHT) 20% and Kshs. 6,612,756/- being a payment toward Card business-Royalties VAT 16% bringing the total payment of the principal tax to Kshs. 16,945,187/- which was paid by way of RTGS (Real time Gross Settlement) on 20th December 2013 which payment, in the Respondent’s view was an admission of the fact that taxes on withholding tax on Royalties and VAT were indeed due and payable by the Applicant.

74. On behalf of the Respondent it was submitted that the issues of taxation in this matter arise out of e-commerce transactions and reference was made to extracts from ***The Institute of Chartered Accountants of India Publication on “E-commerce Transactions”*** in which it is states that:

“(a) E-commerce or electronic commerce means; business transactions conducted over a network, using computers and telecommunications. In other words, e-commerce refers to the exchange of goods or services for value on the internet. It includes electronic funds transfers, electronic data exchanges and on-line trading of financial instruments; (b) E-commerce is commercial transactions based on the processing or transmission of digitised data units, sound, visual images, which are carried out over networks; (c) Whereas traditional businesses have rested squarely on the physical presence and delivery of goods, in doing business via the internet as is the case in e-commerce transactions, physical presence of goods or services is not required. Goods and services are available in digital form, and physical transactions are replaced by transfer of bytes. E-commerce transactions can be completed almost instantaneously across the world and irrespective of the time of day.”

75. It was the Respondent’s position that, income arising out of e-commerce transactions is subject to tax by virtue of the economic attachment to the income that arises out of these transactions.

76. The Respondent submitted that there are several principles under which the taxman determines that taxes have accrued over certain income. The 1st and core principle, according to the Respondent is that *all Income is taxable*. This principle according to the Respondent emanates from sec. 3 (1) as read with sec. 4 (a) of the ***Income Tax Act Cap 470*** which provides that:

Subject to, and in accordance with, this Act, a tax be known as income tax shall be charged for each year of income upon all the income of a person, whether resident or non-resident, which accrued in or was derived from Kenya.

77. According to the Respondent, this means that **all income**, so long as it is income made in Kenya is taxable and even if payments are made to companies abroad, such as Visanet, Amex and MasterCard, the income taxes due from the income must be withheld by the withholding agent, (such as the Applicant), who makes the payment.

78. The 2nd principle that the Respondent relied on is that *Income Tax crystallises upon payment*. The Respondent argued that according to the definition of “paid” under sec 2 of the ***Income Tax Act***, **“paid” “includes distributed, credited, dealt with or deemed to have been paid in the interest or on behalf of a person”**.

79. The 3rd principle relied upon by the Respondent was **“Who paid and for what?”** According to sec 10 (a) and (b) of the ***Income Tax Act*** it is provided that:

“For the purposes of this Act, where a resident person or a person having permanent establishment in Kenya makes a payment to any other person in respect of:-

a. A management or professional fee.....

b. A royalty; the amount thereof shall be deemed to be income which accrued or was derived from Kenya.

80. The 4th principle, in the Respondent’s view – “*What does the law mandate the payer of income to do?*” According to the Respondents, sec 35 of the ***Income Tax Act*** - Withholding Tax (Deduction of tax) provides that:

(1)“A person shall, upon payment of an amount to a non-resident person not having a permanent establishment in Kenya in respect of –

a. a management or professional fee....

b. a royalty;

which is chargeable to tax deduct therefrom tax at the appropriate non-resident rate.”

81. The 5th principle which the Respondents feel they are guided by is– “*How to define the payments that were made and nature of income.*” The Respondents argued that Applicants in their submissions focused on misleading notions as to what the payments they made were for in an attempt to create an ambiguity in the definition of Royalty payments and Management and Professional fees payments. It was the Respondent’s position that the taxes demanded from the Applicants for royalties and management and professional fee fell squarely within the legal definitions referred to in the Respondent’s demands and the definitions contained in Section 2 of the ***Income Tax Act***.

82. It was the Respondent’s case that Royalty Income is defined in Sec 2 of the ***Income Tax Act*** as meaning: ‘***a payment made as a consideration to use or the right to use: a)b)c) a patent, trademark, design or model, plan, formula or process; ord)for information concerning industrial, commercial or scientific equipment or experience, and gains derived from the sale or exchange of any right or property giving rise to that royalty.*** To the Respondent, the ***Payments*** made by the Applicant to the card companies (Visa, Amex, MasterCard) had been established and evidenced to include payments for use of logo, software license fees, trademark licensing and service fees, which the Respondents submitted, were payments for the right to use the global network services for the purposes of linking the services to users. It was the Respondent’s case that these payments therefore fell within the above meaning of the term royalty, particularly when the payments are for the right to use Trademarks, patents and license, which are intellectual property rights.

83. The Respondent contended that in an e-commerce situation, if a payment is made in consideration for the right to use a patent, trademark, design or model, plan, formula or process, such payment is for a license to use and this would clearly be characterised as a royalty income to the payee. The Applicants argued that the right to use is paid for, irrespective of whether the use is done by transfer of information through software, or by transfer of digitalised information, as in this case and therefore the physical transfer of hardware or software from one point to another point is not the issue in this case as is misconstrued by the Applicant.

84. In support of its case, the Respondents relied on a treatise by ***E.P. Ellinger, Ellinger’s on Modern Banking Law***” at p.584 where it is stated:

“As noted above, many credit cards currently in use bear a logo or insignia such as “Visa” or “MasterCard”. Such a logo is usually held by a corporation which sponsors and controls the card in question. The corporation itself is not a card-issuer. That role is undertaken by the participating banks and financial institutions. The corporation’s role is, basically, to hold the

trademark respecting the card in question (including the logo)..."

85. The Respondents concluded that the owner of the logo sells the right to use; and the payment for the right to use is a Royalty which when sold falls under the definition of intellectual Properties. This position was based on *Black's Law Dictionary* which defines "**Intellectual Property**" as "**A category of intangibles rights protecting commercially valuable products of the human intellect. The category comprises primarily trademark, copyright, and patent rights**". The Respondent was therefore convinced that these are commercially viable products of the human intellect, in a concrete or abstract form, such as a copyrightable work, a protectable trademark, a patentable invention et *Black's Law Dictionary*, "licensing" is "The sale of a license authorising another to use something protected by copyright, patent, or trademark." These are intellectual Property rights and a licence gives permission to the licensee to use Intellectual Property Rights.

86. According to the Respondent, Royalties as defined in the *Income Tax Act* are payments made for the right to use intellectual property. The Respondents argue that the permission/licence to access and use specialized online software or networks that facilitate payment/expenditure between the card companies and the Applicant, and also facilitate the clearing and settlement between the issuer and the acquirers, are what is paid for. According to the Respondent, all the payments made by the Applicant in respect of various rights to use the licensor's/credit card company's trademarks and other facilities, fall under the definition of Royalties by law. Further, the license agreements herein clearly demonstrate the relationship and consideration for payments between the acquirer bank, the Applicant as a licensee and the card companies as the licensors and that Licensing and service fees that were paid for the right to use the global network services for purposes of linking services to users, were payments that falls within the meaning of "royalty" as defined in section 2 of the Act and the said royalty attracts withholding tax under section 35 (1) (b).

