REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Koome; CJ & P, Wanjala, Njoki, Lenaola & Ouko, SCJJ)

PETITION NO. 12 (E014) OF 2022

-

BETWEEN- **BARCLAYS BANK OF**

KENYA LIMITED
(NOW ABSA BANK KENYA PLC).....APPELLANT

-AND-

COMMISSIONER FOR DOMESTIC TAXES
***(Large Taxpayers Office)*.....RESPONDENT**

-AND-

KENYA BANKERS ASSOCIATION.....1ST INTERESTED PARTY

MASTERCARD ASIA PACIFIC
(PTE) LIMITED.....2ND INTERESTED PARTY

(*Being an Appeal from the Judgment and Orders of the Court of Appeal at Nairobi* ***(Karanja, M'Inoti & Sichale, JJ.A.)*** *delivered in Civil Appeal No. 195 of 2017 on 6th November, 2020*)

Representation:

Mr. Fred Ojiambo, SC and Ms. Nazima Malik for the Appellant
(Kaplan and Stratton Advocates)

Ms. Judith Kithinji, Mr. Gaya Ochieng and Ms. Diana Almedi for the Respondent
(G.O. Ochieng Advocate)

Mr. Daniel Ngumi, Ms. Faith Macharia and Mr. Ikoha Muhindi for the 1st Interested Party
(Anjarwalla & Khanna LLP)

Mr. Abbas Esmail, Ms. Georgina Amayo and Ms. Joanne Kahumbu for the 2nd Interested Party
(Anjarwalla & Khanna LLP)

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] Before this Court is a petition dated 17th June 2022 and filed on even date, pursuant to its admittance by this Court as one involving a matter of general public importance under Articles 163(4)(b) and 163(5) of the Constitution. The appellant is challenging the Judgment of the Court of Appeal at Nairobi *(Karanja, M'Inoti & Sichale, JJ. A)* in *Civil Appeal No. 195 of 2017* delivered on 6th November 2020. In certifying the appeal as one involving a matter of general public importance in ***Absa Bank Kenya Plc Vs Domestic Taxes (Large Taxpayers Office)*** [2022] KESC 13 (KLR), this Court *(Mwilu, DCJ & VP, Wanjala, Ndungu, Lenaola & Ouko, SCJJ*) stated:

> ***"…. The question of whether such payments made by banks to card companies constitute royalties and whether interchange fees paid by banks are classified as management or professional fees liable to taxation and subject to withholding tax is an important one within the banking industry."***

B. BACKGROUND

[2] The respondent commenced an audit of the appellant on 23rd May 2011, covering the following tax heads and periods: Accounts Audit (Corporation Tax) for the years 2007 to 2010; PAYE for the period

January 2007 to September 2011; Withholding Income Tax for the period January 2007 to September 2011; and VAT

for the period January 2007 to September 2011. After several meetings, exchanges of communication, and deliberations on issues, the principal tax liability was settled on agreed items. The non-agreed issues were on Card Business, VAT, and Withholding Income Tax.

[3] On 27th December 2012 and 21st January 2013, the respondent assessed withholding tax on interchange local commissions and interchange fees on international commissions, that is, payments made by the appellant to other banks that issue credit cards (*the issuers*). The respondent made the assessment subject to withholding tax under Section 35 of the Income Tax Act, on the grounds that the payments were professional or management fees. The respondent demanded payment of withholding tax from the appellant on payments made to three card companies, namely Visa International Services Association, MasterCard Inc., and American Express Ltd. (*the card companies*), as well as by the appellant to other banks. The demand was also made under Section 35 of the Income Tax Act on the basis that the payment to the card companies was royalty.

C. LITIGATION HISTORY

i. Proceedings at the High Court

[4] Upon being granted leave, the appellant instituted judicial review proceedings in ***JR Misc. CA No. 46 of 2013***, seeking the following orders:

a. *An Order of Certiorari to remove into the High Court for purposes of 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 appellant on payments made to card companies namely VISA International Services Association,*

MasterCard Inc. and American Express Limited and payments made by the appellant 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 appellant to card*

companies, namely VISA International Services Association, MasterCard Inc. and American Express Limited and payments made by the appellant 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.

[5] The appellant argued that the respondent lacked jurisdiction to demand withholding tax, as no professional or management services had been rendered to the issuing banks under Sections 2 and 35 of the Income Tax. It relied on a decision delivered by the High Court on 8th October 2012 in ***Republic Vs Commissioner of Domestic Taxes Large Tax Payer's Office Ex-Parte Barclays Bank of Kenya Ltd*** [2012] KEHC 1988 (KLR), a similar matter between the two parties, wherein *Majanja J.* held that the respondent's claim of withholding tax on the interchange fee lacked a legal footing as the Commissioner had failed to identify the specific facts or transactions that formed the basis of the tax. The court further stated that the respondent's duty in assessing tax is to identify transactions or payments that attract tax liability with clarity and to specify how the transaction falls within the terms of the statute. The appellant complained that the respondent, in defiance of the decision in ***Republic Vs Commissioner of Domestic Taxes Large Tax Payer's Office Ex-Parte Barclays Bank of Kenya Ltd*** *(supra),* raised a claim for withholding tax in respect of interchange fees without specifying whether the interchange fees were managerial, technical, contractual, or professional or consultancy fees.

[6] In the alternative, the appellant urged that the withholding tax assessed was not applicable or payable because, in the course of its banking and financial services, it enables its customers to make payments using credit cards, and to do so, it is a member of networks operated by the card companies. Furthermore, the card companies

operate a global consumer payment system, enabling their members to provide their customers with the means to make payments through credit cards. Moreover, the consumer payment system is administered by the credit card companies through networks that link all their members globally.

[7] It explained that the networks of the card companies provide for two types of membership, *Issuers* and *Acquirers*. An issuer is defined as a financial institution that issues a credit card to its customer, and an acquirer as an institution that honours payments to a merchant (for instance, a supermarket) based on the credit transactions by a customer made using a credit card. Further, a member can be both an issuer and an acquirer, as in the case of the appellant herein.

[8] According to the appellant, it pays the card companies *transaction fees* to access and use their network, and the transaction fees include access fees, authorisation fees, switching fees, PIN verification fees, and clearing and settlement fees. The appellant averred that the *interchange fee* is an inter-bank remittance paid by an acquirer to the issuer to subsidise the cost of issuing the card, and to compensate a member for costs incurred as a result of the transaction. It emphasised that the fee is not paid to the card companies, but merely effected through VisaNet and the other networks. It urged that it performs a balancing act of promoting the coordination of the decision and the activities of the four-party system involving the cardholder, *the issuer, the acquirer,* and *the merchant*, to ensure maximum benefit of the system. Since it was established that no agency relationship exists between the acquirers, issuers, and the card company, each operating independently and for its own commercial benefit, the characterization of interchange as an agency fee therefore does not arise.

[9] With respect to royalties, the appellant contended that the burden lay on the respondent to establish that the payments in question constituted royalties and were therefore subject to withholding tax under Section 35(1)(b) of the Income Tax Act. The appellant argued that, having regard to the definition of “royalty” under Section 2 of the Act, the respondent failed to demonstrate with the requisite

clarity why royalties were payable on the sums remitted by the appellant to the card companies. They maintained that it is a settled principle of tax law that the onus rests upon the taxing authority to show, with precision, that a taxing statute expressly imposes a charge on the taxpayer.

[10]Conversely, the respondent's position was that its audit findings established two key points. First, the interchange fees paid by the appellant to issuing banks were subject to withholding tax, as such payments were made in consideration of professional or management services rendered by the issuer banks to the appellant/acquirer. Second, the appellant derived revenue from a wide range of services, including the installation of terminals, issuance of statements, operation of help desk hotlines, and, most significantly, the processing of transactions.

