REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

CIVIL APPEAL 77 OF 2008

STANBIC BANK KENYA LIMITED.....................................APPELLANT

AND

KENYA REVENUE AUTHORITY......................................RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Nairobi (Wendoh, J.)

dated 22nd November, 2007

in

H.C.Misc. Appl. No. 1371 of 2005)

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JUDGMENT OF AGANYANYA, J.A.

This appeal arises from the decision of the superior court *(Wendoh, J)* dated 23rd November, 2007 dismissing the appellants application for Judicial Review. By the application dated 21st September, 2005 the appellant sought the following orders namely:-

"*(a) AN ORDER OF CERTIORARI removing to this Honourable Court for the purpose of the same being quashed the letter dated 2nd September, 2002 written by V.W. Muhatia for the Deputy Commissioner Large Tax Payer Office, Kenya Revenue Authority and addressed to Messrs. KPMG Kenya and the letter dated 8th September, 2005 written by J. M. Ojee Senior Assistant Commissioner, Large Taxpayer office, Kenya Revenue Authority and addressed to the Finance Director, Stanbic Bank Kenya Limited.*

(b) AN ORDER OF PROBIHITION to prohibit the Respondent or any of its agents or any other party acting for and on behalf of the Respondent from further demanding from the applicant or its agents the sum of Kshs.7,954,342.00 or any sum at all, with respect to this suit.

(c) AN ORDER OF PROHIBITION to prohibit the Respondent from taking any recovery measures forced or otherwise against the applicant for the payment of the said sum of Kshs.7,954,342.00 or any sum at all, with respect to this suit."

According to the judgment of the superior court, the notice of motion was premised on a statutory statement dated 16th September, 2005 and a verifying affidavit of one *Brenda Amoch*, head of the

appellant's Legal and Compliance Department sworn and filed on 10th September, 2005 and skeleton arguments dated 8th February 2007. It was however, opposed by an affidavit sworn to by *James Masiro Ojee*, a Senior Assistant Commissioner in the Large Taxpayers Office of Kenya Revenue Authority. The Respondent also filed skeleton submissions on 15th March, 2007. The application was fixed for hearing before the superior court on 2nd October 2007 when *Mr. Ogunde* and *Mr. Mutuku* learned counsel for the appellant and the respondent respectively made their submissions. After hearing these submissions, the law pertaining thereto and the authorities counsels cited, the learned Judge wrote her judgment and concluded as follows:-

"*Is there any ambiguity in the provisions of law relied upon? I find none. In adopting a purposeful approach, I am of the considered view that the services rendered by Reuters (UK) to the applicant do fall under the management and professional fees" category as the services rendered by Reuters (UK) were technical and consultancy.*

Can the orders sought lie? Judicial review orders are discretionary in nature. I have found in my judgment that the services rendered by the applicant are technical and consultancy and subject to withholding tax. Section 5 of the Income Tax Act mandates the respondent to collect taxes and Reuters having received income from the applicant, it was the duty of the applicant to remit withholding tax to the respondents. The respondents have not acted outside their mandate under the statutory provisions of Income Tax nor has the Act been applied retrospectively as alleged. The applicants have not demonstrated that they are entitled to the orders sought and the same will not be granted. The motion is dismissed with costs to the respondent."

The appellant was aggrieved by this decision and it lodged an appeal to this Court on 6th May 2008 through a memorandum of appeal which had six grounds of appeal as hereunder:-

"(*1) The learned Judge erred in holding that in the circumstances of the case the meaning of the provisions of section 35(1)(a) of the Income Tax Act was clear and unambiguous.*

(2) The learned Judge erred in fact by failing to hold that the service that the applicant took from Reuters was no more than a subscription or information which attracted no tax liability under section 35(1)(a) of the Income Tax Act.

(3) The learned Judge erred when she failed to hold that in substance the Judicial Review application here was on all fours with that in Republic versus Commissioner of Income Tax ex-parte SDV Transmmi (K) Limited Miscellaneous Application No. 21 of 2004 which was allowed by the High Court.