87. In the instant case, the Respondents averred that Applicant admitted that it pays for the facility to access Card company's networks through its systems which in turn means that BBK is therefore granted access to knowhow, formula or process by which it carries out its own business transactions and as such the payment for this access therefore amounts to Royalty which does not require a transfer of equipment or software in order to qualify as a royalty as mistakenly submitted by the Applicant. The Respondents argued that in conventional commerce, when all rights in a property are transferred it would amount to a sale giving rise therefore to business income e.g. the sale of software. On the other hand, when only limited rights to the use of property are transferred, the transferor retaining substantial rights therein, the income therefrom would be classified as royalty as in this case where limited rights to property were transferred to the Applicant by credit card companies to use their facilities in consideration for payments called royalties.

88. To the Respondent, under Section 2 of the *Income Tax Act*, "Management Fees and professional fees" means a payment made to a person, other than a payment made to an employee by his employer, as consideration for managerial, technical, agency, contractual, professional and consultancy services however calculated. It was the Respondent's argument that if the principles of statutory interpretation are applied, by reading the words in the definition together with the friends it keeps, the terms management and professional fees are expressly defined by statute to include managerial, technical, agency, contractual, professional and consultancy services. The Respondent further submitted that the definition makes the exclusion or distinction of payment made to an employee by his employer, which directs the Respondents to interpret this provision as meant to focus on payment for services provided on an "outsourced" basis as opposed to employment basis and therefore the argument by the Applicants that management is strictly for instances where the payee is in control of the payer, irrelevant and out of context. The Respondents further argued that where e-commerce transaction are for the sale of services in a virtual environment, then such income would have to be characterised as fees for management or professional services and in this case, the Respondents submitted that the payment of interchange fees for services rendered to the Applicant fall under payments for management and professional fees as defined under Section 2 of the Act.

89. The Respondent submitted that on the strength of *The Organisation for Economic Co-operation and*

Development (OECD) Report on Tax Treaty Characterisation Issues Arising from E-Commerce, the following definitions are provided; Provision of services in an e-commerce situation arises if the customer owns the relevant property after the transaction, but the property was not acquired from the provider, then the transaction should be treated as a services transaction. Technical fees and Technical Services in an e-commerce transaction take place when services are of a technical nature and special skills or knowledge related to a technical field are required for the provision of such services. Consultancy Services in an e-commerce transaction refers to services constituting in the provision of advice by someone, such as a professional, who has special qualifications allowing him to do so. The Respondent contended that it was recognised that this type of services overlapped the categories of technical managerial services to the extent that the latter types of services could well be provided by a consultant. The Respondent submitted that they were guided by the above and similar definitions in the matter at hand.

90. It was the Respondent's case that interchange commissions are payment for management and professional services provided and that their assessment for local interchange commissions to issuing banks is based on sec. 35(3)(f) of the **Income Tax Act**, on the basis that the interchange fees paid by BBK as an acquirer to local issuer banks are professional and management fees and applied in accordance with the 3rd Schedule Para 5 (f) (i) of the **Income Tax Act**.

91. In the Respondent's view, although the Applicant contends that the Respondents failed to specify in its decision whether the payments made by them constitute technical, agency, management, professional or consultancy services, the Applicants are themselves well aware of the services which they pay for, which include, but are not limited to;

- i. The service of facilitating a medium of communication between the operators (issuers, acquirers and merchants). For this facility fees are payable such as access fee, authorization fee, membership fees, etc.
- ii. The issuing bank provides management services by sourcing card holders, keeping their accounts, and confirming to the acquiring bank of the credit worthiness of the cardholder. In return for this service, the acquiring bank pays the issuer bank the interchange fees.
- iii. The Applicant bank has to pay the issuing bank to manage the issuing banks customer accounts. By ultimately advising the Applicant banks and by sending a confirmation that the card holder is in a good financial position to be allowed to settle their bills via the card, this is the point at which the issuer earns the interchange fee.

92. To the Respondent, all the above services constitute agency, technical, management and professional services that fall under the umbrella definition of "Management and professional services" as defined under section 2 of the **Income Tax Act**.

93. The Respondent relied on **Chambers Dictionary** and **Wikipedia**, the free encyclopaedia which defines "Management" as; "the function that coordinates the efforts of people to accomplish goals and objectives using available resources efficiently and effectively. Management comprises planning, organising, staffing, leading or directing and an organization or initiative to accomplish a goal". The Respondent submitted that the erroneous interpretation given by the Applicants that the word management is limited to "the people in a company responsible for its operation" is inadmissible, because the word management is all inclusive of the many components that go into the **Wikipedia** definition. Further **Wikipedia**, the free encyclopaedia defines "Professional services" as; "Occupations in the [tertiary sector of the economy](#) requiring special training in the arts or sciences. Some professional services require holding professional licenses such as architects, auditors, engineers, doctors and lawyers. Other professional services involve providing specialist business support to businesses of all sizes and in all sectors; this can include tax advice, supporting a company with accounting, or providing management advice;" and as such in this case the issuer banks provide banking professional services.

94. It was the Respondent's case that the word "Agency" is defined in **Black's Law Dictionary** as "A **fiduciary relationship created by express or implied contract or by law, in which one party (the**

agent) may act on behalf of another party (the principal) and bind that other party by words or actions.”According to the Respondent, the basic theory of the agency device is to enable a person, through the services of another, to broaden the scope of his activities and receive the product of another’s efforts, paying such other for what he does but retaining for himself any net benefit resulting from the work performed. The Respondent argued that in regard to the inter-change fee, what is relevant is that this is an income and therefore it becomes taxable and this is because the fee in issue is in the nature of income regardless of whatever costs and expenses the income will meet, the taxes arising therefrom must be paid and the cost of the card are born by the cardholder who purchases it who pays an annual service charge fee for the card and further, withholding tax is based on the payment side of a transaction rather than the intentions of how the payee will utilise their income.

95. To the Respondent, a Statute is to be read in context and relies on an extract on page 25 of **“Principles of Statutory Interpretation”** which states that when the question arises as to the meaning of a certain provision in a statute, **it is not only legitimate but proper to read that provision in its context, and the mischief it intended to remedy.** Another core principle of statutory interpretation is to seek to know the intention of its makers and on this score, reference was made to page 3 of **G.P Singh’s Principles of Statutory Interpretation** which provides that:

“It is the duty of the judicature to act upon the intention of the Legislature. If a statutory provision is open to more than one interpretation the Court has to choose that interpretation which represents the true intention of the Legislature.”

96. In the Respondent’s view, the mischief that the legislators intended to cure was that income made in Kenya and paid abroad, should not deny Kenya of taxes due, to the detriment of the Kenyan economy. The Respondents also relied on another principle of statutory interpretation which states that *“A statute is to be construed to make it effective and workable”* based on page 33 of the said **Principles of Statutory Interpretation.**

97. It was the Respondent’s case that it produced trademark license agreements and merchant acquirer agreements between VISA, MasterCard, and the ‘licensee’ Applicant, where the right to use their trademarks is licensed and in consideration for the rights to use the licenses, fees are paid. The Respondents also alleged that the Applicants also produced a **“Visa CEMEA Fee Guide”** in which there are provisions for fees to be paid for the use of the Visa License. It was also the Respondent’s case that there is a *“Taxation Note”*, under which, there is a provision that *“taxes imposed from time to time by any taxing authority however designated or levied, “such taxes shall be payable by the Member in addition to amounts payable under this Fee guide thereby supporting the Respondent’s argument that the Taxation Note recognises that there will be taxes on this transaction and that Withholding Taxes are a possibility.* The Respondents also submit that the Applicants have provided proof that they do pay for *“software licence fees”* and the Respondents have relied on the same document to demonstrate that taxation on Royalties was recognised and payments were being made towards software licence fees. It is also the Respondents’ submission that the Applicant has produced invoices evidencing the payments made to Visa towards various fees and that the Respondent shall rely on those invoices to support its assessment as contained in its demand letters.