[11] The respondent further averred that the merchant discount, typically ranging between 1.5% and 3.5% of the purchase amount, represented the fee charged for transaction processing and comprised three distinct components: interchange fees, payable to the issuer; dues and assessment fees, accruing to the card company; and processing fees, earned by the acquirer. It maintained that the audit findings confirmed that interchange fees were subject to withholding tax, as they constituted payments for management services rendered by issuing banks to acquiring banks within the meaning of Section 35 of the Income Tax Act. The respondent argued that issuing banks provide management services by sourcing cardholders, maintaining their accounts, and verifying their creditworthiness on behalf of acquiring banks, and that, in consideration of these services, the acquiring banks pay interchange fees to the issuing banks.

[12] The respondent further contended that the payments made by the appellant to card companies comprising software licence fees, trademark licensing, and service fees were, in essence, consideration for the right to use global network services that enable connectivity between the appellant's system and its users, and therefore properly fell within the definition of "royalty." It maintained that the fees paid for access to and use of specialized online software facilitating

payments, expenditure flows between the card companies and the appellant, as well as clearing and settlement between issuers and acquirers, were royalties subject to withholding tax. In conclusion, the respondent argued that the appellant had, by making certain payments, effectively admitted the tax liability. It further reaffirmed the principle that all income accruing in or derived from Kenya is

taxable pursuant to Section 3(1) as read with Section 4(a) of the Income Tax Act, and that tax liability crystallizes upon payment.

[13] In a Judgment dated 20th May, 2015, the High Court (*Odunga, J. (as he then was))* allowed the application and granted the orders sought by the appellant. At the onset, the court noted that even though the issues raised in the matter were similar to those raised in ***Republic Vs Commissioner of Domestic Taxes Large Tax Payer's Office Ex-Parte Barclays Bank of Kenya Ltd*** *[supra],* the decision was made by a court of concurrent jurisdiction and therefore, was not binding, but merely persuasive.

[14]The court reiterated that in matters of taxation, it is bound by the express language of the statute and must apply the law as written, without recourse to intendment. It was observed that Section 2 of the Income Tax Act defines "management or professional fee" as encompassing distinct categories, including managerial, technical, agency, contractual, professional, or consultancy services. Accordingly, it was incumbent upon the respondent to specify, in its decision, the precise category of service rendered by the issuing banks. A mere broad assertion that the payments constituted "professional or management fees" was inadequate. The court further emphasized that the legislature's deliberate use of the terms "*professional" and "management"* fees signified that each bears a distinct meaning, which cannot be conflated.

[15] The court, aligning itself with the earlier decision in ***Republic Vs Commissioner of Domestic Taxes Large Tax Payer's Office Ex-Parte Barclays Bank of Kenya Ltd*** *[supra],* reaffirmed that in assessing tax, it is the duty of the respondent to identify with precision the specific transactions or payments that give rise to tax liability. The law obligates the respondent to articulate its claim

clearly and to demonstrate how the impugned transaction falls within the ambit of the statute. In the present case, the court found that the respondent’s approach fell short of this standard of clarity, noting that reliance on

a broad and omnibus definition of *"professional and managerial fee"* was impermissible.

[16] Consequently, the court issued an Order of *Certiorari* quashing the decisions of the respondent dated 27th December 2012 and 21st January 2013, which had demanded withholding tax from the appellant in respect of payments made to card companies and interchange fees paid to issuing banks. The court further granted an Order of Prohibition restraining the Commissioner of Income Tax from demanding withholding tax on such payments on the basis of the impugned decisions. Finally, the Court awarded costs to the appellant.

ii. Proceedings at the Court of Appeal

[17] Aggrieved by the decision of the High Court, the respondent moved the Court of Appeal vide ***Civil Appeal No.195 of 2017***. Its appeal was premised on eleven (11) grounds, that the learned judge erred by:

i. *Failing to consider that the payments made by the appellant to credit card companies (VISA International, MasterCard and American Express-Amex) were royalties and subject to withholding tax under Section 35 of the Income Tax Act.*
ii. *Failing to consider that the payments made for professional and management services as defined under Section 2 of the Income Tax Act by the appellant to other banks, which issue credit cards, were subject to withholding tax under Section 35 of the Income Tax Act.*
iii. *Failing to appreciate that the respondent acted within the law and that the Judicial Review orders of Certiorari and Prohibition ought not to have been issued.*
iv. *Failing to apply his mind to the issues at hand and opting*

to associate himself entirely with the sentiments of an earlier decision by Majanja

J. in ***JR No. 1223 of 2007.***

v. *Failing to appreciate that in* ***JR. No. 1223 of 2007****, Majanja J. noted that the respondent in that decision had failed to bring clarity*

as to the application of the law and the facts, and failing to appreciate and apply his mind to the clarity that was demonstrated by the respondent in this matter.

vi. *Rendering an unjust decision by rigidly applying the decision in* ***JR.1223 of 2007*** *without regard to the consequence that the decision went against the law.*

vii. *Misdirecting himself in law and failing to find that the law was clear in the matter and ought to have been strictly applied.*

viii. *Failing to recognize that, where an earlier decision is erroneous, the court ought to attempt to distinguish it if the decision does not reflect Parliament's intention.*

ix. *Rendering a decision whose conclusion was unjust and inappropriate, by misapplying the doctrine of precedence, leading to an unlawful outcome.*

x. *Merely rehashing the parties' submissions and dwelling on the academic principles of judicial review rather than determining the issues in contention between the parties by applying his mind to the contents.*

xi. *Not considering the evidence produced as proof of payment of royalties by the appellants, which would have rendered the appellants taxable.*

[18] The respondent sought the following reliefs:

i. *The appeal be allowed;*

ii. *The judgment entered by Odunga J on 20th May 2015 in JR Misc No. 46 of 2013 be set aside;*

iii. *The decision and orders of the respondent dated 27th December 2012 and 21st January 2013 be reinstated; and*

iv. *Costs be awarded to the respondent.*

[19] In response, the appellant opposed the appeal, maintaining that the payments made to card companies and other banks did not amount to royalties or management and professional fees and were therefore not subject to withholding tax. The appellant further argued that the respondent had failed to clearly and categorically establish any tax obligation on its part. By purporting to demand taxes not due under the Income Tax Act or any other tax law, the respondent, it contended, acted illegally, unreasonably, and in excess of its jurisdiction. Accordingly, the appellant submitted that the trial court had properly exercised its discretion in granting the orders of *certiorari* and prohibition, and urged the Court of Appeal not to interfere with that decision.

[20] In a Judgment delivered on 6th November, 2020, the Court of Appeal *(Karanja, M'Inoti & Sichale, JJ. A)* overturned the Judgment of the High Court and allowed the appeal with costs. In its reasoning, the court reaffirmed the principle requiring strict construction of tax legislation, to the effect that any tax demanded must fall within the terms of the legislation without any ambiguity. However, the court stated that the determination of whether there is clarity or ambiguity in the legislation is not an abstract or pedantic exercise, but must be based on the evidence and circumstances of each case.

[21] On the issue *whether payments made by the appellant to card companies constituted royalties*, the appellate court examined Sections 2 and 35(1)(b) of the Income Tax Act and found that the evidence clearly showed the appellant had executed various agreements with the card companies. These included a *Trademark License Agreement* with Visa International Service Association, a *Card Member License Agreement* with MasterCard International, and a *Trademark License Agreement* with AMEX.

[22] The court observed that while the Visa agreement was silent on royalty payments, the agreements with MasterCard and AMEX expressly stipulated that no royalties were payable. Nevertheless, it noted that in order to access and participate in the networks operated by the card companies, the appellant was

required to use their respective cards, each bearing the companies' distinctive trademarks and logos, as a precondition for access to the networks. In these circumstances, the court held that the respondent had sufficiently identified the basis for its claim of withholding tax on account of royalty, and there was no statutory ambiguity necessitating legislative clarification. It concluded that the transaction fees paid by the appellant amounted to consideration for the right to use the card companies' trademarks and logos, and therefore constituted royalties within the meaning of Section 2(c) of the Income Tax Act.

