



REPUBLIC OF KENYA



**Commissioner of Domestic Services v Airflo Limited (Income Tax Appeal E063 of 2022)
[2023] KEHC 17848 (KLR) (Commercial and Tax) (15 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17848 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E063 OF 2022**

JWW MONG'ARE, J

MAY 15, 2023

BETWEEN

COMMISSIONER OF DOMESTIC SERVICES APPELLANT

AND

AIRFLO LIMITED RESPONDENT

*(Being an appeal from the judgement of the Tax Appeals Tribunal
dated 8/4/2022 in Tax Appeals Tribunal Appeal Number 367 of 2021)*

JUDGMENT

1. On 3/6/2022 the Appellant vide a memorandum of Appeal moved this court seeking to challenge the decision of the Tax Appeal Tribunal (Tribunal's) decision dated 8/4/2022.
2. The Appellant is a principal officer appointed under the Kenya Revenue Authority and its mandate is to assess, collect and account for revenue in Kenya.
3. The Respondent is a company registered in Kenya carrying on the business of providing handling services including documentation, cold room handling, vacuum cooling and security (x-ray screening) to its parent company Airflo BV.
4. Airflo BV is a company based in the Netherlands which operates a transport, freight and logistics company which engages in the transportation of cut flowers to destinations worldwide.
5. The Respondent made an application on 28/10/2019 to the Appellant for a VAT refund claim for the period of January 2019 to September 2019 for the sum of Ksh.36,043,871.00/-. The Respondent made a second application for a VAT refund for the period June 2020 to October 2020 for the sum of Ksh.10,014,465.00/-.



6. The Appellant rejected both of the VAT refund claims and the Respondent being aggrieved with the decision of the Appellant submitted notices of objection dated 24/2/2021 seeking to explain why its services should be zero rated and as such eligible for a VAT refund.
7. In response to the Respondent's objection, the Appellant issued an objection decision dated 21/5/2021 where it upheld its earlier decision to reject the Respondent's VAT refund claims on the basis that the services offered by the Respondent were consumed in Kenya.
8. Being aggrieved with the objection decision, the Appellant filed an appeal to the Tax Appeals Tribunal (the Tribunal). The Tribunal determined the dispute vide its judgement dated 8/4/2022 whereby it allowed the appeal and ordered the Appellant to process the Respondent's VAT refund claims within 6 months of the date of its delivery.
9. The Appellant being dissatisfied with the judgement of the Tribunal filed an appeal before this court against the whole decision and the consequential Orders on the following grounds; -
 - “ 1. That the Honourable Tribunal erred in law by misconstruing Section 8(1) and (2) of the VAT Act 2013.
 2. That the Honourable Tribunal erred in law and fact in failing to correctly identify the user and consumer of the services offered by the Respondent herein as defined in section 2 of the VAT Act 2013 and well elaborated in several decided cases;
 3. That the Honourable Tribunal erred in law and fact in failing to appreciate the definition of “supply of service” as defined by Section 2 of the VAT Act.
 4. That the Honourable Tribunal erred in law and fact in failing to appreciate the terms “use” or “consumption” under Section 2 and therefore failed to determine who the “consumer” and “beneficiary” of the services were.
 5. That the Honourable despite confirming that Horticultural services are exempt as per the VAT Act proceeded to rule that services offered by the Respondent are Zero-rated.
 6. That the Honourable Tribunal misapplied the law and facts and therefore arrived at the wrong decision.”
10. Based on the grounds above, the Appellant prayed for orders to have the Tribunal's judgement dated 8/4/2022 set aside and its objection decision dated 21/5/2022 upheld and to have this case stayed pending the outcome of the Court of Appeal case.
11. The Respondent opposed the appeal through its statement of facts dated 6/7/2022. In its opposition the Respondent contended that the Tribunal correctly held that the Respondent's services were consumed in the Netherlands and are therefore exported services hence zero rated for the purpose of VAT; that the Tribunal was correct in holding that what matters is not the place of performance of a service but the place of consumption of the service.
12. That the Respondent is not in the business of providing horticultural services merely because the product to which it provides logistical services is flowers, as the persons performing the horticultural services are the farmers; that the Respondent provides logistical support services of ensuring that the flowers are processed and delivered in pristine condition to the consumers in the Netherlands.



13. The Respondent further contended that the Tribunal was right in finding that the Respondent's services are not horticultural services and are therefore zero rated in accordance with the maxim of certainty in tax laws that provides that where there is ambiguity in tax laws, such ambiguity must be interpreted in favour of the taxpayer; that therefore the Tribunal correctly held that the Respondent's services are zero rated and that the Appellant erred in disallowing the Respondent's VAT refund claim contrary to section 17(5) of the VAT Act.
14. The Respondent prayed to have this appeal dismissed and to have the Tribunal 's judgement of 8/4/2022 upheld. Further the Respondent sought an order to have the Appellant pay the costs of this appeal and the one before the Tribunal.
15. I have considered the entire record of appeal, the Respondent's opposition to the appeal and the submissions filed by both parties.
16. In my view the grounds of appeal listed in the memorandum of appeal can be condensed to the following issues for determination:
Issue 1: Whether the services provided by the Appellant were exported services.
Issue 2: Whether the services provided by the Appellant were horticultural services that are tax exempt.
Issue 1: Whether the services provided by the Appellant were exported services.
17. The Appellant submitted that the Respondent provided services in Kenya such as cold storage services, palletization and other services to support the export of flowers, which were consumed in Kenya by the flower farmers who would not be able to export their produce to the international market if the goods were not provided.
18. On the other hand, the Respondent submitted that the handling services provided by the Respondent including documentation, cold room handling, vacuum cooling and x ray screening were consumed by its parent company in the Netherlands and therefore qualify as an exported service and therefore zero rated under Paragraph 1 of Part A of the second schedule to the VAT Act at the time.
19. On this issue the Tribunal found, under Paragraph 64 of its judgement the Respondent's services were consumed in the Netherlands and were therefore exported services for the purpose of VAT.
20. The crux of this matter is the nature of the services provided by the Respondent. The Respondent's case hinged on its claim that the services it provides are zero rated thereby entitling it to a VAT refund. It was not disputed that the Respondent provides services such as documentation, cold room handling, vacuum cooling for its parent company in the Netherlands. Section 7(1) of the VAT Act states:

“Where a registered person supplies goods or services and the supply is zero rated, no tax shall be charged on the supply, but it shall, in all other respects, be treated as a taxable supply.”

While Section 17(5) of the VAT Act states:

“Where the amount of input tax that may be deducted by a registered person under subsection (1) in respect of a tax period exceeds the amount of output tax due for the period, the amount of the excess shall be carried forward as input tax deductible in the next tax period:

Provided that any such excess shall be paid to the registered person by the Commissioner where-



(a) such excess arises from making zero rated supplies;”

21. Further, Part A of the second schedule in the VAT Act, at the time, stated the following:

“Where the following supplies, excluding hotel accommodation, restaurant or entertainment services where applicable, take place in the course of a registered person’s business, they shall be zero rated in accordance with the provisions of section 7—

1. The exportation of goods or taxable services.”

22. The court must therefore determine what an exported service entails. Guided by Section 2 of the repealed VAT Act which stated that a “service exported out of Kenya” means a service provided for use or consumption outside Kenya and as well as in the case of Commissioner of Domestic Taxes v Total Touch Cargo Holland (2018) eKLR where the court held that it matters not whether that service was performed in Kenya or outside Kenya, the determining factor is the location where that service is to be finally used or consumed.

23. In the Total Touch case (supra), Odero J held:-

“From the above it is clear that Section 2 of the repealed VAT Act which stipulates that an “exported service” is that which is provided for use or consumption outside Kenya is in keeping with the destination principles under the OECD guidelines. As such the taxing rights in terms of VAT to be charged on the services offered by KAHIL to the Respondent is in the Netherlands and not in Kenya, since the final consumer of the horticultural produce and flowers being prepared for export is the Respondent and its customers in Europe.”

24. In the present case, which is in all aspects similar to the Total Touch Cargo case (supra), the Respondent’s services ensured that the flowers arrived in pristine condition in the Netherlands. The benefit of the services offered by the Respondent to its parent company accrued in the Netherlands and were in no way for the benefit of Kenyan flower farmers as submitted by the Appellant.

25. I find therefore that the services provided by the Respondent fell within the scope of exported services and are zero rated.

Issue 2: Whether the services provided by the Appellant were horticultural services that are tax exempt.

26. The Appellant contended that the services of the Respondent fell squarely within the definition of horticultural services; that horticultural services are exempt hence no input VAT could be claimed by the Respondent; that in supplying exempt supplies, the supplier does not incur any tax liability hence not entitled to claim input tax.

27. Conversely, the Respondent submitted that its services included the provision of handling services to its parent company and did not fall within the broad definition of horticulture and that it has never been in the horticulture business.

28. The Tribunal on its part found that the VAT Act did not define what horticulture meant and that where there is ambiguity in a tax law, it must be interpreted in favour of the taxpayer. The Tribunal, therefore found that since it was unclear whether services auxiliary to the cultivation of horticultural products were included in the definition of horticultural services as envisaged under the VAT Act, it interpreted this in favour of the Appellant i.e that the services it offers are not horticultural services and are therefore zero rated.



29. Paragraph 5 of part 2 of the first schedule of the VAT Act states that Agricultural, animal husbandry and horticultural services are exempt supplies. It however does not define what constitutes horticultural services. In the Court of Appeal case of Stanbic Bank Kenya Limited v Kenya Revenue Authority [2009] eKLR, Nyamu JA held:-

“In my interpretation of the law, it is quite evident that I have not sought any assistance from outside a dictionary in ordinary use. Moreover, I have not strained the meaning of the words in order to achieve any particular result. I have simply adopted the ordinary meaning of the words used in the relevant tax statute. This is because as regards tax law the issue of intention or intendment does not arise. If there is any ambiguity, and I did not detect any in my analysis, the same must be construed in favour of the taxpayer.”

30. As the VAT Act is silent on what constitutes a horticultural service, the court cannot blindly include the services offered by the Respondent to be part of it.

31. The Court of Appeal was clear in the Stanbic Bank case (supra) in stating that there is no room for intendment in tax law and that if any ambiguity arises, the same must be construed in favour of the taxpayer. I therefore construe the law in favour of the Respondent by excluding the services offered by the Respondent in the definition of horticultural services for the purposes of VAT.

32. In the end, I find no merit in this appeal and uphold the decision of the Tribunal dated 8/4/2022. Cost of this appeal to be borne by the Appellant.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 15TH DAY OF MAY 2023.

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J. W. W. MONG'ARE

JUDGE

In the Presence of:-

1. Ms. Njuguna holding brief for Ms. Naeku for the Appellant

2. No appearance for the Respondent.

3. Sylvia- Court Assistant