98. With respect to **R vs. The Commissioner of Domestic Taxes ex-parte Barclays Bank of Kenya Ltd** (supra)the Respondent referred to ***F.A.R Bennion MA on Statutory Interpretation, Fourth Edition Butterworths*** from pages 135 and 433 and particularly the last paragraph of page 434 which reads that:

”..... Although of course the courts of this country are bound by the doctrine of precedent, sensibly interpreted, nevertheless it would be irresponsible for judges to act as automations (sic), rigidly applying authorities without regard to consequences. Where therefore it appears at first sight that authority compels a judge to reach a conclusion which he senses to be unjust or inappropriate, he is, I consider under a positive duty to examine the relevant authorities with scrupulous care to ascertain whether he can, within the limits imposed by the doctrine of precedent (always sensibly interpreted), legitimately interpret or qualify the principle expressed in the authorities to achieve the result which he perceives to be just or appropriate

in the particular case”.

99. The Respondents therefore urged the court to exercise its own mind and give this matter an equitable hearing even in light of the decision of **R vs. The Commissioner of Domestic Taxes ex-parte Barclays Bank of Kenya Ltd.** (supra) which decision, the Respondent submitted is only persuasive and not binding on this Honourable Court because this court has the inherent jurisdiction to exercise its own mind by looking at the facts and the law now submitted, in order to make a sound decision and avoid a miscarriage of justice.

100. The Respondents noted that the **Honourable Justice Majanja** observed with reference to **R vs. Commissioner of Income Tax ex-parte SDV Transami (Kenya) Ltd HC Misc. Applc No. 212 of 2004**, at para 11 of his decision in **JR No. 1223 of 2007** that the court has the authority to consider whether the respondent has acted within or outside its jurisdiction. To the Respondent, this inquiry involves the examination of facts to determine whether the transaction is captured by the statute. The Respondents further submitted that this court will find that the Respondents have sufficiently discharged their onus of proof by clearly demonstrating that their demand for the taxes herein falls squarely within the provisions of the law, even if they may have failed to do so in **R vs. The Commissioner of Domestic Taxes ex-parte Barclays Bank of Kenya Ltd.** (supra). Whereas in that case, the Court dwelt on the definitions of the terms “design”, “model”, “plan” and “formula”, referred to in the definition of **Royalty** and these definitions, as counsel for the Applicant then submitted, presupposes tangible things which would be physically identifiable, and that similar reference to equipment must mean something tangible; it was the Respondent’s submission that the word Royalty, has several components that are cited in its definition such as payments for both physical and intangible things and in this particular case, the relevant words to dwell on in the definition, would have been the intangible components that would put the Applicants squarely within the definition of Royalty and that the relevant words are “**patent**”, “**trademark**”, “**process**” ie, “**a payment made as a consideration for the use of or the right to use a patent**”, “**trademark**”, “**process**”.

101. Other discrepancies that the Respondents cited in regard to the decision in **R v The Commissioner of Domestic Taxes ex-parte Barclays Bank of Kenya Ltd** (supra) are that:

a. At paragraph 25, the Honourable Judge made a finding that there was no evidence of payments to the bank for software and equipment, but the Judge acknowledges that the Applicant bank admits that there was payment of access and authorisation fees paid by the bank and concludes that these payments were not Royalties. The Respondents submit that these payments for the right and authorisation to use were squarely within the definition of the word royalty.

b. In the above decision, it was held that “Payment of the kind made by the bank to VISA International...cannot constitute royalties...” In his judgment, it is evident that the basis of this decision was the failure by parties to clearly and fairly running of the Judgement, it states in part that, ‘it is not clear which payments fall within the statutory definition.....’ In the present case, the Respondents argue that they have remedied this situation by providing the Applicant and the court with sufficient evidence in support of its case.

c. The Respondents have produced the Applicant’s own Profit & Loss accounts that show proof that payments were actually made.

d. The Respondents argued that this case deals with a different financial period and years of income than the earlier suit.

e. The Respondents believed that they have demonstrated the particular provisions of the law by which they are making their demand and they have made clarifications that the Judge in the other suit stated were lacking.

f. According to the Respondents the earlier suit based its entire arguments on Visanet transactions, whereas the bulk of the demand on Royalties was to Amex and as well as other credit card

companies not only Visa-net.

g. The Respondents also differed on the partially correct interpretation of the definition of Royalties in **Re: R vs The Commissioner of Income Tax Ex-parte SDV Transami**, (supra) quoted by the Applicant at P. 90 where he stated that **“It is my understanding that a royalty is a payment made to the creator of an industrial or artistic work or design or contraption which bears a certain “capital” quality and which will serve intellectual or reproduction or entertainment purposes. It is for the clear benefits flowing from such works that their authors or creators are paid royalties”**. It was the Respondent’s case that while they agree that there is a capital quality for which the creators of intellectual property are paid royalties; they would like to remind the court that the definition of “Intellectual Properties” is **“A category of intangibles rights protecting commercially valuable products of the human intellect. The category comprises primarily trademark, copyright, and patent rights”** as such the court misled itself by insisting that Intellectual property refers to tangible items only, and hence the payments made for access to use networks did not amount to Royalties.

h. The Applicant relied on and cited the following cases on the issue of clarity;

i. The case of **Adamson vs. Attorney General** (supra) which was restated by Justice Majanja and where the Judge held “The section is one that imposes a tax upon the subject, and it is well settled law that in such cases it is incumbent on the Crown to establish that its claim comes within the very words used, and if there is any doubt or ambiguity this defect, if it in view of the Crown a defect, can only be remedied by legislation”.

The Respondents submitted that they have clearly established in this suit, that the taxes demanded were for royalties as defined and for Management and Professional fees as also well defined. There is no ambiguity, save the one consciously and intentionally created by the Applicant’s themselves.

ii. At para 13 of the **R v The Commissioner of Domestic Taxes ex-parte Barclays Bank of Kenya Ltd** (supra), the learned Judge cited **Cape Brandy Syndicate vs. Inland Revenue Commissioner [1920] 1 KB 64** “in a taxing Act, one has to look at what is clearly said. There is no room for intendment as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.... If a person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be.”

The Respondents reiterated that the clear words of the statute put the Applicants within the law as due for taxation and that the Applicants themselves are the ones insisting on blurring the clarity, applying irrelevant meaning into the words of the statute which are irrelevant to the interpretations at hand while ignoring the relevant definitions, e.g. Focusing on the words “formula”, “design”, “industrial, commercial or scientific equipment” as opposed to the words “trademarks”.

iii. In **R vs. The Commissioner of Domestic Taxes ex-parte Barclays Bank of Kenya Ltd** (supra) the Judge stated in para 25 that **“Fourthly, the claim based on facility fees such as access fee, authorisation fees, membership fees do not fall within the definition of Royalty”**.