[23] On the question of *whether the interchange fee paid by the appellant, in its capacity as an acquirer, to the issuing banks constituted management and professional services,* the appellate court held that the evidence demonstrated the existence of coordination, managerial, professional, and contractual services rendered by the issuers to the acquirer, for which consideration was paid. On this basis, the court found that the respondent had established that the payments fell within the definition of "management and professional fees" under Section 2 of the Income Tax Act. The court further noted that the uncertainty or lack of clarity previously identified in ***Republic Vs Commissioner of Domestic Taxes Large Tax Payer's Office Ex-Parte Barclays Bank of Kenya Ltd*** *(supra),* regarding whether the payments amounted to royalties or management/professional fees, was not borne out by the evidence in the present case. Accordingly, the Court of Appeal allowed the appeal with costs to the respondent.

iii. Proceedings at the Supreme Court

[24] Dissatisfied with the outcome, the appellant sought certification of the appeal as one involving a matter of general public importance. The Court of Appeal declined the certification, prompting the

appellant to seek a review before this Court, culminating in the present appeal. In allowing the application for review in its ruling dated 19th May 2022, this Court addressed the question of general public

importance, as set out in part in paragraph [1] above, and which bears repeating in the following terms:

> ***"Having so pointed out, on our part, we note that the issues raised are not frivolous and indeed transcend the specific circumstances of the parties before us. The question of whether such payments made by banks to card companies constitute royalties and whether interchange fees paid by banks are classified as management or professional fees liable to taxation and subject to withholding tax is an important one within the banking industry."***

[25] Consequently, the appellant seeks the following reliefs:

i. *A declaration that payments to card companies are not subject to withholding tax as they are not royalties.*
ii. *A declaration that the interchange fee is not subject to withholding tax, as it is not a management or professional fee.*
iii. *A declaration that the respondent's failure to specify the category of management or professional fees in its demands dated 27th December 2012 and 21st January 2013, and instead resorting to an omnibus reference, did not meet the level of clarity required in taxation.*
iv. *A declaration that the appellant's constitutional right to a fair*

    hearing granted by Article 50(1) has been violated.
v. *A declaration that the High Court correctly quashed the respondent's demands dated 27th December, 2012 and 21st January 2013.*
vi. *The Judgment and Order of the Court of Appeal delivered*

on 6th November 2020 be set aside in its entirety.

vii. *The Petition herein be allowed.*

viii. The costs of the Petition, as well as the costs in the superior courts be accorded to the appellant.

[26] In response, the respondent filed a replying affidavit to the appeal, as well as affidavits replying to those of the 1st and 2nd interested parties, all sworn by *Philip Munyao* on 4th July 2022, 9th November 2022, and 9th November 2022, respectively.

[27] The respondent's case was that, following the decision of *Majanja J. in* ***Republic Vs Commissioner of Domestic Taxes Large Tax Payer's Office Ex-Parte Barclays Bank of Kenya Ltd*** *[supra],* its second audit adequately identified the services for which the interchange fee was chargeable under Section 2 of the Income Tax Act. It maintains that the payments were properly subjected to withholding tax under Section 10 of the Act. The respondent further contends that payments made under the trademark agreements constituted royalties, as those contracts conferred upon the appellant the right to use and access the card payment platforms. In support of its assessment, the respondent relied on the appellant's invoices for royalty and interchange payments.

[28] Moreover, the respondent contends that the appellant derives revenue from a wide range of services, including securitization, installation of terminals, issuance of statements, and transaction processing. It explains that the fee associated with transaction processing is referred to as the Merchant Discount or Merchant Service Commission, typically ranging between 1.5% and 3.5% of the purchase amount. According to the respondent, the Merchant Discount comprises three distinct components: interchange fees, which constitute revenue to the issuer and cost to the acquirer; dues and assessment fees, which accrue to the card company; and the acquirer's fees, which are retained by the acquirer.

[29]The respondent's case was that dues and assessment fees (also referred to as processing fees) attract royalty, while interchange fees, paid by the appellant to issuing banks, are consideration for professional or management services and therefore subject to withholding tax. It specified that the verification and

authorization of transactions amount to coordination and managerial services, thereby bringing interchange fees within the definition of “management or professional fees” under Section 2 of the Income Tax Act.

[30] It is asserted that Section 2 of the Income Tax Act defines a payment made in respect of managerial, technical, agency, contractual, or consultancy services as a management or professional fee, which is taxable under Section 35 of the Act. The respondent contends that there is no legal requirement that a service must fall exclusively within one of these categories to attract tax liability, and that a composite service may embody characteristics of two or more subsets. It is further averred that interchange fees are governed by the Card Company By-laws and Regulations, to which both the issuer and the acquirer are bound.

[31] It is averred that the card companies themselves do not issue cards, engage merchants, or process payments; rather, they license eligible banks to act as issuers and/or acquirers. The respondent contends that its audit established that the appellant had entered into Trademark Licence Agreements to utilize the card companies’ systems for facilitating transactions. It further found that, in making payments to the card companies in respect of assessment or processing fees, the appellant failed to withhold tax, notwithstanding that such payments constituted royalties for the use or right to use the card systems.

[32]The 1st interested party was joined to the appeal pursuant to the Ruling of this Court *(Mwilu DCJ & VP, Wanjala, Njoki, Lenaola & Ouko, SCJJ)* delivered on 7th October 2022. In support of the appeal, it filed a replying affidavit sworn by *Dr. Habil Olaka* on 21st October 2022. In his affidavit, Dr. Olaka outlines step by step the card

payment transaction process, which entails: the swiping of the card; the merchant seeking approval from the acquiring bank; verification by the issuing bank; the issuing bank’s response and transmission of approval to the merchant; debiting of the cardholder’s account; release or decline of goods; uploading of the transaction claim file to the acquiring bank; settlement of payment by the card company; and the eventual receipt of funds by the merchant.

[33] The 2nd interested party was also joined to the appeal pursuant to the Ruling of this Court *(Mwilu DCJ & VP, Wanjala, Njoki, Lenaola & Ouko, SCJJ)* delivered on 7th October 2022. In support of the appeal, it filed a replying affidavit and a supplementary affidavit in response to the respondent's replying affidavit, both sworn by *Shafi Shaikh* on 19th October 2022 and 6th March 2024, respectively. The 2nd Interested Party contends that the display of the Mastercard logo on payment products serves solely to indicate that payments are processed through the Mastercard Processing Network and that the issuer is a member of the Mastercard Member Network. It asserts that the acquirer's role is limited to enrolling merchants authorized to accept Mastercard payments, and that neither the Mastercard Corporate Group nor the 2nd Interested Party levies any royalty or other fees on merchants or members for the use of the Mastercard logo.

[34] Regarding interchange fees, the 2nd interested party avers that each time a cardholder uses a Mastercard payment product to purchase goods or services, the issuer deducts an interchange fee from the amount payable to the acquirer. While Mastercard may set the interchange rate, it does not derive any revenue from it. The fee is not a payment for any service rendered or a reimbursement for costs incurred by the issuer on behalf of the acquirer; rather, it compensates the issuer for the costs, risks, and efforts associated with providing payment solutions to cardholders. The fee is therefore collected by the issuer through deduction from the payment transmitted via the acquirer to the merchant.

[35] The 2nd interested party further contends that the interchange fee cannot be characterized as a fee for technical, management, or professional services, as no service is rendered by the issuer to the acquirer. It maintains that imposing withholding tax on transaction fees would unduly burden payment systems and undermine the

national agenda of advancing digital payments.

D. PARTIES' SUBMISSIONS

i. Appellant's Submissions

[36] The appellant's submissions are dated 30th May 2024 and were filed on the same day. It also filed submissions dated 12th June 2025 on 13th June 2025, in response to the respondent's submissions.

[37] On *whether the payments received by the card companies constitute royalties*, the appellant submits that under Section 2 of the Income Tax Act, a payment qualifies as royalty only if it is made as consideration for the use of a trademark. It maintains that its contracts with the card companies expressly exclude any royalty payments for trademark use. The appellant faults the Court of Appeal's finding that payment of royalties was a precondition for accessing the network, asserting that no such clause exists in the agreements.

