



Commissioner of Domestic Taxes v Kenya women Microfinance Bank Limited (Income Tax Appeal 123 of 2021) [2024] KEHC 10172 (KLR) (Civ) (6 August 2024) (Judgment)

Neutral citation: [2024] KEHC 10172 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
CIVIL**

INCOME TAX APPEAL 123 OF 2021

A MABEYA, J

AUGUST 6, 2024

BETWEEN

COMMISSIONER OF DOMESTIC TAXES APPELLANT

AND

KENYA WOMEN MICROFINANCE BANK LIMITED RESPONDENT

JUDGMENT

1. He appellant assessed and reviewed the respondent's financial statements, audited reports and Excise Duty returns and made an assessment on 24/1/2019. The respondent gave a notice of objection on 22/2/2019 and on 17/4/2019, the appellant issued an objection decision.
2. Being dissatisfied with the appellant's decision, the respondent lodged an appeal at the Tax Appeals Tribunal ("the Tribunal") and judgment was delivered on 13/5/2021 allowing the appeal.
3. Aggrieved by that decision, the appellant filed this appeal via a memorandum of appeal dated 9/7/2021. The appeal was founded several grounds which can be summarized as follows: -
 - a. That the Tribunal erred in law and fact in applying the definition of interest as defined in the [Income Tax Act](#) to the [Excise Duty Act](#) as opposed to the definition stipulated in the [Banking Act](#);
 - b. That the Tribunal erred in fact and law in failing to appreciate the provisions of the [Banking Act](#) and the Central Bank of Kenya ("CBK") Prudential Guidelines; and
 - c. That the Tribunal erred in law and fact in disregarding the exemption under the definition of interest as per the CBK Prudential Guidelines.



4. The appellant urged the Court to find error in the Tribunals findings that late payment penalty is interest and could not be charged Excise.
5. In opposition to the appeal, the respondent filed an undated Statement of Facts. The respondent's position was that, there was no error made by the Tribunal in holding that the definition of interest will be derived from the [Income Tax Act](#) since the repealed Customs and [Excise Duty Act](#) and [Customs Duty Act](#), 2015 did not define it.
6. That the Tribunal correctly held that the appellant had no legal basis to assess and demand Excise Duty on late instalment payment penalty imposed by the respondent. That the provisions of the [Banking Act](#) and CBK Prudential Guidelines were not relevant as the definition of interest had already been addressed in the case of [Cooperative Bank Kenya v Commissioner of Domestic Taxes](#) 2017.
7. The respondent raised a preliminary objection on 11/8/2021 on the grounds that the complete memorandum of appeal was filed outside the timelines provided for under Rule 3 of the [Tax Appeals Tribunal \(Appeals to the High Court\) Rules 2015](#).
8. The parties canvassed the appeal by way of written submissions. The appellant submitted that there was no error in filing the Notice of Appeal after the memorandum of appeal provided the same was filed within 30 days. That the delay in filing the notice of appeal was that the document was bulky and it needed to be compressed.
9. On interest, the appellant submitted that interest on loan or return on loan was not subject to Excise Duty. That what was in dispute was the definition of interest on late instalment payment penalty. That the Tribunal erred in adopting the definition found in the [Income Tax Act](#) since it governed a completely different tax head. That the definition under the [Income Tax Act](#) was the ordinary definition which generalizes the term to cover different issues.
10. On its part, the respondent submitted that the appeal ought to be struck out as the respondent did not give reasons for the delay. That Article 159 of the [Constitution](#) was not fashioned to aid indolence.
11. On interest, it was submitted that the [Banking Act](#) did not have the definition of interest and therefore not relevant in the circumstances of the case. That the penalty charged for late installment payment was additional interest levied on overdue accounts based on the amount outstanding and the period of default. That the definition of interest under the [Income Tax Act](#) should not be restrictive.
12. I have considered the parties' contestations and the submissions on record. There are two issues for determination. The first is whether the preliminary objection dated 11/8/2021 is merited. It is trite that a preliminary objection should be based on a point of law. See [Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd](#) (1969) EA 696.
13. The preliminary objection was raised on the ground that the memorandum of appeal was filed outside the timelines prescribed by law. The [Tax Appeals Tribunal Act](#) ("TAT") and the [Tax Appeals Tribunal \(Appeals to the High Court\) Rules, 2015](#) prescribe the timelines for filing appeals against the decisions of the Tribunal.
14. Rules 3 and 4 of the [Tax Appeals Tribunal \(Appeals to The High Court\) Rules, 2015](#), provide: -
 - "(3) The appellant shall, within thirty days, after the date of service of a notice of appeal under section 32(1), file a memorandum of appeal with the Registrar and serve a copy on the respondent.