The Respondents argue that the Judge misdirected himself by not asking himself what were these fees in payment of or for? The Respondents submit that these fees were for the right to use, the facility that the payee and licensor were granting the Applicants the right to use and that the right to use was granted for commercial value and this commercial value and payment of the right to use falls squarely within the definition of Royalties.

102. The Respondents argued that the Order of Certiorari, like the order of Prohibition issues where an applicant had established that the decision under challenge had been made either in excess of or without jurisdiction or in breach of the rules of natural justice, or on grounds of irrationality, irregularity or unreasonableness, or for TTprocedural impropriety. Citing **Republic vs. Kenya National Examination Council, H.C Misc Application No. 266 of 1999**, the Respondent submitted that that there is no question that the Respondent had the jurisdiction to demand for taxes due. The rationale of the decision has been demonstrated both within the demand letters challenged, as well in the detailed responses to the letters and objections raised in the Applicant's letters. The Respondent referred to the case of **Council of Civil Service Union vs. Minister For The Civil Service [1984] 3 ALL ER 935** at page 951, where **Lord Diplock**, pointed out that the courts will interfere only where a decision has no rational basis or is so outrageous in its denial of accepted moral standard that no sensible person who has applied his mind to the matter to be decided could have arrived at it. It was the Respondent's argument that they had demonstrated that the decision in issue was well reasoned and the reasons have been demonstrated and substantiated.

102. Citing ***Judicial Review Handbook*** by **Michael Fordham, 3rd Edition** and ***Judicial Review*** by **Michael Supperstone**, the Respondent submitted judicial review is concerned with reviewing the merits of the decision in respect of which the application for Judicial Review is made and that it is not an Appeal, where the decision in a matter rests with a particular body mandated to make the decision.

104. Contrary to the Applicant's position, the Respondent's view was that even after taxation, the industry will always ensure that there is price control because if the cost of having a card is too high, it would discourage users, therefore. The Respondents further stated that the cost of goods can never be significantly increased as a result of taxation, or an increase in the Interchange Fees and that this is regulated so that a card-holders goods and services will not be charged higher than a non-card holder, as this would discourage customers from using cards.

105. The Respondent concluded its submissions by stating that despite the divergence of methods between traditional commercial transaction and e-commerce transactions, it is essential to capture e-commerce transactions according to the tenets of taxation. It was the Respondent's view that as techniques of e-commerce progress, and commercial transactions are completed in cyberspace, taxation must keep up with the times or else the country will suffer diminishing revenues for developing the country, if it fails to realise and ensure that e-commerce transactions are regarded as commercial transactions that ought to be taxed as long as they fall within the definitions of Income within the ***Income Tax Act***. The Respondents therefore urged this court to dismiss Applicant's application with costs as it is only fair and just in the circumstances to allow the Respondent to undertake its statutory duties unhindered.

Determination

106. That this application has striking similarities to **R vs. The Commissioner of Domestic Taxes ex-parte Barclays Bank of Kenya Ltd** (supra) cannot be in doubt. In **R v The Commissioner of Domestic Taxes ex-parte Barclays Bank of Kenya Ltd** (supra) the parties herein were the same and the orders sought therein were as follows:

- 1. An Order of Certiorari to remove into the High Court for purposes of it being quashed the decision and order of the Commissioner of Domestic Taxes dated 31st October, 2007 in so far as he has invoked the provisions of section 35 of the Income Tax Act to demand payment of withholding tax from the Applicant on payments made to Card Companies namely VISA International Services Association, MasterCard Inc. and American Express Limited and payments made by the Applicant as an Interchange Fee to other Banks referred to as the Issuers.**
- 2. An order of Prohibition to prohibit the Commissioner of Income Tax from demanding withholding tax on the payments made by the Applicant to Card Companies namely VISA International Services Association, MasterCard Inc. and American Express Limited and**

payments made by the Applicant to other Banks referred to as the Issuers.

3. An Order that the Respondent do pay the cost of the proceedings.

107. Just like in **R vs. The Commissioner of Domestic Taxes ex-parte Barclays Bank of Kenya Ltd** (supra) an issue has been raised as to whether the issues raised herein are issues which ought to be determined in the proceedings in the nature of judicial review as opposed to an appeal. In dealing with the said issue, the Court while relying in the ***Transami Case*** (supra) in which it was held that where what is being questioned is the exercise of a public power by a public body, judicial review is an eminently appropriate course, held that the bank was entitled to move the Court and the Court has the authority to consider whether the respondent has acted within or outside its jurisdiction and the inquiry may involve the examination of facts to determine whether the transaction is captured by the statute. On my part I agree with the said position.

108. This Court is aware of the dynamic nature of the law; it is always speaking and develops as new legal problems emerge in society or the old ones metamorphose into complicated and coloured problems. As was held in **R vs. Panel on Take Over and Mergers Ex Parte Datafin [1987] QB 815**, judicial review is developing fast and extending itself beyond the traditional targeted areas and grounds. The reason for saying this is due to the recognition that the grounds upon which the Court exercises its judicial review jurisdiction are incapable of exhaustive listing. As was stated by Nyamu, J (as he then was) in **Republic vs. The Commissioner of Lands Ex parte Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998:**

“Availability of other remedies is no bar to the granting of the judicial review relief but can however be an important factor in exercising the discretion whether or not to grant the relief...The High Court has the same power as the High Court in England up to 1977 and much more because it has the exceptional heritage of a written Constitution and the doctrines of the common law and equity in so far as they are applicable and the Courts must resist the temptation to try and contain judicial review in a straight jacket...Although judicial review has been bequeathed to us with defined interventions namely illegality, irrationality and impropriety of procedure the intervention has been extended using the principle of proportionality...The court will be called upon to intervene in situations where authorities and persons act in bad faith, abuse power, fail to take into account relevant considerations in the decision making or take into account irrelevant considerations or act contrary to legitimate expectations...Even on the important principle of establishing standing for the purposes of judicial review the Courts must resist being rigidly chained to the past defined situations of standing and look at the nature of the matter before them...Judicial review is a tool of justice, which can be made to serve the needs of a growing society on a case-to-case basis...The court envisions a future growth of judicial review in the human rights arena where it is becoming crystal clear that human rights will evolve and grow with the society.”

109. Similarly in **Bahajj Holdings Ltd. vs. Abdo Mohammed Bahajj & Company Ltd. & Another Civil Application No. Nai. 97 of 1998** the Court of Appeal held that the limits of judicial review continue expanding so as to meet the changing conditions and demands affecting administrative decisions while in **Re: National Hospital Insurance Fund Act and Central Organisation of Trade Unions (Kenya), Nairobi HCMA No. 1747 of 2004 [2006] 1 EA 47**, Nyamu, J (as he then was) held the view that while it is true that so far the jurisdiction of a judicial review court has been principally based on the “3 I’s” namely illegality, irrationality and impropriety of procedure, categories of intervention by the Court are likely to be expanded in future on a case to case basis.