[38] The appellant further argues that by inferring the existence of a royalty payment, the appellate court effectively amended or rewrote the agreements between the appellant and the card companies. It adds that the appellate court substituted its own findings for those of the respondent, noting that the respondent's decision of 27th December 2012, which was the subject of the judicial review proceedings, made no reference to royalty payments for trademark use.

[39] On *whether the respondent's decisions dated 27th December 2012 and 21st January 2013 were unclear, unlawful, or unreasonable*, the appellant submits that the respondent failed to identify the specific service allegedly rendered by the issuing banks to the appellant. It argues that under Section 35(3)(f) of the Income Tax Act, one of the categories encompassed within the definition of "management or professional fees" is contractual fees, which are

expressly defined as fees for building, civil, or engineering works. The appellant, therefore, contends that banking does not fall within this definition, and consequently, payments allocated by the networks to issuing banks cannot properly be categorized as professional fees.

[40] The appellant submits, without prejudice to the foregoing, that the respondent's decisions did not specify that the alleged services were of a coordination, managerial, professional, or contractual nature, but merely stated that the issuing banks provided services to the appellant. It therefore argues that, in categorizing those services, the Court of Appeal impermissibly substituted the respondent's decision with its own. The appellant further explains that the issuing bank's role is limited to verifying a card's validity and confirming the availability of funds when a cardholder makes a purchase at a merchant's point of sale terminal, actions that do not amount to services rendered to the appellant. It maintains that there is no direct relationship between the issuer and the acquirer, as all transactions are routed through the card companies' networks, which process the transactions between acquirers and issuers.

[41] The appellant further submits that interchange fees do not fall within any of the categories constituting "management or professional fees" under Section 2 of the Income Tax Act. It argues that, since no legislation provides for the imposition of withholding tax on interchange fees, the Court of Appeal's finding to the contrary contravenes Article 210 of the Constitution, which stipulates that *no tax or licensing fee may be imposed, waived, or varied except as provided by law*. The appellant further contends that interchange fees form part of the Merchant Service Fee paid by the merchant, not by the appellant. It adds that the issuing bank receives the interchange fee as compensation for facilitating the transfer of funds through the verification process, which does not attract withholding tax. Without prejudice, it submits that to find that the appellant was obligated to pay withhold tax would be against the law, which is categorical that it is the party making the payment that has the duty to deduct withholding tax.

[42] On *whether the Court of Appeal erred by determining a judicial review matter on its merits and substituting its own decision for that of the respondent,* the appellant relies on the Supreme Court decision in ***Dande & 3 others Vs Inspector General, National Police Service & 5 others*** [2023] KESC 40 (KLR). It argues that the appellate court fundamentally erred by

delving into the merits of the case and substituting the respondent's decision. Specifically, because it held that payments to card companies constituted royalties for the use of trademarks, an issue not raised by the respondent, and that interchange fees amounted to coordination, managerial, professional, and contractual services, contrary to the respondent's original findings in the decisions dated 27th December 2012 and 21st January 2013. The appellant, therefore, urges this Court to set aside the Court of Appeal's decision, maintaining that the withholding tax imposed lacks legal foundation and would negatively affect the banking, tourism, and public sectors.

*ii. The 1st Interested Party's s*ubmissions

[43]The 1st interested party's submissions, dated 29th May 2024 and filed on 30th May 2024, echo the appellant's arguments and reiterate the latter's position that the transactions and interchange fees do not constitute professional or management fees, nor royalties under the Income Tax Act, and are therefore not subject to withholding tax. Citing ***Russel Vs Scott*** *[1948] 2 All ER 5*, it asserts that taxation must be expressly provided for in law. It submits that under Section 2 of the Income Tax Act, royalties relate to the use of intellectual property, whereas the payments in question are for transaction facilitation services, which do not amount to intellectual property use. Further, it maintains that the agreements between the appellant and the card companies do not involve any transfer of intellectual property rights. The 1st interested party contends that the respondent's tax demand was vague, as it failed to specify any particular know-how, formulas, or processes allegedly used or exploited by the appellant.

[44] On *whether interchange fees earned and deducted by issuing banks constitute professional or management fees under the Income Tax Act and are therefore subject to withholding tax,* the 1st interested

party submits that such fees do not fall within the ambit of “management or professional fees” as defined under Sections 2 and 35 of the Act. It argues that interchange fees are earnings of the issuing banks and not payments for managerial, technical, agency, contractual,

professional, consultancy services, or specialized expertise rendered to the appellant. Rather, they are transaction-based fees arising from the facilitation of payments between merchants and cardholders, that is, the transfer of funds from the cardholder's account to the merchant's account. Without prejudice to the foregoing, the 1st interested party urges that the interchange fees and transaction fees by the issuing and acquiring banks, respectively, constitute part of the total receipts by the banks in a year. Further, once the total receipts are adjusted by deducting allowable expenses, they constitute the bank's income or profits for the year, which is subject to corporate income tax at a rate of 30%. The interested party argues that the bank had paid the corporate tax for the period 2007-2010, and a finding that the interchange fees are to be subjected to further tax would amount to double taxation.

[45] The 1st interested party submits that affirming the Court of Appeal would occasion a significant negative economic impact. More so, leading to an increase in the merchant service fee and an increase in the overall card transaction cost for both local and international cardholders. This, in effect, pushes Kenya towards a cash economy against the progressive laws on anti-money laundering, the Bribery Act, among others.

iii. The 2nd Interested Party's submissions

[46] The 2nd interested party's submissions are dated 29th May 2024, and filed on 30th May, 2024. On *whether the Assessment, Clearing and Settlement Fees constitute "royalties" subject to withholding tax for the right to use trademarks*, the 2nd interested party submits that this issue was improperly introduced by the respondent before the Court without leave and should therefore not be entertained. It contends that these fees are earned as consideration for facilitating payment

transactions, not as royalties. Further, it argues that Section 2 of the Income Tax Act expressly excludes from the definition of royalties any fees charged in exchange for performing business activities, providing services, or making similar commercial contributions.

[47] The 2nd interested party contends that the appellant neither uses nor exploits its trademarks to justify payment of any royalty. It maintains that no consideration is paid for the use of its trademarks and, in line with Section 2 of the Income Tax Act and OECD guidance, the fees in question do not constitute royalties. Moreover, the Framework Agreement between the appellant and the 2nd interested party, or its affiliates, expressly provides that no fee is or can be charged for the use of the 2nd interested party's trademarks. The Court is invited to take judicial notice of the fact that the respondent's E-Citizen and I-Tax platforms use Mastercard as one of their payment systems, but do not pay Mastercard any royalties for the use of its name or logo.

[48] The 2nd interested party further notes that the respondent has improperly introduced a new issue, alleging that it granted the appellant rights to exploit its application software. It urges the Court to disregard this claim and submits, without prejudice, that the appellant is not granted any rights to exploit the software, but only to upload data as required by the 2nd interested party.

[49] On *whether the interchange fees were earned for management or professional services rendered by the Issuer to the appellant and therefore subject to withholding tax*, it is submitted that these fees arise only upon the successful completion of a card transaction and are earned by the issuer each time a cardholder purchases goods or services from a merchant. The interchange fees are deducted on a transaction-by-transaction basis, and where a transaction is declined, no fees are earned or deducted.

[50] The 2nd interested party also contends that since the fees are contingent upon successful transactions and not on any service provided by the issuer to the acquirer, they do not constitute

management or professional fees within the meaning of the Income Tax Act. In support of this contention, the appellant cites *Tax Appeals Tribunal No. 319 of 2018,* ***Bank of Africa Kenya Limited Vs Commissioner of Domestic Taxes;*** *Tax Appeals Tribunal No. 302 of 2018,* ***Standard Chartered Bank Kenya Limited Vs Commissioner of***

Domestic Taxes; and *Tax Appeals Tribunal No. 361 of 2018,* ***NIC Group PLC & NIC Bank PLC Vs Commissioner of Domestic Taxes.***

iv. The Respondent's Submissions

[51] The respondent filed two sets of submissions dated 18th December 2024 on 19th December 2024, and further submissions dated 5th June 2025, on even date, in response to those of the petitioner, 1st and 2nd interested parties.

