REPUBLIC .....
APPLICANT

AND

THE COMMISSIONER OF DOMESTIC TAXES LARGE TAX PAYER'S OFFICE
…..... RESPONDENT

EX-PARTE

BARCLAYS BANK OF KENYA LTD

JUDGMENT

Background

1. The *ex-parte* applicant ("the bank") is a well-known Kenyan bank and in the course of its business it enables its customers to make payments of goods and services using credit cards instead of cash in Kenya and elsewhere in the world.

2. In order to provide credit card services worldwide, the bank is a member of the various networks operated by international credit card companies like Visa, American Express and MasterCard. These companies administer a worldwide consumer payment system for their members which enables their members to provide their customers with the means of making payments using credit cards. The consumer payment system is administered by the credit card companies through a network that links all their members throughout the world.

3. The bank pays various fees to the Card Companies in order to access the networks and this application concerns the payment of taxes on the fees paid to international credit card companies. The respondent carried out an audit on the bank for the years 2003 to 2006 which resulted in the decision contained in the letter dated 31st October 2007 which the bank now challenges.

The Decision

4. The decision that is the subject of these proceedings is contained in the letter dated 31st October 2007 ("the decision") from the respondent to the bank responding to the bank's objection to assessment of tax by the respondent. In the said decision the respondent set out in detail its reasons for claiming tax in the manner it did. The material part of the decision states, in part, as follows;

We refer to your objection to our assessment number 1520070000040 issued on 7th July, 2007 covering the period January 2003 to December 2006 and wish to notify you that this has now been reconfirmed since there was no additional evidence to negate the same. The assessed tax of Kshs. 176,448,213 therefore remains due and payable and continues to attract interest at the rate of 2% per month…

Withholding Tax on Card Business – payments to Card Companies.

It was noted that in your grounds of objection, concentration was made only on VISANET services; no mention was made on the other services offered by MasterCard and American Express. This has been taken to mean that those services offered by MasterCard and American Express are not subject of the objection and therefore tax is still due and payable as per our letter dated 2nd April 2007.

On the other hand, VISANET services offered which are billed as per the VISA CEMEA fees guide (October 2004 Edition) include the following:

(1) Association one-off services fees (Membership licence fees, merchant and internet acquiring licence, Visa First Programme fee).

(2) Quarterly service fees (issuing fees and acquiring fees)

(3) International service fees (International service assessment fees, International outgoing interchange fees).

(4) VISANET service fees (software licence fees, VisaNet indirect access fee among others).

Therefore, it is clear that software licence is applicable negating the argument that software licence was not applicable.

Secondly, an issuer in glossary of VISA terms is defined as a member that issues VISA or Electron cards, or proprietary cards bearing the plus symbol, and whose name appears on the card as an issuer. For any member to be allowed to use the 'VISA' Logo on the cards it issues to its customers – it must be a member of VISA and membership fees is applicable annually. 'VISANET' is also defined as the systems and services, including the V.I.P. system and BASE II, through which VISA delivers authorization, clearing and settlement services to members.

From the above, therefore it means that the services offered by card companies can broadly be categorised as follows:

(1) Facilitating a medium of Communication between the operators (issuers, acquires and merchants). For this facility fees are payable such as access fee, authorization fees, membership fees etc.

(2) Availing a logo for use for which a fee is payable directly or through membership fees.

(3) Availing software for use for which software license fee is payable.

All the above services are in the nature of royalty whereby fees payable is for the use of or right to use design or model, plan, formula or process or any industrial, commercial or scientific equipment, or for information concerning industrial, commercial or scientific equipment or experience and withholding tax is applicable under section 35 of IT Act. [Emphasis mine]

Withholding tax on Card Business – payment to issuers

The issuer bank issues cards to its customers with a promise that they will be honoured when being swiped or drawing money from ATM's, the issuers therefore inevitably rely wholly on the acquirers to make good the promise to its customers by accepting card holders transactions, on the other hand the acquirers take the purchase liabilities of the issuers customers by paying out their own monies to the merchants and expecting a refund of the same from the issuers. For this service the acquirers pay out interchange fees (fees an acquirer pays to an issuer in the clearing and settlement of an interchange transaction, based on either the standard rate or electronic rate). The interchange fee is what the acquirer pays out to the issuer from commission earned from the merchants. The commissions payable to the issuers are based on a percentage of the dollar value of the interchange transactions.