110. Again in **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69** the Court expressed itself as follows:

“So long as the orders by way of judicial review remain the only legally practicable remedies for the control of administrative decisions, and in view of the changing concepts of good governance which demand transparency by any body of persons having legal authority to

determine questions affecting the rights of subjects under the obligation for such a body to act judicially, the limits of judicial review shall continue extending so as to meet the changing conditions and demands affecting administrative decisions...This therefore implies that the limits of judicial review should not be curtailed, but rather should be nurtured and extended in order to meet the changing conditions and demands affecting the decision-making process in the contemporary society. The law must develop to cover similar or new situations and the application for judicial review should not be stifled by old decisions and concepts, but must be expansive, innovative and appropriate to cover new areas where they fit. The intrusion of judicial review remedies in criminal proceedings would have the effect of requiring a much broader approach, than envisaged in civil law.”

111. This is in tandem with the holding in Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 that:

“... like the Biblical mustard seed which a man took and sowed in his field and which is the smallest of all seeds but when it grew up it became the biggest shrub of all and became a tree so that the birds of the air came and sheltered in its branches, judicial review stems from the doctrine of *ultra vires* and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure (the three “I’s”) and has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. It has been said that the growth of judicial review can only be compared to the never-ending categories of negligence after the celebrated case of Donoghue vs. Stephenson in the last century...”

112. Article 259 of the Constitution of Kenya, 2010, places a constitutional obligation on courts of law to develop the law so as to give effect to its objects, principles, values and purposes. This position was appreciated in the South African case of Pharmaceutical Manufacturers Association of South Africa & Another vs. Minister of Health Case CCT 31/99, with respect to the provisions of the Constitution of that Country which bears similarities to our own Constitution. In that case, the Constitutional Court of South Africa (Chaskalson, P) expressed itself as follows:

“Powers that were previously regulated by the common law under the prerogative and the principles developed by the courts to control the exercise of public power are now regulated by the Constitution...Whilst there is no bright line between public and private law, administrative law, which forms the core of public law, occupies a special place in our jurisprudence. It is an incident of the separation of powers under which courts regulate and control the exercise of public power by the other branches of government. It is built on constitutional principles which define the authority of each branch of government, their inter-relationship and the boundaries between them. Prior to the coming into force of the interim Constitution, the common law was “the main crucible” for the development of these principles of constitutional law. The interim Constitution which came into force in April 1994 was a legal watershed. It shifted constitutionalism, and with it all aspects of public law, from the realm of common law to the prescripts of a written constitution which is the supreme law. That is not to say that the principles of common law have ceased to be material to the development of public law. These well-established principles will continue to inform the content of administrative law and other aspects of public law, and will contribute to their future development. But there has been a fundamental change. Courts no longer have to claim space and push boundaries to find means of controlling public power. That control is vested in them under the Constitution which defines the role of the courts, their powers in relation to other arms of government, and the constraints subject to which public power has to be exercised. Whereas previously constitutional law formed part of and was developed consistently with the common law, the roles have been reversed. The written Constitution articulates and gives effect to the governing principles of constitutional law. Even if the common law constitutional principles continue to have application in matters not expressly dealt with by the Constitution, (and that need not be decided in this case) the Constitution is

the supreme law and the common law, in so far as it has any application, must be developed consistently with it, and subject to constitutional control.”

113. According to *Judicial Review Handbook*, 6th Edition by **Michael Fordham** at page 5, judicial review is a central control mechanism of administrative law (public law), by which the judiciary discharges the constitutional responsibility of protecting against abuses of power by public authorities. It constitutes a safeguard which is essential to the rule of law: promoting the public interest; policing parameters and duties imposed by Parliament; guiding public authorities and securing that they act lawfully; ensuring that they are accountable to law and not above it; and protecting the rights and interests of those affected by the exercise of public authority power.

114. Whereas it is true that judicial review remedies presently have a constitutional basis in Kenya by virtue of Articles 10, 25, 27, 47 and 50 of the Constitution and the conventional grounds for judicial review take a secondary role after the constitutional benchmarks, the South African Constitutional Court, itself recognised in **Pharmaceutical Manufacturers Association of South Africa & Another vs. Minister of Health** (supra) that:

“The common law supplements the provisions of the written Constitution but derives its force from it. It must be developed to fulfil the purposes of the Constitution and the legal order that it proclaims — thus, the command that law be developed and interpreted by the courts to promote the “spirit, purport and objects of the Bill of Rights.” This ensures that the common law will evolve within the framework of the Constitution consistently with the basic norms of the legal order that it establishes. There is, however, only one system of law and within that system the Constitution is the supreme law with which all other law must comply. What would have been ultra vires under the common law by reason of a functionary exceeding a statutory power is invalid under the Constitution according to the doctrine of legality. In this respect, at least, constitutional law and common law are intertwined and there can be no difference between them. The same is true of constitutional law and common law in respect of the validity of administrative decisions within the purview of section 24 of the interim Constitution. What is “lawful administrative action,” “procedurally fair administrative action” and administrative action “justifiable in relation to the reasons given for it,” cannot mean one thing under the Constitution, and another thing under the common law...Although the common law remains relevant to this process, judicial review of the exercise of public power is a constitutional matter that takes place under the Constitution and in accordance with its provisions. Section 167(3)(c) of the Constitution provides that the Constitutional Court “makes the final decision whether a matter is a constitutional matter”. This Court therefore has the power to protect its own jurisdiction, and is under a constitutional duty to do so. One of its duties is to determine finally whether public power has been exercised lawfully. It would be failing in its duty if it were to hold that an issue concerning the validity of the exercise of public power is beyond its jurisdiction.”

115. In my view since the Constitution is incremental in its language, what the current constitutional dispensation requires is that both the grounds and remedies in judicial review applications be developed and the grounds for granting relief under the Constitution and the common law be fused, intertwined and developed so as to meet the changing needs of our society so as to achieve fairness and secure human dignity. It is within those prescriptions that judicial review is seen in our context. But care should be taken not to think that the traditional grounds of judicial review in a purely judicial review application under the ***Law Reform Act*** and Order 53 of the ***Civil Procedure Rules*** have been discarded or its scope has left the airspace of process review to merit review except in those cases provided in the Constitution. In other words the categories of judicial review grounds are not heretically closed as opposed to their being completely overtaken or that the Court’s jurisdiction under Order 53 of the ***Civil Procedure Rules*** should include merit review. Once that distinction is made, there shall be little difficulty for this Court to maintain that it should and shall be concerned with process review rather than merit review of the decision of the Respondent.

116. I am therefore of the view that the decision in **Municipal Council of Mombasa vs. Republic &**

Umoja Consultants Ltd Civil Appeal No. 185 of 2001 is still relevant in so far as it held that:

“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.”

117. The House of Lords in the case of **Council of Civil Service Unions vs. Minister of State for Civil Service (1984) 3 All ER 935**, rationalized the grounds of judicial review and held that the basis of judicial review could be highlighted under three principal heads, namely, illegality, procedural impropriety and irrationality. Illegality as a ground of judicial review means that the decision maker must understand correctly the law that regulates his decision making powers and must give effect to it. Grounds such as acting ultra vires, errors of law and/or fact, onerous conditions, improper purpose, relevant and irrelevant factors, acting in bad faith, fettering discretion, unauthorized delegation, failure to act etc., fall under the heading “illegality”. Procedural impropriety may be due to the failure to comply with the mandatory procedures such as breach of natural justice, such as *audi alteram partem*, absence of bias, the duty to act fairly, legitimate expectations, failure to give reasons etc. Irrationality as fashioned by **Lord Diplock** in the **Council of Civil Service Unions Case** takes the form of Wednesbury unreasonableness explicated by Lord Green and applies to a decision which is so outrageous in its defiance to logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.