[52] On *whether the payments made by the appellant to the card companies constitute royalties and are therefore subject to withholding tax*, the respondent submits that the appellant entered into Trademark License or contractual agreements with the card companies, granting it the right to use their systems to facilitate transactions. It asserts that there are no separate contracts for Acquirers or Issuers. According to the respondent, the payments, including software licence fees, trademark licensing, and service fees, are paid for the right to access and use the global network services linking the appellant's systems to users. Consequently, such payments amount to royalties subject to withholding tax. To support this contention, the respondent cites ***Victoria Commercial Bank PLC Vs Commissioner of Domestic Taxes,*** *Tax Appeals Tribunal Appeal No. E260 of 2023.* The respondent further argues that even if the contract with the card companies provides that no royalties are payable, it also provides that the licensee agrees to pay promptly any dues, assessments, fees and fines or penalties properly levied or allocated by the licensor. The court is invited to look at the totality of the arrangements between the parties, to ascertain the true character of the payments made by the appellant to the card companies.

[53] On *whether the interchange fees paid by the Acquirer (the*

appellant) fall within the definition of management or professional fees, the respondent submits that its assessment of local interchange commissions is grounded in Section 35(3)(f) of the Income Tax Act. It contends that the interchange fees paid by the appellant, as acquirer, to local issuer banks constitute professional and management fees and were properly subjected to tax in accordance with Paragraph

5(f)(i) of the Third Schedule to the Act. In support of its position, the respondent relies on the High Court of Justice of the UK decision in ***Asda Stores Ltd Vs Mastercard Inc*** [2017] EWHC 93 (Comm); 4 CMLR 32.

[54] The respondent contends that the services rendered by the issuer, for which the interchange fee is paid, include receiving transaction information from the acquiring bank through the card network, verifying the validity of the transaction, confirming that the cardholder has sufficient funds and that the account is in good standing, approving or declining the transaction, and reimbursing the acquiring bank. It asserts that these functions constitute a composite service encompassing authorization, clearing, and settlement. In support, the respondent cites the Supreme Court of India decision in ***Commissioner of GST and Central Excise Vs M/S Citibank N.A,*** *Civil Appeal No. 8228 Of 2019.*

[55] The respondent argues that the authorization, clearing, and settlement services provided by the issuing bank, for which interchange fees are paid, constitute agency, technical, managerial, and professional services as defined under Section 2 of the Income Tax Act. It further submits that the invoices and receipts on record confirm that the appellant, as the acquirer, makes these payments to the issuer. According to the respondent, the interchange fee qualifies as taxable income because it is in the nature of earnings; the cardholder bears the cost of the card and pays an annual service charge; and withholding tax is applied on the payment side of a transaction, irrespective of how the payee utilizes the income.

[56] The respondent further argues that the appellant has improperly introduced a new ground, namely, *whether the Court acted outside the scope of its jurisdiction in arriving at its finding,* which was not

among the issues for which leave was granted. It maintains that the questions before the High Court were the same as those before the Court of Appeal, and therefore, the appellate court did not exceed its jurisdiction.

[57] The respondent further contends that the issues raised by the interested parties are factual in nature, whereas a second appeal is confined to questions of law. It adds that the 1st interested party's argument on the economic impact of upholding the Court of Appeal's decision is speculative, as courts do not base their decisions on hypothetical consequences. In any event, the respondent submits that after the Court of Appeal judgment, no stay orders were issued, and subsequently the appellant and other banks have paid the impugned tax assessed by the respondent. The respondent accordingly urges that the appeal be dismissed with costs.

E. ISSUES FOR DETERMINATION

[58] Having carefully considered the grounds of appeal, the submissions of the parties, the authorities cited in support thereof, and the pronouncement of this court, admitting this appeal as one involving a matter of general public importance, it is clear to us that only two issues fall for determination. We hereby restate the two issues as being:

i. *Whether payments made by Acquiring Banks to Card Companies constitute royalties liable to taxation and subject to withholding tax; and*
ii. *Whether interchange fees paid by an Acquiring Bank to an Issuer Bank can be classified as management or professional fees liable to taxation and subject to withholding tax*

[59] This Court, in its Ruling delivered on 16th June 2023, directed that the issue whether the 2nd interested party's affidavit introduces *new grounds of appeal is a substantive question that will be properly determined in the main appeal.* This issue shall be subsumed in the two issues set out for our determination.

F. ANALYSIS AND DETERMINATION

i. On Royalties

[60] Before delving into the specifics of the issue on royalties as framed above, it is important to restate the foundational constitutional principle regarding the imposition of tax. To this end, Article 210(1) 0f the Constitution provides that "***no tax or licensing fee may be imposed, waived or varied except as provided by legislation***". There are two normative limbs to this provision by which the Court must be guided as we navigate the two questions before us. The first limb is that imposition of tax by the national and county governments must be anchored in and authorized by legislation. A tax cannot be imposed, varied or waived in a vacuum or through executive fiat. The second limb is that even where tax is to be imposed by legislation, it must be so done '***as provided***' by the said law. The tax to be imposed, waived or varied must be so done in strict conformity with the provisions of the legislation in question. The taxing authority cannot exercise its powers based on generalized opinion, implication or conjecture. The tax payer, on the other hand, must know with specific clarity what it is he is surrendering in terms of tax.

[61]Now, before us, is a dispute revolving around the foregoing constitutional provision. The appellant's case, stated generally, is that the respondent is seeking to impose a tax upon it in a manner not provided by legislation. On its part, the respondent is categorical that the tax it seeks to impose is clearly provided for by legislation. The legislation in question is the ***Income Tax Act***. We have elaborately re-stated the respective parties' cases in the foregoing paragraphs as captured in the litigation history of this protracted dispute. We have also paraphrased as best we could, the parties' submissions in support of their cases.

[62] Reverting to the issue of royalties, the crux of the appellant's case is that the payments it makes to the three card companies, namely, Mastercard, Visa and Amex, in its capacity as the Acquiring Bank, are not "royalties" within the meaning of Section 2 of the Income Tax Act, hence not taxable. These payments in their

opinion are therefore not subject to Withholding Tax under Section 35 of the Income Tax Act.

[63] The respondent's case on the other hand, is that these payments are "royalties", hence taxable and subject to Withholding Tax.

Section 2, of the Income Tax Act provides:

> ***"royalty**" means a payment made as a consideration for the use or the right*
>
> *to use—*
>
> *a) any copyright of a literary, artistic or scientific work;*
>
> *b) any software, proprietary or off-the-shelf, whether in the form of licence, development, training, maintenance or support fees;*
>
> *c) any cinematograph film, including a film or tape for radio or television broadcasting;*
>
> *d) any patent, trademark, design or model, plan, formula or process;*
>
> *e) any industrial, commercial or scientific equipment; or*
>
> *f) information concerning industrial, commercial or scientific equipment or experience, and any gains derived from the sale or exchange of any right or property giving rise to that royalty;*

[64] For our purposes, Section 2(d) is the relevant provision given the fact that, both parties are making out their cases based on whether they regard the payment to the card companies, as being a consideration for the use of the latters' trademark or not. The long and short of the respondent's case is that the appellant entered into what are called 'Trademark Licence Agreements' with the three card companies. Pursuant to these agreements, the appellant makes certain payments to the card companies. It is the respondent's argument that these payments constitute royalties since the

agreements conferred upon the appellant the right to use and access the card payment platforms.

[65] The appellant on the other hand, submits that the payments it makes to the card companies are not royalties, but transaction fees paid in consideration for the

facilitation of the four-way transaction system involving the acquirer, the issuer, the merchant and the cardholder. The appellant further submits that the framework agreements between itself and the card companies expressly exclude any royalty payments for the use of the latters' trademarks. Both the 1st and 2nd interested parties support the appellant's arguments in this regard. The 2nd interested party in particular, being a party to one of the framework agreements, is categorical that the appellant neither uses, nor exploits its trademarks to justify payment of royalty. It reiterates the appellant's submission that the framework agreement between itself and the latter expressly provides that no fee can be charged for the use of its trademark.

