



**REPUBLIC OF KENYA**

**IN THE HIGH OF KENYA**

**AT MACHAKOS**

**Coram: D. K. Kemei – J**

**MISCELLANEOUS APPLICATION NO. 74 OF 2015**

**MUEMA KITULU T/A MUEMA KITULU & CO ADVOCATES.....APPLICANT**

**VERSUS**

**THE COUNTY SECRETARY, COUNTY GOVERNMENT OF KITUI...RESPONDENT**

**RULING**

1. The ruling relates to directions pertaining to the question as to whether the respondent is legally entitled to subject taxation on the decretal sums awarded by the court.
2. The background to this matter is that the amounts due to the applicant were subjected to VAT deduction on the basis that it was income due to the advocate and therefore was to be forwarded by the respondent to the taxman. The applicant was aggrieved and was of a contrary view hence sought that this court issues directions that the deductions of VAT from the decretal sum was unlawful and should be returned to the applicant.
3. Counsel for the applicant placed reliance on the case of **Ibrahim Manyara v Registered Trustees Of Agricultural Society Of Kenya (Ask) [2014] eKLR**

“These provisions of the Income Tax come out and clearly stipulate what is chargeable as tax – see Section 3 and particularly in respect to this cause what is defined as Income from Employment under Section 5 of the Act. Under no circumstances does any of these provisions of law include a decree of a court as a taxable item under the Income Tax law.

Would a decretal amount, in the circumstances be subjected to taxation as of this case? If this be the case, would this be feasible in law? My answer is no. If this were the case, the legislature would have come out clearly and provided for this. It cannot be argued that this was lost to the law maker. His, I suspect was in avoidance of creating confusion by subjecting decrees of court to taxation. This was partly because these are in most cases amorphous amounts and figures that would not necessary be in law deemed income. For example, would an amount of compensation in damages arising out of a fatal accident claim be deemed income accruing to the aggrieved or injured property? I guess not.

4. Also cited was the case of **MBUGUA & MBUGUA ADVOCATES v KENINDIA ASSURANCE CO. LTD Misc. Appl. 742 of 2005 [2006] eKLR** where it was observed that

“The fourth ground which is that the advocates have been paid in full is for the reasons given above also without merit. The client goofed when it unilaterally decided to settle the decree by making payment to a party who was not joined in these proceedings. This application has no redeeming feature at all. The client has authored its own misfortune. It has paid auctioneers’ charges which it should not have paid if it had acted diligently. It has made payment elsewhere which payment it was not liable to pay. It has needlessly paid dearly. This application in my view is incompetent and misconceived and I so hold. I dismiss it with costs to the advocates.”

5. The operative law is the VAT Act No.35 of 2013. I have considered the provisions of section 5 of the VAT Act 35 of 2013 that deals with charging of tax. It states as follows;

“5.(1) A tax, to be known as value added tax, shall be charged in accordance with the provisions of this Act on—

**a. a taxable supply made by a registered person in Kenya;**

(b) the importation of taxable goods; and

(c) a supply of imported taxable services.

(2) The rate of tax shall be—

(a) in the case of a zero-rated supply, zero per cent; or

(b) in any other case, sixteen per cent of the taxable value of the taxable supply, the value of imported taxable goods or the value of a supply of imported taxable services.

(3) Tax on a taxable supply shall be a liability of the registered person making the supply and, subject to the provisions of this Act relating to accounting and payment, shall become due at the time of the supply.

(4) The amount of tax payable on a taxable supply, if any, shall be recoverable by the registered person from the receiver of the supply, in addition to the consideration.

(5) Tax on the importation of taxable goods shall be charged as if it were duty of customs and shall become due and payable by the importer at the time of importation.

(6) Tax on the supply of imported taxable services shall be a liability of the registered person receiving the supply and, subject to the provisions of this Act relating to accounting and payment, shall become due at the time of the supply.”