118. However, as stated hereinabove, like all legal remedies, judicial review continues to enlarge the categories of its sphere of influence. Proportionality for example is considered to be one of the grounds upon which judicial review relief may be granted. In my view the issue of proportionality ought to be seen in the context of rationality. This position is the one prevailing in England as was highlighted by **Lord Steyn** in **R (Daly) vs. Secretary of State For Home Department (2001) 2 AC 532** where it was held that: (1) Proportionality may require the reviewing Court to assess the balance which the decision maker has struck, not merely to see whether it is within the range of rational or reasonable decisions; (2) Proportionality test may go further than the traditional grounds of review in as much as it may require attention to be directed to the relative weight accorded to interests and considerations; and (3) Even the heightened scrutiny test is not necessarily appropriate to the protection of human rights.

119. A further illuminating discourse on heightened judicial scrutiny in the human rights arena is found in **Republic vs. The Commissioner of Lands Ex parte Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998.**

120. However, it is my view that the common law and practice by the High Court of England on judicial review still recognize and apply the conventional grounds for judicial review except within enlarged categories of intervention by the Court. In Kenya such expansion on a case to case basis is permitted by the Constitution as a way of ensuring a complete remedy is availed by the Court as a Court of law. Matters of fair trial and administrative action under Article 47 and 50 of the Constitution are proper grounds for judicial review and are a codification of what is generally known as principles of natural justice.

121. In my view Article 47 of the Constitution is now emphatic on the fairness of administrative action. The purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large. It is meant to uplift the quality of public decision making, and thereby ensure for the citizen civilised governance, by holding the public authority to the limit defined by the law. Judicial review is therefore an important control, ventilating a host of varied types of problems. The focus of cases may range from matters of grave public concern to those of acute personal interest; from general policy to individualised discretion; from social controversy to commercial self-interest; and anything in between. As a result, judicial review has significantly improved

the quality of decision making. It has done this by upholding the values of fairness, reasonableness and objectivity in the conduct of management of public affairs. It has also restrained or curbed arbitrariness, checked abuse of power and has generally enhanced the rule of law in government business and other public entities. Seen from the above standpoint it is a sufficient tool in causing the body in question to remain accountable.

122. However, it is important to remember that Judicial Review is a special supervisory jurisdiction which is different from both (1) ordinary (adversarial) litigation between private parties and (2) an appeal (rehearing) on the merits. The question is not whether the judge disagrees with what the public body has done, but whether there is some recognisable public law wrong that has been committed. Whereas private law proceedings involve the claimant asserting rights, judicial review represents the claimant invoking supervisory jurisdiction of the Court through proceedings brought nominally by the Republic. See **R vs. Traffic Commissioner for North Western Traffic Area ex parte Brake [1996] COD 248.**

123. Judicial review is a constitutional supervision of public authorities involving a challenge to the legal and procedural validity of the decision. It does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through taking into account an irrelevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. While the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies, it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence. See **Reid vs. Secretary of State for Scotland [1999] 2 AC 512.**

124. Judicial review, it has been held time and again, is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. See **R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285.**

125. The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment reaches on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the court. See **Chief Constable of the North Wales Police vs. Evans (1982) 1 WLR 1155.**

126. With respect to the ground of Wednesbury unreasonableness, it is not mere unreasonableness which would justify the interference with the decision of an inferior tribunal. It must be noted that unreasonableness is a subjective test and therefore to base a decision merely on unreasonableness places the Court at the risk of determination of a matter on merits rather than on the process. In my view, to justify interference the decision in question must be so grossly unreasonable that no reasonable authority, addressing itself to the facts and the law would have arrived at such a decision. In other words such a decision must be deemed to be so outrageous in defiance of logic or acceptable moral standards that no sensible person applying his mind to the question to be decided would have arrived at it. Therefore, whereas that the Court is entitled to consider the decision in question with a view to finding whether or not the Wednesbury test of unreasonableness is met, it is only when the decision is so grossly unreasonable that it may be found to have met the test of irrationality for the purposes of Wednesbury unreasonableness.

127. The courts will only interfere with the decision of a public authority if it is outside the band of reasonableness. It was well put by **Professor Wade** in a passage in his treatise on ***Administrative Law***, 5th Edition at page 362 and approved by in the case of the **Boundary Commission [1983] 2 WLR 458, 475:**

“The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires. The court must therefore resist the temptation to draw the bounds too lightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended.”

128. I must appreciate that the decision in **R vs. The Commissioner of Domestic Taxes ex-parte Barclays Bank of Kenya Ltd** (supra) being a decision of a Court of concomitant jurisdiction, its outcome is not binding on this Court. However the said decision is persuasive and if it reflects the true legal position there would be no basis for this Court to form a different opinion. **Benjamin Cardozo’s**, in *‘The Nature of the Judicial Process’*, New Haven; Yale University Press (1921) p. 149 opines:

“In these days, there is a good deal of discussion whether the rule of adherence to precedent ought to be abandoned altogether. I would not go so far myself. I think adherence to precedent should be the rule and not the exception. I have already had occasion to dwell upon some of the considerations that sustain it. To these I may add that the labour of judges would be increased almost to breaking point if every past decision could be reopened in every case, and one could not lay one’s own course of bricks on the secure foundation of the courses laid by others who had gone before him.”

129. The House of Lords similarly held in **R vs Knuller (Publishing, Printing and Promotions) Ltd (1973) A.C 435** :

“It was decided by this House in Shaw vs Director of Public Prosecution [1962] A.C 220 that conspiracy to corrupt public morals is a crime known to the law of England...I dissented in Shaw’s case. On reconsideration I still think that the decision was wrong and I see no reason to alter anything which I said in my speech. But it does not follow that I should now support a motion to reconsider the decision. I have said more than once in recent cases that our change of practice is no longer regarding previous decision of this House as absolutely binding does not mean that whenever we think that a previous decision was wrong we should reverse it. In the general interest of certainty in the law we must be sure that there is some very good reason before we so act... I think that however wrong or anomalous the decision may be it must stand and apply to cases reasonably analogous unless or until it is altered by Parliament.”

130. I also associate myself with the decision of Lord Wilberforce in **Fitzleet Estates vs Cherry (1971) 1 WLR 1345**, where he expressed himself as follows;

“Nothing could be more undesirable, in fact, than to permit litigants, after a decision has been given by this House with all appearance of finality, to return to this House in the hope that a differently constituted committee might be persuaded to take the view which its predecessors rejected ...[D]oubtful issues have to be resolved and the law knows no better way of resolving them than by the considered majority opinion of the ultimate tribunal. It requires much more than doubts as to the correctness of such opinion to justify departing from it.”

131. Accordingly, a Court ought only to depart from its earlier findings, if there is a substantial cause and in exceptional circumstances.

132. In this case apart from the non-binding nature of the said decision, the Respondents have attempted to distinguish that decision from this case on the basis that the Respondent has clarified its basis for imposing tax on the Applicant as opposed to the circumstances under which that decision was made.