[66] Faced with the question as to whether the fees paid by the appellant to the card companies amounted to royalty payments, the Court of Appeal held that the same amounted to royalties, thus triggering the appeal before us. The appellate court observed that while the Visa agreement was silent on royalty payments, the agreements with MasterCard and AMEX expressly stipulated that no royalties were payable. Nevertheless, it noted that in order to access and participate in the networks operated by the card companies, the appellant was required to use their respective cards, each bearing the companies' distinctive trademarks and logos, as a precondition for access to the networks. In these circumstances, the court held that the respondent had sufficiently identified the basis for its claim of withholding tax on account of royalty, and there was no statutory ambiguity necessitating legislative clarification. It concluded that the transaction fees paid by the appellant amounted to consideration for the right to use the card companies' trademarks and logos, and therefore constituted royalties within the meaning of Section 2(d) of the Income Tax Act.

[67] We have considered the arguments by the parties regarding this

issue, and the clearly articulated reasoning and holding by the Court of Appeal. On our part, we are in no doubt that the two most critical legal instruments for the resolution of the issue before us are Section 2 (d) of the Income Tax Act (as read with Section

35) and the Trademark and Licence Agreements between the appellant and the three card companies. Section 2 (d) of the Income Tax Act provides:

> ***"royalty" means a payment made as a consideration*** *for the use or the right to use* ***any patent, trademark, design or model, plan, formula or process"***

[68] The operative words in this definition are *payment made as a consideration for the use or right to use.* What would amount to a usage or right to use in this context? Did the framework agreements between the appellant and the card companies grant the former the right to use their trademarks in a manner that would attract payment of royalties? Does the display of a credit card logo or trademark amount to the use of such trademark so as to attract the payment of a royalty, in a manner envisaged under Section 2 of the Income Tax Act? The Court of Appeal held that the payment of the transaction fees by the appellant was a consideration for the right to use the credit card companies' logos, and therefore constituted royalties. What is not clear is what type of usage the appellate court was referring to. However, we can safely conclude that by making reference to the card companies' trademarks and logos, the court meant the display of the latter on the appellant's card products. However, it is our view that the best approach to these questions, is to be guided by what was agreed upon between the parties regarding the payment of royalties.

[69] The 2nd interested party submits that the agreement between itself and the appellant did not grant the latter, the right to use its trademark. On the contrary, the agreement expressly forbade the payment of royalties, which means that the card company was out to protect its trademark and had allowed its use by the appellant by way of licence and/or as a precondition to be connected to the card

company’s global network, albeit not being paid for its usage by the appellant whether as acquirer or issuer, the same agreement applying across the board. A similar submission is made by the appellant regarding its framework agreements with the other two card companies. The Court of Appeal acknowledged this

particular provision between the parties, save for the one between the appellant and Visa Card, which was silent on the question of royalties. This being the case, we are of the opinion that it would not serve the interests of justice to disregard the clear provisions of a written contract between the parties and substitute the same with our thinking. Unless it can be deduced from the wording of the contract and the conduct of the parties, that what the appellant was paying the card companies, were not transaction fees, but royalties in disguise, the framework agreements must be respected as they are.

[70] So if the appellant was not paying royalties to the card companies, what was it paying for? In response to this question, the appellant and the two interested parties have provided an elaborate explanation as captured in paragraphs 32, 33, 43 and 45 of this judgment. In essence, the payments made to the card companies by the appellant in its capacity as the acquiring bank, are transaction facilitation fees to the former. The appellant makes the payments because, the respective credit card company uses its global payment platform, to facilitate transactions between the merchant and the cardholder. Neither the merchants, nor the issuing banks, pay any royalties to the card company, for the display of the latter's logos on their business premises or card products respectively. We are persuaded by this explanation, which typifies the ever-evolving and complex system of credit card transactions, digital banking and mobile money transfers, among others. Suffice it to state that for any payment to be classified as a royalty, the language in the relevant legislation must be clear and unambiguous, and so must the agreement between the parties.

[71] The respondent urges that irrespective of whether the framework agreements provided that royalties would not be payable, it is important for the Court to look at the totality of the contracts to

determine the real nature of the agreement. In support it cites the decision in ***South African Broadcasting Corporation Vs L E McKenzie*** (1999) 20 ILJ 585 (LAC) to the effect that, the *parties' own perception of their relationship and the manner in which the contract is carried out in practice may, in areas not covered by the strict terms of the contract, assist*

in determining the relationship. Similarly, in the case of ***Goldberg Vs Durban City Council*** (1970) (3) SA 325 (N), *in seeking to discover the true relationship between parties, the court must have regard to the realities of the relationship and not regard itself as bound by what the parties have chosen to call it.* We are however, of the view that such an approach, while useful in the construction of general contractual relationships, is not to be encouraged in construing written contracts that have a bearing on the interpretation of a Taxing Statute.

[72] In the process of our analysis, we have also considered other persuasive authorities presented to the Court by the parties in support of their submissions. In so doing, we have strictly limited ourselves to those cases we regard as speaking to the two issues upon which this appeal was admitted as one involving matters of general public importance. Consequently, we have disregarded those authorities that are either tangential or irrelevant to the two issues.

[73] The principle that taxing legislation must be strictly construed, without intendment, conjecture or inference has been recognized by the courts in the Commonwealth and beyond. In ***Russell Vs Scott*** [1948] 2 ALL ER 5, a question arose as to the interpretation of the Income Tax Act, 1918, in relation to the taxation of profits from the exploitation of a sand-pit. The House of Lords ***determined*** that the sand-pit operation did not fall within the category of "concerns of the like nature" listed in Rule 3, which included ironworks, gasworks, salt springs, and other similar activities. The court ***opined*** that the taxpayer was carrying on a concern in connection with the sand-pit, but it was not a concern of the like nature to those enumerated in Rule 3 of Schedule A. The House of Lords relied on a maxim of income tax law, *that the subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax upon him*. Therefore,

income tax should be charged on the annual value of the farm as a whole, and not separately on the profits from sand sales. This case clarified the scope of Rule 3 and the taxation of profits from land exploitation in the UK.

[74]Similarly, in ***Cape Brandy Syndicate Vs I.R. Commissioners*** [1921] 1 KB, the ***issues*** before the court were whether blending imported brandy with other spirits changed its legal classification for excise purposes under the Finance Act 1918 and whether the blended mixture was excluded from the statutory definition of "brandy" and thereby qualified for a reduced tax rate. The Court ***determined*** that the blended product remained classified as "brandy" for excise purposes, and the Finance Act 1918 did not provide any basis for altering the tax or legal treatment of the product as a result of blending. The court therefore declined to reinterpret or expand upon the statutory definition of "brandy" beyond the explicit language of the legislation. The court held that tax statutes must be construed strictly in accordance with their precise statutory language; courts are not permitted to infer legislative intent or modify statutory definitions without explicit parliamentary authority; tax liability arises solely from the clear and explicit wording of the statute, ensuring certainty and predictability in its application; and statutory provisions must be applied according to their plain and ordinary meaning, without resort to extrinsic reinterpretation. In other words, in a Taxing Act, one has to look merely at what is clearly said. There is no room for any intendment. There is no equity in a tax. Nothing is to be read in, nothing is to be implied, and one can only look fairly at the language used. The UK House of Lords in ***Adamson Vs Attorney General*** (1933) AC 257 similarly held that it is well settled that in cases where a section imposes a tax on a subject, 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.

[75] This strict interpretation was also endorsed by the Court of Appeal in ***Mount Kenya Bottlers Ltd & 3 others Vs Attorney***

General & 3 others [2019] KECA 500 (KLR) and ***Mjengo Limited Vs Commissioner of Domestic Tax*** [2016] KECA 66 (KLR). In ***Jafferali Mohamedali Alibhai Vs The Commissioner of Income Tax*** [1961] EA 61, the court stated that *"the subject is not to be taxed unless the words of the taxing Statute unambiguously*

impose the tax upon him. Further, taxation can only be done on the basis of clear words and not on intendment, and that certainty of law is an important ingredient of the rule of law, including tax law. The court added that a penalty must be imposed in clear words and that 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.