Therefore, the payments described as interchange is basically for services like clearing and settlement fees between issuers and acquirers, sub categorised into clearing and settlement fees, returned items fees, risks monitoring non-compliance fees, etc.

The payments thus fall under management and professional fees which by definition includes agency fee under section 35 of IT Act.[Emphasis mine]

The Application

5. Pursuant to leave granted on 15th November 2007 the bank moved the Court by Notice of Motion dated 28th November 2007 under **Order 53 rule 3** of the ***Civil Procedure Rules*** for the following orders;

(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.

6. The Notice of Motion is supported by the verifying affidavit of Charles Ogega Ongwae sworn on 14th November 2007, the statutory statement dated 14th November 2007, the further affidavit of Yusuf Omari sworn on 20th April 2012 and that of Jabula Basopo sworn on 20th April 2012. The applicant also relies on the written submissions filed on 24th April 2012 and further submissions filed on 27th July 2012.

7. The application is opposed on the basis of the replying affidavit of George O. Obell, a Senior Assistant Commissioner sworn on 12th March 2012. The respondent has also filed written submissions dated 19th July 2012 in support of its decision.

Issues for determination

8. The issues for determination arise from the respondent's decision to demand withholding tax on the various payments to the card companies and those flowing from the credit card transactions. The two issues for resolution are as follows;

(a) Whether the respondent is entitled to claim tax on payments made to international credit card companies as royalties under the provisions of **section 35(1)(b)** of the ***Income Tax Act***.

(b) Whether the respondent is entitled to claim tax on payments referred to as "interchange fees" made by the bank to other banks referred to as "issuers" on the basis that such payments are "management and professional fees" and subject to withholding tax pursuant to **section 35(1)(a)** of the ***Income Tax Act***.

9. Before I proceed to consider the substantive application, I will dispose of the respondent's argument that this court should not entertain these proceedings on the ground that the bank's case when assessed in its entirety requires the court to examine the evidential and technical aspects if taxation and thus the court should be concerned only with the decision making process and not the correctness of the decision. Mr Ontweka, counsel for the respondent, argued that the bank should have appealed to the Local Committee against the decision of the respondent and hence this court should decline jurisdiction.

10. **Mr Ontweka argument is founded on the scope and purpose of judicial review which has been stated thus,** *"The Court will not, however, on a judicial review act as a "court of appeal" from the body concerned, nor will the Court interfere in any way with the exercise of any power or discretion which has been conferred on that body unless it has been exercised in a way which is not within that body's jurisdiction, or the decision is Wednesbury unreasonable. The function of the court is to see that lawful authority is not abused by unfair treatment. If the court were to attempt itself the task entrusted to that authority by law the Court would, under the guise of preventing the abuse power be guilty of usurping the power*" (See ***Chief Constable of North Wales Police v Evans [1982] I WLR 1155 p.1173*** adopted in ***R v Judicial Service Commission ex-parte Pareno [2004] I KLR 203).***

11. I think the respondent's argument was settled in the *Republic v Commissioner of Income Tax ex-parte SDV Transami (Kenya) Limited* HC Misc. App. No. 212 of 2004 (Unreported) where Hon. Justice Ojwang' in response to the same argument raised by the respondent in that case stated that, *"What the applicant is questing is the exercise of a public power by a public body; and on this account judicial review is an eminently appropriate course."* The issue in this case is whether the respondent's decision falls within the confines of the tax statute. The bank, as a party aggrieved by the exercise of this public power, is entitled to move the court and the court has the authority to consider whether the respondent has acted within or outside its jurisdiction. This inquiry may involve the examination of facts to determine whether the transaction is captured by the statute, this inquiry does not take the matter outside the purview of judicial review.