6. The question then would be whether the decretal amount is a taxable supply.

7. The terms taxable supply is not defined in the VAT Act 35 of 2013, however under section 2, it is stated that

“assessment” means—

(a) a self-assessment return submitted under section 45;

(b) an assessment made by the Commissioner under section 45; or (c) an amended assessment under section 46;

“exempt supplies” means supplies specified in the First Schedule which are not subject to tax;

The material part of the 1<sup>st</sup> schedule states as follows

**PART II – SERVICES**

The supply of the following services shall be exempt supplies—

1. The following financial services—

(a) the operation of current, deposit or savings accounts, including the provision of account statements;

(b) the issue, transfer, receipt or any other dealing with money, including money transfer services, and accepting over the counter payments of household bills, but excluding the services of carriage of cash, restocking of cash machines, sorting or counting of money;

(c) issuing of credit and debit cards;

(d) automated teller machine transactions, excluding the supply of automated teller machines and the software to run it;

(e) telegraphic money transfer services;

(f) foreign exchange transactions, including the supply of foreign drafts and international money orders;

(g) cheque handling, processing, clearing and settlement, including special clearance or cancellation of cheques;

(h) the making of any advances or the granting of any credit;

- (i) issuance of securities for money, including bills of exchange, promissory notes, money and postal orders;
- (j) the provision of guarantees, letters of credit and acceptance and other forms of documentary credit;
- (k) the issue, transfer, receipt or any other dealing with bonds, Sukuk debentures, treasury bills, shares and stocks and other forms of security or secondary security; [Act No. 15 of 2017, s.9]
- (l) the assignment of a debt for consideration;
- (m) The provision of the above financial services on behalf of another on a commission basis.
- (n) asset transfers and other transactions related to the transfer of assets into Real Estates Investment Trusts and Asset Backed Securities. [Act No. 15 of 2017, s.9]
- (o) any services set out in items (a) to (n) that are structured in conformity with Islamic finance. [Act No. 15 of 2017, s.9]

2. Insurance and reinsurance services excluding the following—

- (a) management and related insurance consultancy services.
- (b) actuarial services; and
- (c) services of insurance assessors and loss adjusters.

3. The supply of education services for the purposes of this paragraph, education services means education provided by—

- (a) a pre-primary, primary, or secondary school;
- (b) a technical college or university;
- (c) an institution established for the promotion of adult education, vocational training or, technical education but shall not apply in respect of business or user training and other consultancy services designed to improve work practices and efficiency of an organization.

4. Medical, veterinary, dental and nursing services.

5. Agricultural, animal husbandry and horticultural services.

6. Burial and cremation services.

7. Transportation of passengers by any means of conveyance excluding international air transport or where the means of conveyance is hired or chartered.

8. Supply by way of sale, renting, leasing, hiring, letting of land or residential premises; “residential premises” means land or a building occupied or capable of being occupied as a residence, but not including hotel or holiday accommodation;

Provided that this paragraph shall not apply where such services are supplied in respect of— (a) car park services; or (b) conference or exhibition services, except where such services are provided for educational institutions as part of learning.

9. Community, social and welfare services provided by National Government, County Government or any political sub-division thereof.

10. Insurance agency, insurance brokerage, stock exchange brokerage and tea and coffee brokerage services.

11. The supply of—

(a) services rendered by educational, political, religious, welfare and other philanthropic associations to their members,  
or

(b) social welfare services provided by charitable organizations registered as such, or which are exempted from registration, by the Registrar of Societies under section 10 of the Societies Act (Cap. 108), or by the Non- Governmental Organizations Co-ordination Board under section 10 of the Non-Governmental Organization Coordination Act (Cap. 134) and whose income is exempt from tax under paragraph 10 of the First Schedule to the Income Tax Act (Cap. 470), and approved by the Commissioner of Social Services: Provided that this paragraph shall not apply where any such services are rendered by way

of business.

12. The following entertainment services—

(a) stage plays and performances which are conducted by educational institutions, approved by the Cabinet Secretary for the time being responsible for education as part of learning;

(b) sports, games or cultural performances conducted under the auspices of the Ministry for the time being responsible for culture and social services.

13. Accommodation and restaurant services provided within the following premises by the proprietors thereof—

(a) establishments operated by an educational training institutions approved by the Cabinet Secretary for the time being responsible for education for the use of the staff and students by that institution; or

(b) establishments operated by a medical institution approved by the Cabinet Secretary for the time being responsible for health for the use by the staff and patients of such institutions; or

(c) canteens and cafeterias operated by an employer for the benefit of his employees.

14. Conference services conducted for educational institutions as part of learning where such institutions are approved by the Ministry for the time being responsible for Education.

15. Car park services provided by National Government, County Government, any political subdivision therefore by an employer to his employees on the premises of the employer.

16. The supply of airtime by any person other than by a provider of cellular mobile telephone services or wireless telephone services.

17. Betting, gaming and lotteries services.

18. Hiring, leasing and chartering of aircrafts.

18A. Transportation of sugarcane from farms to milling factories. [Act No. 24 of 2016, s. 2.]