[76] Coming to what constitutes "royalties", and whether payments made by the appellant as an acquiring bank to the card companies constitute royalties, a number of authorities are instructive. In ***Republic Vs Commissioner of Domestic Taxes Large Tax Payer's Office Ex-Parte Barclays Bank of Kenya Ltd*** [2012] KEHC 1988 (KLR) (a decision by the High Court that in fact triggered this appeal). The two ***issues*** for determination were as follows: whether the respondent was 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; and whether the respondent was 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.

[77] On the first issue, the court held that payments made by the bank to

international credit card companies, specifically Visa International, do not constitute royalties; that the decision of the respondent in this respect fell outside the language of section 2 as read with section 35(1)(b) of the *Income Tax Act* and was thus amenable to an order of *certiorari*. The trial court held that 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; that there was no plan, design, formula or industrial, commercial, or scientific equipment identified to place the payments within the statutory provision; and that 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.

[78] In ***Republic Vs Commissioner of Income Tax & another*** [2005] KEHC 3201 (KLR) among the ***issues*** that arose for determination were whether judicial review is a suitable recourse in tax disputes; whether access to a website constitutes the application of a scientific formula and payments made thereto must attract royalty tax; and whether payments made to UPS Forwarding Inc. by TRANSAMI (the applicant) constitute agency fees subject to withholding tax under Section 35(1) (a) of the Income Tax Act.

[79] On the second issue, the court held that ***Section 35(6) of the Income Tax Act (Cap. 470)*** does not capture the payments made by the applicant to SITA, so that the applicant may log on to SITA's website and access information lodged thereon, regarding the movement of containers worldwide. It defined royalty as a 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. The court ***opined*** that payment for mere access to neutral information cannot be treated as payment for a regenerative scientific formula; that payment of such a kind cannot constitute royalties; therefore, it is wrong in law to require that the applicant should make deductions of withholding tax, when it pays for such website information.

ii. On Management or Professional Fees

[80] The next issue is whether, the inter-change fees paid by the acquirer bank to the issuer bank, can be characterized as

management or Professional fees hence liable to Withholding Tax under Section 35 of the Income Tax Act. The parties herein hold sharply differing positions regarding the same. The parties' respective submissions regarding this issue have been elaborately set out in paragraphs 39,

40, 41, 44, 48, 49, 52, 53,and 54 of this judgment. Section 2 of the Income Tax Act provides that:

> "**Management or professional fee**" *means any payment made to any person, other than a payment made to an employee by his employer, as consideration for any managerial, technical, agency, contractual, professional or consultancy services, however calculated;"*

[81] Section 35 (1) of the Income Tax Act provides that every person shall, upon payment of any amount to a non-resident person not having a permanent establishment in Kenya, in respect of a *management, professional, training fee, or royalty,* which is chargeable to tax, deduct therefrom tax at the appropriate resident withholding tax.

[82] It is the respondent's case that the interchange fees paid by the appellant as acquirer to local issuer banks, constitute "professional" and "management" fees within the meaning of Section 2 of the Income Tax Act, hence liable to withholding tax under Section 35 of the Act. These fees, argues the respondent, are in the nature of income, hence taxable. The services rendered by the issuer for which the interchange fees are paid, constitute a composite service by way of authorization, clearance, and settlement. In the respondent's view, these services are technical, agency, managerial, and professional in nature.

[83] The appellant on the other hand, contends that the interchange fees paid by itself to local issuer banks are not professional or management fees as envisaged under Section 2 of the Income Tax Act. These fees, are paid as compensation for the costs incurred by the latter in processing the purchases by the cardholders and payments to the merchants by the card companies. The appellant further submits

that the inter-change fees form part of the Merchant Service Fees paid by the Merchant and not by the appellant. The appellant's stance is essentially supported by the 1st and 2nd interested parties, with the former arguing that, the interchange fees are "earnings" by the issuer banks and not "payments" by the appellant for

“managerial”, “technical”, “contractual”, “agency”, or “consultancy” services. The fees are earned upon a successful transfer of funds from the cardholder’s account to the merchant’s account. In support, the 2nd interested party submits that the inter-change fees are earned on “a transaction by transaction basis” upon a successful completion of a card transanction.

[84] The appellate court held that the evidence demonstrated the existence of coordination, managerial, professional, and contractual services rendered by the issuers to the acquirer, for which consideration was paid. On this basis, the court found that the respondent had established that the payments fell within the definition of “management and professional fees” under Section 2 of the Income Tax Act. The court further noted that the uncertainty or lack of clarity previously identified in ***Republic Vs Commissioner of Domestic Taxes Large Tax Payer’s Office Ex-Parte Barclays Bank of Kenya Ltd*** *[supra],* regarding whether the payments amounted to royalties or management/professional fees, was not borne out by the evidence in the present case.

[85] In our view, the obvious starting point of our inquiry is to ask, under which category or categories do these services fall? Are the inter-change fees paid to the issuer-bank a consideration for managerial, technical, contractual, agency, or consultancy services rendered by the former to the acquirer bank?

[86] Under the *Organisation for Economic Cooperation and Development (OECD) Report on Tax Treaty Characterisation Issues Arising from E- Commerce,* ***Technical Services*** (para 36-42) are defined as services of a technical nature when special skills or knowledge related to a technical field are required for the provision of such services. While ***consultancy services*** are defined as services

consisting of the provision of advice by someone, such as a professional, who has special qualifications allowing them to do so. It was recognised that this type of service overlapped the categories of technical managerial services to the extent that the latter types of services could well be provided by a consultant.

[87] The *Chambers Dictionary* defines ***Management*** as the function that coordinates the efforts of people to accomplish goals and objectives using available resources efficiently and effectively. While ***professional services*** are defined 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.

[88] Contractual and Agency services on the other hand, almost invariably derive from agreements between two or more parties that create a contractual or agency relationship. Where any of these relationships is said to exist, recourse is usually had to the written agreement with a view to determining what the parties agreed upon. For our purposes, it suffices to restate the definition of an "Agency" as rendered in the *Black's Law Dictionary (11th Ed.)* as "a relationship that arises when one person (a principal) manifests assent to another (an agent) that the agent will act on the principal's behalf, subject to the principal's control, and the agent manifests assent or otherwise consents to do so"

[89] The *Burton's Legal Thesaurus (4th Ed)* defines the term ***Technical*** as "abstruse, difficult to understand, highly specialized, highly specific, industrial, mechanical, occupational, professional, scientific, special, specialized, trained, vocational. ***Management*** is defined as administration, board of directors, care, charge, command, direction, governance, leadership, etc". While ***professional*** is defined as "able, adept, career, competent, established, experienced, expert, learned, qualified, skilled, trained, etc".

[90] From the above definitions, each of these terms (technical, consultancy, management, professional) denotes the possession of some kind of "specialized skill" by a person or entity so as to be able

to render a specific service. Can the “services” provided by an issuer bank to the acquirer bank, the cardholder, and the merchant be characterized as “management” or “professional” fees? We don’t think so. Definitely not for withholding tax purposes. The respondent submits that the services rendered are “composite” in nature and therefore subject to

withholding tax. The Court of Appeal agreed with this submission, as it perceived the existence of coordination, managerial professional and contractual ingredients in the services rendered by the issuer bank. It is precisely this characterization with which we find difficulty. Strictly speaking, which service in the transaction facilitation process by the issuer bank, for which it is paid inter-change fees, can be characterized as technical, professional, managerial, agency, contractual, or consultancy? If it is a contractual or agency relationship, what are the terms of these relationships, from which the application of withholding tax can be inferred? Without clear answers to the foregoing questions, we find no basis on which to conclude that inter-change fees paid to issuer banks are subject to withholding tax.