12. It is also well established that the existence of an alternative remedy is not a bar to seeking judicial review (See generally *Shah Vershi Devshi and Co. Ltd v Transport Licensing Board* [1970]EA 631 and *David Muga t/a Manyatta Auctioneers v R* CA Civil Appeal No. 265 of 1997(Unreported), *Republic v Commissioner of Co-operative Development and Another exparte David Mwangi and Others* Nairobi HC Misc. 805 of 1990 (Unreported). The respondent has not presented any matter that would be sufficient to enable the court exercise its discretion against the applicant on the ground that there is an alternative remedy.

13. The approach of to this case is that stated in the oft cited case of ***Cape Brandy Syndicate v Inland Revenue Commissioners*** **[1920] 1 KB 64** as applied in ***T.M. Bell v Commissioner of Income Tax*** **[1960] EALR 224** where Roland J. stated, *" …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 it 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."*

14. As this case concerns the interpretation of the ***Income Tax Act***, I am also guided by the dictum of Lord Simonds in ***Russell v Scott*** **[1948] 2 ALL ER 5** where he stated, *"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 the tax upon him"* adopted in ***Stanbic Bank Kenya Limited v Kenya Revenue Authority*** **CA Civil Appeal No. 77 of 2008 (Unreported) [2009] eKLR** per Nyamu JA (See also ***Jafferali Alibhai v Commissioner of Income Tax*** **[1961] EA 610**, ***Kanjee Naranjee v Income Tax Commissioner*** **[1964] EA 257)**.

15. Any tax imposed on a subject is dictated by the terms of legislation and taxing authority must satisfy itself that the transaction fits within the definition of the statute. In ***Adamson v Attorney General*** **(1933) AC 257 at p 275** it was held that, *"The section is one that imposes a tax upon the subject, and it is well settled 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 be in view of the Crown a defect-can only be remedied by legislation."*

16. The determination of this case depends on the construction given to the words of **section 35** of the ***Income Tax Act*** as applied to the facts of the case and whether the justification given by Commissioner and whether this accords with the letter of law. If the Commissioner's claim falls outside the words of the

statute then an order of *certiorari* will be issued to correct the error.

Relevant provisions of the Income Tax Act

17. The pertinent parts of the *Income Tax Act* necessary for the determination are as follows;

35. *(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 or training fee except –
(i) a commission paid to a non-resident agent in respect of flowers, fruits or vegetables exported from Kenya and auctioned in any market outside Kenya and audit fees for analysis of maximum residue limits paid to a nonresident laboratory or auditor; or
(ii) a commission paid by a resident air transport operator to a non-resident agent in order to secure tickets for international travel.

(b) a royalty;….

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

Section 2 of the ***Income Tax Act*** defines the terms **"management and professional fee"** and **"royalty"** as follows;

"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;*

"royalty" *means a payment made as a consideration for the use of or the right to 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;

Whether payments amount to a royalty

18. The first issue for determination depends on whether payments made to Visa International for the services offered to the bank amount to a royalty within the meaning of **section 2** of the ***Income Tax Act***. After conducting the audit, the respondent concluded that upon examination of the 2004 edition of the VISA CEMEA fee guide issued in October 2004 that the payments made for certain services were in the nature of royalties and therefore subject to withholding tax under **section 35** of the ***Income Tax Act***.

19. The bank's position is that the VISA CEMEA fees guide cannot be the basis for concluding that the fees charged are a royalty because the fee guide is only a guide for the various fees charged for the variety of services offered by VISA and in order to determine the whether tax is due as claim the respondent is obliged to consider the specific fees charged by the VISA as evidenced by the invoices and payments rather than the overall fee structure.

20. The term **"royalty"** is specifically defined in **section 2** of the ***Income Tax Act*** and in order for the respondent to collect tax under this provision the respondent must show that the transaction subject of the

tax falls within the definition. The respondent based its decision on the fact that the bank made payment for certain services which it classified as royalties as *"All the above services are in the nature of royalty whereby fees payable is for the use of or right of use design or model, plan, formula or process or any industrial, commercial or scientific equipment, or for information concerning industrial, commercial or scientific equipment or experience .."* For purposes of its decision, the service falling within definition (a) and (b), that is use of or right of use of a copyright of a literary , artistic or scientific work or a cinematographic film were readily be excluded.