19. Deleted by Act No. 14 of 2015, s. 5.

20. Taxable services for direct and exclusive use in the implementation of official aid funded projects upon approval by the Cabinet Secretary to the National Treasury.

21. Services imported or procured locally for use by the local film producers or local film agents upon recommendation by the Kenya Film Commission, subject to approval by the Cabinet Secretary for the National Treasury. [Act No. 38 of 2016, s. 30 (b)(i).]

22. Taxable services provided for direct and exclusive use in the construction and infrastructural works in industrial parks of one hundred acres or more including those outside special economic zones approved by the Cabinet Secretary for the National Treasury. [Act No. 38 of 2016, s. 30 (b)(ii).]

23. Supply of sewerage' services by the national government, a county government, any political subdivision thereof or a person approved by the Cabinet Secretary for the time being responsible for water development.

24. Entry fees into the national parks and national reserves. [Act No. 38 of 2016, s. 30 (b)(iii).]

25. The services of tour operators, excluding in-house supplies. [Act No. 38 of 2016, s. 30 (b)(iv).]

26. Taxable services for direct and exclusive use for the construction of tourism facilities, recreational parks of fifty acres or more, convention and conference facilities upon the recommendation by the Cabinet Secretary responsible for matters relating to recreational parks. [Act No. 38 of 2016, s. 30 (b)(iv).]

27. Taxable services for direct and exclusive use for the construction of specialized hospitals with accommodation facilities upon recommendation by the Cabinet Secretary responsible for health, who shall issue guidelines for the criteria to determine the eligibility for the exemption. [Act No. 38 of 2016, s. 30 (b)(iv).]

28. Taxable services, procured locally or imported for the construction of liquefied petroleum gas storage facilities with a minimum capital investment of four billion shillings and a minimum storage capacity of fifteen thousand metric tonnes as approved by Cabinet Secretary for National Treasury upon recommendation by the Cabinet Secretary responsible for liquefied petroleum gas. [Act No. 11 of 2017, Sch.]

“services” means anything that is not goods or money;

“supply” means a supply of goods or services;

“tax” means the value added tax chargeable under this Act;

“taxable supply” means a supply, other than an exempt supply, made in Kenya by a person in the course or furtherance of a business carried on by the person, including a supply made in connection with the commencement or termination of a business;

8. In the case of **Card Protection Plan Ltd v Commissioners Customs and Excise [2001] UKHL 4** Lord Slynn of Hadley held that:

“.... every supply of a service must normally be regarded as distinct and independent and secondly that a supply which comprises a single service from an economic point of view should not be artificially split so as not to distort the functioning of the VAT system, the essential features of the transaction must be ascertained in order to determine whether the taxable person is supplying the customer, being a typical customer with several distinct principal services or with a single service. .... a service must be regarded as ancillary to a principle service it does not constitute for customers an aim in itself but a means of better enjoying the principal service supplied.”

9. A decretal amount has neither been included as an exempt service neither does it fit within the definition of a service and in placing reliance on the case in Paragraph 8 above, it would be a travesty to include it as a service to as to force it within the gloves of the respondent. In the case of **CIT v Vegetable Product Ltd (1973) ITR 192** it was held;

“if the Court finds that the language of the taxing provision is ambiguous or capable of more meaning than one, then the Court has to adopt the interpretation that favours the assessee (taxpayer)

10. This is why I agree with the finding in the case of **Ibrahim Manyara v Registered Trustees Of Agricultural Society Of Kenya (Ask) [2014] eKLR** that “*The offshoot of my finding on this subject is that there is no known law that subjects decrees of court to taxation. The Income Tax Act aforesaid is silent on this and we should so far trend that path.*”

11. I have also not seen any assessment of VAT by the Commissioner of Tax on the applicant as a result by dint of section 45 of the VAT Act and one wonders why the respondent took it upon itself to be a tax assessor. There is no evidence that it had been requested to collect taxes on behalf of the Commissioner of Tax. Clearly the respondent committed a mischief and thus the applicant’s suspicion that the money might not end up with the taxman and it would be safer with the applicant as the trail on the decretal sum will be easily identified.

12. In the result I direct that any deductions of VAT by the respondent is not supported by any law and therefore the same is illegal and that any sum so deducted ought to be refunded to the applicant within 14 days of the date of this ruling.

It is so ordered.

**Dated and delivered at Machakos this 6<sup>th</sup> day of October, 2020.**

**D. K. Kemei**

**Judge**