[91] From the submissions by the appellant and the 1st and 2nd interested parties, it is clear that a bank can operate both as an acquirer and issuer. Indeed, the appellant herein, is both an acquiring and issuing bank. If the appellant is also an issuing bank, why would it be necessary for it to seek technical, consultancy, and like services from other banks, for which it must pay a consideration, subject to withholding tax? It is also our understanding that not all banks in Kenya can be both acquirers and issuers. This being the case, issuing banks get paid inter-change fees for their role, because they also issue credit cards to their account holders, and facilitate payment from the cardholder's account to the merchants. Thus, credit card transactions have become an integral part of the banking business. The *Black's Law Dictionary (11th Ed,)* defines an ***Interchange fee,*** as:

> *"In the bank-payment-card industry (as with major credit-card networks),* ***a fee paid by the acquiring ("merchant") bank to the issuing bank for each card transaction.*** *An acquiring bank acquires the card-paid transactions and provides services to the relevant merchant, while the issuing*

bank issues cards to cardholders. The interchange fee is imposed by the system so that acquiring banks will share their merchant fees with the issuing bank, which *bears the greater risk of nonpayment."*

[92] The foregoing definition illuminates the explanations given by the appellant and the interested parties regarding the nature of interchange fees. Such fees, are an income that accrues to the acquiring bank for its role in providing services to the merchants. But these fees must be shared with the issuing bank for its role in issuing credit cards to cardholders. It is also clear that such fees are payable upon a successful card transaction (on a transaction-by transaction basis), not on the basis of a predetermined scale, as a consideration for a technical, managerial, consultancy, or professional service.

[93] In its submissions, the respondent acknowledges the fact that interchange fees constitute an income but insists that the same is subject to withholding tax. The appellant also concedes to the fact that interchange fees are an income, but such income is already subject to corporate tax at a rate of 30%. To subject it to withholding tax would amount to double taxation. The appellant and the interested parties urge that the transaction fees and interchange fees received by the acquiring and issuing banks respectively, constitute part of the total receipts by the banks for the year. We find this argument compelling, given the fact that any income earned by a bank from its banking business (including credit card transactions) must be declared. Once declared, such income is automatically subject to a 30% corporate tax. The purpose of a withholding tax is to enable a taxing authority to keep track of any income that could escape taxation unless declared. Furthermore, we note that subjecting these fees to withholding tax, in addition to corporate income tax, raises a concern of double taxation on the same stream of income, a result which the legislature is unlikely to have intended without clear statutory language to that effect.

[94] In ***Republic Vs Commissioner of Domestic Taxes Large Tax Payer's Office Ex-Parte Barclays Bank of Kenya Ltd*** [2012] KEHC 1988 (KLR) [Supra], one of the two issues was

whether the respondent was 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. The court held that the

respondent's decision to claim withholding tax on the basis of the interchange fee lacked a legal footing as the Commissioner failed to identify the specific facts or transactions that form the basis of application of the tax.

[95]The court further held that it was the duty of the respondent in assessing tax, to identify transactions or payments that attract tax liability, especially where there are objections to such categorization. The trial court concluded that Section 35(1)(a) of the *Income Tax Act* identifies specific types of payments that attract tax, and the respondent is obligated by law to state with clarity its claim and state how the transaction falls within the terms of the statute.

[96] Similarly, in the UK Supreme Court case of ***Sainsbury's Supermarkets Ltd and others Vs MasterCard Incorporated and others*** [2020] UKSC 24, a question arose as to who sets the interchange fees, and the court held that interchange fees can, in theory, be agreed bilaterally between issuers and acquirers. In practice, this is not how the interchange fee is determined. Under the Scheme Rules (Rule 8.3), MasterCard sets the interchange fees that are to apply compulsorily in default of bilateral agreements.

[97] The respondent categorizes the following forms of services for which an interchange fee is payable and taxable: authorization, clearing, and settlement transactions. In support, it cites the Indian case of ***Commissioner of Gst & Central Excises Vs M/S Citibank*** N.A Civil Appeal No(s) S0 8228 of 2019.

[98]These Appeals were maintained under Section 35L(1)(b) of the Central Excise Act, 1944, read with Section 83 of Chapter V of the Finance Act, 1994. They were directed against the Orders passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench. By the impugned Orders, the Tribunal *set aside the Final*

Orders, by which the Principal Commissioner of Service Tax, Chennai, found the Respondent/Bank liable to pay service tax, penalty and interest on the amount of the "interchange fee" received by it.

[99] The Court considered the credit card business involving issuing banks, acquiring banks, the merchants and the operating system enabling the transaction; evaluated the tax regime in India; and found the issuing bank was providing service as determined by the Commissioner of Service Tax; the issuing bank, provided services within the meaning of Section 65(33a)(iii); and the respondent, as issuing bank, was liable to pay service tax, under Section 68(1), being the service provider.

[100]The Court held that it was clear that the interchange fee, is earned by the respondent as the issuing bank as consideration for the service which is provided, and indisputably, the interchange fee is not a gift. Therefore, the Judge was of the view that the contention of the respondent that it constitutes merely a transaction in money involves overlooking the service provided by the respondent as issuing bank.

[101] This case is, however, distinguishable on three grounds. Firstly it revolves around the interpretation of the Indian Central Excise Act, and the Indian Finance Act. The respondent has not shown how the provisions in these two statutes mirror Sections 2 and 35 of the Kenyan Income Tax Act. Secondly, the decision was based on the conclusion by the court that the interchange fee is earned as a consideration for the *"Service"* it renders as determined by the Commissioner of Service Tax. Again, the respondent has not demonstrated how the "service" is the same as any of those as would accrue the withholding tax under the Kenyan Income Tax Act. Thirdly, and most crucially, the Indian Court arrived at its decision based on its conclusion that "the interchange fee is not a gift, hence taxable under the relevant Act". It is clear that the bank was arguing that the interchange fees it was earning was not taxable. To the contrary, the argument by the appellant and interested parties herein is not that the interchange fees are not taxable, but that they are not subject to

withholding tax within the meaning of Sections 2 and 5 of the Income Tax Act. Further, it is their argument that such fees are already taxed as income, within the rubric of corporate tax.

G. CONCLUSION

[102] Flowing from the foregoing analysis, we arrive at the following authoritative conclusions on two questions posed:

i. The Fees paid by an acquiring bank to card companies, are not royalties within the meaning of Section 2 of the Income Tax Act, hence not liable to withholding tax, under Section 35 of the Income Tax Act.

ii. The Interchange Fees paid by an acquiring bank to an issuing bank are not professional or management fees within the meaning of Section 2 of the Income Tax Act, hence not liable to withholding tax under Section 35 of the Income Tax Act.

[103] Costs follow the event, but in keeping with our Judgment in ***Rai and 3 others Vs Rai and 4 others*** [2014] KESC 31 (KLR), we are of the opinion that this litigation is not one suitable for visiting any of the parties with costs, given the fact that, each of them has particiapated in a protracted dispute that has resulted in a final clarification of the law, which should go along way in serving the Country's revenue collection, financial and banking system, and the tax paying public. Moreover, the Court admitted this appeal as one involving matters of general public importance which transcend the interests of the litigants herein.

H. ORDERS

[104] These conclusions, in turn, lead us to make the following consequential Orders:

a) The appeal dated 17th June 2022 and filed on even date, is hereby allowed;

b) The Judgment of the Court of Appeal dated 6th

November, 2020, is hereby overturned and set aside;

c) Each party shall bear its costs; and

d) The sum of Kshs 6,000 deposited as security for costs be refunded to the petitioner.

DATED and **DELIVERED** at **NAIROBI** this **5th** Day of **December 2025.**

……

M. K. KOOME

CHIEF JUSTICE &

PRESIDENT OF THE

SUPREME COURT

…… ……

……

S. C. WANJALA **NJOKI NDUNGU**

JUSTICE OF THE SUPREME COURT **JUSTICE OF THE SUPREME COURT**

…… ……

……

I. LENAOLA **W. OUKO**

JUSTICE OF THE SUPREME COURT **JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy of the original

REGISTRAR
SUPREME COURT OF KENYA