21. The question for consideration then is whether the transactions referred to fall within part (c) and (d) of the definition. Ms Malik, counsel for the applicant, submitted that the terms "design", "model", "plan" or "formulas" are not defined in the ***Income Tax Act*** and therefore the plain and ordinary meaning must be adopted to discern the meaning of these terms. According to ***Black's Law Dictionary (9th Ed.)*** a **"Design"** is, *"1. Plan or scheme. …..… 3. the pattern or configuration of elements in something, such as work of art. 4. Patents. The drawing or the depiction of an original plan for a novel pattern, model, shape, or configuration that is chiefly decorative or ornamental"*.

22. A **"plan"** is also defined in the ***Concise Oxford Dictionary*** as *"a formulated and esp. detailed method by which a thing is to be done; a design or scheme, a drawing or diagram made by projection on a horizontal plane. Esp. Showing a building or one floor of a building"* and a **"formula"** is defined in the ***Concise Oxford*** **Dictionary**as *"a set of chemical symbols showing the constituents of a substance and their relative proportions, a mathematical rule expressed in symbols"*.

23. Ms Malik contended that these definitions show that a design, plan or formula actually presuppose a tangible thing in the form of a drawing or diagram on a piece of paper which would be physically identifiable. Similarly the reference to equipment must mean something tangible. Counsel submitted that the issue of what constitutes a royalty was considered in ***Republic v Commissioner of Income Tax ex-parte SDV Transami (Kenya) Limited*** **(Supra),** the Commissioner claimed withholding tax for payments made by SDV Transami to SITA for the purposes of accessing information about the movement of parcels on its website. The Commissioner argued that the payments made were royalties. Justice Ojwang' disagreed and held 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."*

24. VISA International operates an 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. 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 the 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 by the respondent. It is the duty of the taxing authority to identify the specific payment which attracts tax liability and the fee guide of itself is only evidence of the kind of payment made by the bank.

25. 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 authorisation fees by the bank clearly negatives 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.

26. The case of ***Stanbic Kenya Limited v Kenya Revenue Authority*** **CA Civil Appeal No. 77 of 2008 (Unreported) [2009]eKLR** cited by Mr Ontweka and relied upon by the respondent is not applicable to this aspect of the respondent's decision as the case dealt with management or professional fee and not royalties. That decision was based on the specific facts of the case where the respondent claimed tax on payments made to Reuters on the basis that the services provided through its terminals fell within the definition of professional or management services. In this case, the respondent's basis for claiming fees paid to VISA International is that the fees were royalties.

27. 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 **section 35(1)(b)** of the ***Income Tax Act*** and is thus amenable to an order of certiorari.

Whether payments amount to management or professional fees

28. According to the respondent's decision, *"[P]ayments described as interchange is basically for services like clearing and settlement fees between issuers and acquirers, sub categorised into clearing and settlement fees, returned items fees, risks monitoring non-compliance fees, etc. The payments thus fall under management and professional fees which by definition includes agency fee under section 35 of IT Act."*

29. This limb of the respondent's claim is on based on sums paid to other banks known as "issuers." The applicant challenges this aspect of the decision on the basis that there is no agency relationship between the bank and the issuers as the bank has no control over the acts of the issuer as the issuers do not perform any services on behalf of the bank and therefore the transaction is not captured by the definition of *"management and professional fees."*

30. In order to determine this issue it is necessary to describe is some detail the workings of the credit card payment system and what constitutes the interchange fee as described by the respondent. According to the applicant the sequence of steps followed in a typical credit card transaction according to material before court is as follows:-

(a) A customer applies to an Issuer (a financial institution that issues credit card to its customer) 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 card. The merchant is any establishment that allows for payment of goods or services with the use of credit a card.

(c) By swiping, the card, the merchant seeks authorization through the Acquirer; the institution that honours payments to a merchant based on the credit transactions made with a credit card, who then seeks authorisation through the particular network in this case Visanet.

(d) Since it is only the Acquirer that has an agreement with the Merchant, the network switches the transactions from the Acquirer to the Issuer in order to enable the latter verify the card holder's data and credit status before issuing an authorisation message back through the Acquirer.

(e) 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 so purchased.