133. In the said judgement, the Court found that the payment by the Bank to VISA International could not

constitute royalties hence it was wrong in law to require the bank to make deductions of withholding tax. I have on my own considered the position adopted by the Applicant in this case more so the contention that the payments made to VISA international cannot be used as a guide for establishing tax liability.

134. The principles guiding tax legislation were restated in Cape Brandy Syndicate vs. Inland Revenue Commissioner [1921] 1 KB 64, where it was held:

“In a taxing Act one has to look merely at what is clearly stated. There is no room for any intendment. There is no equity about tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used” See also H vs. The Commissioner of Income Tax [1958] EA 303.

135. In Tanganyika Mine Workers Union vs. The Registrar of Trade Unions [1961] EA 629, it was held that where the provisions of an enactment are penal provisions, they must be construed strictly and that in such circumstances you ought not to do violence to its language in order to bring people within it, but ought rather to take care that no-one is brought within it who is not brought within it in express language. See London County Council vs. Aylesbury Dairy Company Ltd [1899] 1 QB 106 at 109; Muini vs. R through Medical Officer of Health, Kiambu [2006] 1 KLR (E&L) 15; Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090.

136. Similarly, it was held in Vestey vs. Inland Revenue Commissioners [1979] 3 All ER at 984 that:

“Taxes are imposed on subjects by parliament. A citizen cannot be taxed unless he is designated in clear terms by a taxing Act as a taxpayer and the amount of his liability is clearly defined.”

137. In the same vein, it was held in Russell (Inspector of Taxes) vs. Scott [1943] AC 422 at 433:

“I must add that the language of the rule is so obscure and so difficult to expound with confidence that – without seeking to apply any different principle of construction to a Revenue Act than would be proper in the case of legislation of a different kind I feel that the tax payer is entitled to demand that his liability to a higher charge should be made out with reasonable clearness before he is adversely affected...my Lords, there is a maxim of income tax law, which though it may sometimes be overstressed yet ought not to be forgotten. It is that the subject is not to be taxed unless the words of the taxing statute unambiguously impose tax upon him. It is necessary that this maxim should on occasion be reasserted and this is such an occasion.”

138. In Unilever Kenya Limited vs. The Commissioner of Income Tax Nairobi High Court Income Tax Appeal No. 753 of 2003, in which the holdings in Scott vs. Russell [1948] 2 All ER 1 and Kanjeo Nazanjeo vs. Income Tax Commissioner [1964] EA 257 were cited with approval, it was held that where the language used in the legislation is somehow obscure, the taxpayer is entitled to demand that his liability to a higher charge should be made out with reasonable clarity before he is adversely affected. In Commissioner of Income Tax vs. Westmont Power (K) Ltd Nairobi High Court Income Tax Appeal No. 626 of 2002, the Court while citing Inland Revenue vs. Scottish Central Electricity Company [1931] 15 TC 761 expressed itself as follows:

“Even though taxation is acceptable and even essential in democratic societies, taxation laws that have the effect of depriving citizens of their property by imposing pecuniary burdens resulting also in penal consequences must be interpreted with great caution. In this respect, it is paramount that their provisions must be express and clear so as to leave no room for ambiguity...any ambiguity in such a law must be resolved in favour of the taxpayer and not the Public Revenue Authorities which are responsible for their implementation.”

139. In these kinds of cases therefore the Court is not entitled to attempt a discovery at the intention of the Legislature but is restricted to the clear words of the statute. In a taxing Act one has to merely look at

what is clearly said since there is no room for any intendment. There is no equity about tax and there is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only fairly look at the language used.

140. The same reasoning was adopted by Nyamu, J (as he then was), in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others** [2007] 2 KLR 240 where he expressed himself as follows:

“taxation can only be done on clear words and cannot be on intendment. Linked to this is that a penalty must be imposed in clear words. Finally even where the inclination of the legislature is not clear or where there are two or more possible meanings, the inclination of the court should be against a construction or interpretation which imposes a burden, tax or duty on the subject...Nothing summarises the above position better than *Brooms Legal Maxims*: ‘a remedial statute therefore shall be construed so as to include cases which are within the mischief which the statute was intended to remedy; whilst, on the other hand, where the intention of the Legislature is doubtful, the inclination of the court will always be against that construction which imposes a burden, tax or duty on the subject. It has been designated as “a great rule” in the construction of fiscal law, “that they are not to be extended by any laboured construction, but that you must adhere to the strict rule of interpretation; and if a person who is subjected to a duty in a particular character or answers that description, the duty no longer attaches upon him and cannot be levied. A penalty moreover must be imposed by clear words. The words of a statute shall be restrained for the benefit of him against whom the penalty is inflicted, and the language of the statute must be strictly looked at in order to see whether the person against whom the penalty is sought to be enforced has committed an offence to do with it.’...The principle remarked Lord Abinger “adopted by Lord Tenterden, that a penal law ought to be construed strictly is not only a sound one, but the only one consistent with our free institutions. The interpretation of statutes has always in modern times been highly favourable to the personal liberty of the subject and I hope will always remain so. This Court of course does appreciate the point made by the respondents’ Counsel that if the meaning of the provisions of the relevant empowering taxation laws is clear the court has no business intervening. This principle is based on the high authority of *Bennun on Statutory Interpretation* at page 726, 727 as follows:-If the meaning of the provision is reasonably clear, the courts have no jurisdiction to mitigate such harshness. It is of course regarded as penal for a person to be taxed twice over in respect of the same matter.” The significance of this quotation is that although the applicant did file monthly returns and keep daily production records, and the stockbook as required the tax imposed by the subsequent formula based on input and output purports to tax the company twice. This is also reflected in the inconsistent figures reflected by the three major audits. The taxman had come up with inconsistent figures for the same period due to its lapse in adhering to the law especially s 137 of the Act. I find that they cannot tax the applicant twice over *Bennion* adds:- ‘Nevertheless taxation is clearly “penal” within this section of the Code, and must not be enforced by the courts unless clearly imposed. As Evans LJ said in the context of tax legislation it is necessary to consider the legal analysis with the utmost precision so that the taxpayer shall not become liable to tax unless this is clearly and unequivocally the object of the statutory provisions ... The Courts are reluctant to adopt a construction permitting a person’s tax liability to be fixed by administrative discretion.’...This is how this court has regarded the assessment of tax on an arbitrary input-output formulae because it is not supported by any law nor is its retroactivity permitted by law...The same principles as above, were accepted and applied in the case of *Cape Brandy Syndicate vs. Inland Revenue Commissioners* [1921] KB 64 where Ronlat J, restated the principle in these words: ‘in a taxing Act clear words are necessary in order to tax the subject. Too wide and fanciful a construction is often to be given to that maxim, which does not mean that words are to be unduly restricted against the Crown or that there is to be any discrimination against the crown in those Acts. It simply means that in a taxing Act one has to look merely at what is clearly said. There is no reason for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing to be implied. One can only look fairly on the language used.’... Again, in the case of *Ramsay Ltd vs. Inland Revenue Commissioner* [1992] AC 300 the same principles

were expressed as follows:- ‘A subject is only to be taxed on clear words not upon intendment, or upon the “equity” of an Act’. Any taxing Act of Parliament as to be construed in accordance with this principle. What are “clear words” is to be ascertained upon normal principles; these do not confine the courts to literal interpretation. There may, indeed should, be considered the context and scheme of the relevant Act as a whole and its purpose may, indeed should be regarded ...” A subject is entitled to arrange his affairs so as to reduce his liability to tax. The fact that the motive for a transaction may be to avoid tax does not invalidate it unless a particular enactment so provides. It must be considered according to its legal effect.”