- 4) The Court may extend the time specified in Rule 3 if the Court is satisfied that, owing to absence from Kenya, sickness, or other reasonable cause, the appellant was unable to file the memorandum of appeal within that period and that there has been no unreasonable delay on the part of the appellant.”
15. Further, section 32 of the [Tax Appeals Tribunal Act](#) provides as follows: -
- “A party to proceedings before the Tribunal may, within thirty days after being notified of the decision or within such further period as the High Court may allow, appeal to the High Court, and the party so appealing shall serve a copy of the notice of appeal on the other party.”
16. From the foregoing, it is clear that the Notice of Appeal is the foundation of any appeal to this Court. It is a requirement that, it is after a party has notified the Court and the other party of his/its intention to appeal that he/it can lodge the Memorandum within 30days thereafter.
17. In the present case, the notice of appeal was filed on 11/6/2021, the memorandum of appeal on 9/7/2021 and the record of appeal followed on 13/7/2021. Based on the above provisions the memorandum of appeal was filed within the thirty days prescribed by law.
18. I have noted that the record of appeal was filed outside the thirty days. The provisions do not provide for record of appeal but memorandum of appeal and the accompanying documents. If the respondent had any objection to the late filing of the record, it should have applied to strike out the memorandum of appeal for not being compliant.
19. Accordingly, the Court finds no merit in the preliminary objection and the same is dismissed.
20. The second issue is whether the Tribunal erred in adopting the definition interest in the [Income Tax Act](#). The appellant has faulted the Tax Appeals Tribunal for adopting the definition of interest found in the [Income Tax Act](#). According to the appellant, the Tribunal ought to have been guided by the [Banking Act](#) and the CBK Prudential Guidelines.
21. The respondent on its part contends that since the [Excise Duty Act](#) lacked the definition of interest, the Tribunal was correct in adopting the definition provided for in the [Income Tax Act](#).
22. The hearing before the tribunal was to determine whether Excise Duty was chargeable on penalty on late payment. The Tribunal held that late instalment payment fell under the interpretation of interest and interest on loans was excluded from Excise Duty.
23. I have considered the averments by the parties, it is not in dispute that the bank accrues some money from the late instalment payment. The appellant terms this payment as penalty while the respondent refers the same as interest. The question therefore is whether the late instalment payment qualifies as interest.
24. The first schedule of the part II paragraph 4 of the [Excise Duty Act](#) provides that Excise Duty on other fees charged by financial institutions shall be ten percent of their excisable value.
25. Section 5(1)(b) of the [Excise Duty Act](#), 2015 provides: -
- “Subject to this Act, a tax to be known as Excise Duty shall be charged in accordance with the provisions of this Act on
- a) ...



- b) excisable services supplied in Kenya by a licensed person.
26. Other fees definition is found under part III of the [Excise Act](#), 2015 as follows: -
- “other fees include any fees or commissions charged by financial institutions relating to their licensed activities, but does not include interest on loan or return on loan or any share or profit or an insurance premium or premium based or related commissions specified in the [Insurance Act](#) or regulations made thereunder.”
27. In the present case, the [Excise Duty Act](#) 2015 did not define interest. The appellant was of the view that the Tribunal ought to have been guided by the [Banking Act](#) and the CBK Prudential Guidelines. I have considered the [Banking Act](#) and I note that there is no definition of interest.
28. It is trite that tax statutes are to be interpreted strictly with no room for implication or intendment. Further, where there is any ambiguity in tax law, the same ought to be interpreted in the taxpayer’s favor.
29. The question is whether the Tribunal was justified in importing the definition of interest in the [Income Tax Act](#). In [National Bank of Kenya Ltd v Commissioner of Domestic Taxes](#) (Income Tax Appeal E155 & 533 of 2020 (Consolidated) [2022] KEHC 10549(KLR) (Commercial and Tax) (26 May 2022) (Judgment), the court held: -
- “I am of the view that there was no need to look for the definition of interest in the [Income Tax Act](#). Before going out of the [Excise Duty Act](#) to look for the definition of interest, there should have been difficult first as to what Parliament’s intention was. The term ‘interest’ should have been given its plain and literal meaning before seeking its legal meaning or definition in other statutes. It is not a technical term to warrant looking for its legal definition.”
30. In view of the foregoing, I find that the Tribunal erred in having imported the definition of interest from the [Income Tax Act](#).
31. Having found that the Tribunal was wrong in importing the definition of interest from another statute, should its decision stand? It is clear from the [Excise Duty Act](#) that it did not define what interest is. However, it defined what other fees are which are chargeable Excise Duty. The question is, is late instalment penalty interest, interest which is exempt or is it part of other fees?
32. The answer is to be found in the definition of ‘interest’. In [National Bank of Kenya Ltd v Commissioner of Domestic Taxes](#) (Income Tax Appeal E155 & 533 of 2020 (*supra*), the court gave the definition of interest as follows: -
- “58. From the foregoing, it is crystal clear that interest is the compensation paid in consideration of using someone else’s money. Or put differently, it is the consideration that is paid for keeping someone out of the use of his money. It is payable both when a lender lends money to a borrower or an institution takes a deposit from a depositor and puts it to its own use.
59. Section 7 of the Finance Act, 2013 defined “other fees” to include any fees, charges or commissions charged by financial institutions, but does not include interest.”
33. Since interest is the consideration for keeping one out of use of his own money, penalty levied on late instalment payment is but a sanction which is exerted on someone delaying ‘the return or refund’ of the



money owed to the owner. It is nothing but interest. Accordingly, it does not fall under the definition of 'other fees' and is therefore not liable to a charge of Excise Duty.

34. Accordingly, I find no merit in the appeal and the same is dismissed. The decision of the Tribunal dated 13/5/2021 is hereby upheld.

It is so decreed.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF AUGUST, 2024.

A.MABEYA, FCI Arb

JUDGE