(f) The Merchant initiates banking by uploading the transactions to the Acquirer who pays the Merchant.

(g) The Acquirer then sends the transaction details to Visanet. The information is then transmitted by the network to the issuer who sends a statement to the card holder.

31. These transactions are fast and normally take a few seconds and are facilitated by VISANET. Out of this transaction, the respondent claims that interchange fees are clearing and settlement fees between issuers and acquirers and that interchange fees are paid out of commissions earned from merchants. The bank's position is that interchange fees are not tied to commissions and are not payments in respect of any services provided by the issuers but is paid by acquirers to subsidise the costs of issuing and that in fact some of the payments made are part of the fees the bank pays to international credit card companies for accessing their networks.

32. The purpose of the audit conducted by the respondent is for the respondent to identify these payments and establish whether they fall within the tax net. The obligation of the tax authority then is to identify what payments were made and to whom in order to determine whether payments amount to *"professional and management fees"* and therefore subject to tax. This approach is consistent with the principles I outlined earlier in this judgment.

33. From the outline of the credit card transaction, it is clear that there is a series of relationships between the Issuer and card holder, merchant and card holder, merchant and Acquirer, Acquirer and Issuer. Payments are made at certain stages of the transactions. It is not clear from the decision which payments fall within the statutory definition of *"professional and management fees"* in order to attract the imposition of the tax and it is not the duty of this court to conduct an audit on the respondent's behalf.

34. **Section 2** of the ***Income Tax Act*** defines 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. In ***Republic v Commissioner of Income Tax ex-parte SDV Transami (Kenya) Limited*** **(Supra), Justice Ojwang', when confronted with a similar situation observed that, *"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."***

35. The impugned decision does not make any reference or establish whether the payments termed as interchange fees are for managerial, technical, contractual, professional or consultancy fees. Further, the nature of services rendered to bank is not clear from the decision. What the decision seemed to imply is that the fees *"included agency fees."*

36. Ms Malik submitted that the interchange fees could not be termed as agency fees as contended by the respondent since an agency relationship is one of a fiduciary nature between two persons, one of whom consents that the other should act on his behalf and the other similarly consents so to act or so acts. Counsel relied on ***Bowstead on Agency (15th Edition)*** to support this submission. Counsel contended that the respondent has failed to identify what aspect of the transaction fell within the definition of agency.

37. The hallmark of an agency relationship is the ability of the one party to be bound by the acts of another. It is unclear, on the basis of the evidence at which stage of the credit card transaction, which party assumes the position of the principal and agent. It also appears that based on the chain of transactions outlined above that each of the parties involved acts independently and carries on their business in their own right and for their own benefit. I therefore do not see, and the respondent has not clearly demonstrated in the circumstances how interchange fee can be termed an agency fee so as to become taxable under **section 35(1)(a)** as read with **section 2** of ***Income Tax Act***. I am once again

constrained to agree with Justice Ojwang' in ***Republic v Commissioner of Income Tax ex-parte SDV Transami (Kenya) Limited*** **(Supra), that** ***"It is most important that the Commissioner for Income Tax should be clear on this question and if he is not, then he will not be invoking the agency relationship according to the law. The Commissioner is not clear on the facts."***

38. 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 application of the tax. Once again the words of Justice Ojwang in ***Republic v Commissioner of Income Tax ex-parte SDV Transami (Kenya) Limited*** **(Supra) are appropriate,** ***"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 …"***

39. Consistent with the decision I have cited above, 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 all the fish by casting its net wide. The respondent's decision in this respect falls below this standard and the transaction caught by the decision cannot be said to fall within the statutory definition of the tax.

Conclusion and disposition

40. Having reviewed the application and the depositions I allow the Notice of Motion dated 28th November 2007 on the following terms;

(a) An order of certiorari be and is hereby issued 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.

(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.

(c) The respondents do pay the cost of the proceedings.

DATED and **DELIVERED** at **NAIROBI** this 8th day of October 2012.

D.S. MAJANJA

JUDGE

Ms N. Malik instructed by Kaplan and Stratton Advocates for the *ex-parte* applicant.

Mr Ontweka, Advocate, instructed by the Kenya Revenue Authority for the respondent.