141. Whereas the Court appreciates the need to collect taxes, in carrying out their statutory obligations the tax authorities must adhere to the law. As was held in Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others (supra):

“It is no good answer for the taxman to proclaim that Kshs 1 billion (appx) is intended to swell the public treasury because due to the application of the above principles that money is not lawfully due... Applying the same reasoning, to the matter before this court, it does not matter that the respondents say and think they are owed over a billion Kenya shillings - what matters is whether the amount is lawfully due and whether the law allows its recovery? It is not a question of impression or perception of what is owed, instead it is what if anything, is owed under the relevant law and whether its assessment and recovery is permitted by the applicable law. If rightly due, the huge amount notwithstanding the court must uphold the right of recovery regardless of its consequence to the applicant and if not due under the law it must not hesitate to disallow it and must disallow it to among other things to uphold both the law the integrity of the rule of law.”

142. This position is reflected in Inland Revenue Commissioners vs. Wolfson [1949] 1 All ER 864 at 868 where it was held that:

“It was argued that the construction that I favour leaves an easy loophole through which the evasive tax payer may find escape. That may be so, but I will repeat what has been said before. It is not the function of a court of law to give words a strained and unnatural meaning because only thus will a taxing section apply to a transaction which had the legislature thought of it, would have been covered by appropriate words. It is the duty of the Court to give to the words of this subsection their reasonable meaning, and I must decline on any ground of policy to give them a meaning which with all respect to the dissentient Lord Justice I regard as little short of extravagance.”

143. Section 2 of the *Income Tax Act* provides that:

“management or professional fee” means a payment made to a person, other than a payment made to an employee by his employer, as consideration for managerial, technical, agency, contractual, professional or consultancy services however calculated”.

144. Section 2 of the Act therefore clearly identifies “management or professional fee” as capable of falling in various categories such as managerial, technical, agency, contractual, professional or consultancy services. I agree that it is incumbent on the Respondent to state in its decision which category of service was in its view provided by the Issuing banks or Issuers and it would not suffice for the Respondent to broadly state that the payments amounted to professional or management fees. By using the phrase “professional or managerial” the drafters were clear in their minds that the two words bear different meanings.

145. However in its decision dated 27th December 2012, the Respondent stated:

“KRA assessment for local interchange commissions to issuing banks is based on Section 35(3) (f) on the basis that the interchange fees paid by BBK as an acquirer to local issuer banks are

professional or management fees and applied the rates in accordance with 3rd Schedule Paragraph 5(f)(i),...we are in no doubt that the payment of interchange fees is in respect of a service provided”.

146. Dealing with the issue, the Court in **R vs. The Commissioner of Domestic Taxes ex-parte Barclays Bank of Kenya Ltd**, (supra) expressed itself as follows:

“Section 2 of the Income Tax Act defined what is a “professional and management fee” and in making its decision the taxing authority must sufficiently define or point to the transaction and payment that falls within the definition of the statute. So that the question for consideration would be whether these payments sufficiently defined constitute consideration for management, technical, consultancy or agency services? Casting a broad net on a series of transactions and payments lacks clarity and is to be frowned upon.”

147. To drive the point home, in **Republic vs. Commissioner of Income Tax ex-parte SDV Transami (Kenya) Limited** (supra), the Court expressed itself as follows:

“it is confounding that the Commissioner should communicate with the taxpayer using such terms as ‘agency fees’ and “contractual fees” interchangeably; it creates confusion and may indeed, be typified as a misunderstanding of the law and a possible ground for seeking quashing orders against the decisions taken by the Commissioner...It may well be that there is a heading under which the Commissioner of Income Tax may demand tax broadly falling in that category, but it must be expressly stated to be under a different name consistent with the Act. In the Commissioner’s present demand he has not achieved the clarity required.”

148. In my view, it is bad enough for the Respondent to communicate with the Applicant using such terms as “agency fees” and “contractual fees”. It is worse for the Respondent to resort to “professional or managerial fee” when the said phrase encompasses a host of other services such as managerial, technical, agency, contractual, professional or consultancy services. Therefore if **Ojwang, J** (as he then was) was of the view that the use of the terms as “agency fees” and “contractual fees” interchangeably was improper, it is my respectful view that resort to a term which encompasses managerial, technical, agency, contractual, professional or consultancy services without distinguishing which particular category the service falls into is even worse.

149. I accordingly associate myself with the sentiments of **Majanja, J** in **R vs. The Commissioner of Domestic Taxes ex-parte Barclays Bank of Kenya Ltd**, (supra) to the effect that:

“...the duty of the respondent in assessing tax is to identify transactions or payments that attract tax liability especially where there are objections to such categorisation. Section 35 (1) (a) of the Income Tax Act identifies specific types of payments that attract tax, the respondent is obligated by law to state with clarity its claim and state how the transaction falls within the terms of the statute. The respondent cannot exercise its duty like a trawler in the deep seas expecting to catch all the fish by casting its net wide. The respondent’s decision in this respect falls below this standard and the transactions and payments caught by the decision cannot be said to fall within the statutory definition of the tax.”

150. It is therefore my view that the manner in which the Respondent arrived at its decision did not meet the level of clarity required in taxation. The Respondent ought to have clearly identified the category in which the tax sought by it from the applicant, in its view, fell without resorting to an omnibus definition of “professional and managerial fee”. In this case, the Respondent simply borrowed the phrase in the **Income Tax Act** and applied to the applicant’s circumstances. As the authorities clearly indicate, in tax matters, the practice of “cut and paste” will not do.

151. It is on the basis of this conclusion that I find, without going into the merits of the decision itself, a course which in my view is likely to be fraught with the pit-holes of making a decision on the merit of the respective parties’ cases that the Respondent’s decision cannot be allowed to stand.

152. In the result, I issue the following orders:

1. An Order of Certiorari is hereby issued removing into this Court for purposes of it being quashed the decisions and orders of the Commissioner of Domestic Taxes dated 27th December, 2012 and 21st January, 2013 demanding payment of withholding tax from the Applicant on payments made to Card Companies namely VISA International Services Association, MasterCard Inc. and American Express Limited and payments made by the Applicant as an Interchange Fee to other Banks referred to as the Issuers.

2. An order of Prohibition, prohibiting the Commissioner of Income Tax from demanding withholding tax on the payments made by the Applicant to Card Companies namely VISA International Services Association, MasterCard Inc. and American Express Limited and payments made by the Applicant to other Banks referred to as the Issuers known as interchange fees based the decisions and orders of the Commissioner of Domestic Taxes dated 27th December, 2012 and 21st January, 2013.

3. The costs of these proceedings are awarded to the Applicant.

Dated at Nairobi this 20th day of May, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Malik for the Applicant

Mr Kirugi for Miss Lavuna for the Respondent

Cc Patricia