(4) The learned Judge clearly misdirected herself in law and in fact when she gave a purposive interpretation to the provisions of section 35(1)(a) of the Income Tax Act after holding that in the circumstances of the case the provision was clear and unambiguous.

(5) The learned Judge misdirected herself when after accepting that in law any ambiguity in tax legislation must be resolved in favour of the tax payer she went ahead to resolve a patent ambiguity in the provision of section 35(1)(a) of the Income tax Act in the circumstance of the case by looking for a purposive meaning which resolved the ambiguity in favour of the respondent.

(6) The Judge erred in law and in fact when she failed to give any weight whatsoever to the undisputed facts that the tax claim, if at all properly founded under the Income Tax Act, was in strict sense a liability of a third party which the respondent was looking to recover many years after the liability arose.

The appeal was fixed for hearing before us on 7th July 2009 when *Mr. Gichuhi,* learned counsel for the appellant submitted in proposition thereto. He stated that the appeal related to a simple interpretation whether a person offering service by subscription qualifies to attract withholding tax under *section 35(1)(a)* of the Income Tax Act and referred the Court to the opinion given on the issue by *Gavin T. Mc.Ewen* of Price Water House Coopers dated 1st July 2005 and the standard service contract between the appellant

and Reuters (UK) Limited dated 15th November, 2001. Counsel stated that no evidence was offered to show that Reuters was rendering advice on an international market situation. That what it was doing was to provide a technical definition for the services so provided. According to the counsel Reuters was only an international news gathering agency and services provided to the appellant related to financial reports on daily basis but that during the period of subscription Reuters did not offer professional advice on market movement internationally. That there can be no professional advice on how to access any information on line. *Counsel submitted that even without Reuters such information could still be obtained from various sources*. He stated that there was no evidence that Reuters offered the appellant consultancy services for which the latter was bound to pay withholding tax. In his view there was no expert advice for information Reuters provided from a pool. According to counsel Reuters offered nothing special and hence withholding tax was not payable, *emphasis provided*.

Mr. Mutuku, learned counsel for the respondent opposed the appeal on the basis of the contract entered entered into between the appellant and Reuters which gave the outline of the services to be offered when and where. The services were not available to anyone and this is why they were subscribed for and the conditions thereof spelt out in the contract. These services were paid for and it was on the basis of the payments that the respondent had demanded payment of withholding tax under *Section 35(1)(a)* of the Income Tax Act. Counsel agreed with the definition given by the superior court on the terms "*technical and consultancy*" because payment was made by the appellant to Reuters for technical and professional services rendered since the information offered enables those who receive it to make sound decisions as to where to invest their money.

As this is a first appeal, I am under a duty to re-consider and re-evaluate the submissions on record and to draw my own conclusions thereon; *Viram t/a Kisumu Beach Resort vs. Phoenix of East Africa Assurance Company Ltd. [2002] 2 KLR 269*. The dispute between the parties in this appeal revolved around *Section 35(1)(a)* of the Income Tax Act which provides as follows:

"*A person shall, upon payment of an amount to a non-resident person not having a permanent establishment in respect of:*

(a) Management or professional fee, except a commission paid to a non-resident agent in respect of flowers exported from Kenya and auctioned in any market outside Kenya.

(b) ………

(c) ………

Which is changeable to tax, deduct there from tax by the appropriate resident, withholding tax.

Paragraph 3(a) of the 3rd Schedule of the Income Tax Act then goes ahead to specify which withholding tax will apply and the percentage payable. It provides as follows:

"3. *the non-resident tax rates shall be:*

(a) In respect of management or professional fee other than management or professional fee deductible under paragraph 5 (2) (g) of the ninth schedule, twenty percent of the gross sum payable".

Section 2 of the Income Tax Act then defines what "*Management and Professional fees*" means:

"*… means a payment made to a person other than a payment to an employee by his employer, as consideration for managerial, technical agency contractual or consultancy services howsoever calculated*".

An amendment to it in the year 2000 added the word "*agency and contractual*" which did not affect payments demanded in the years 1996 to 1999.

It is true as the learned Judge found Reuters (UK) is a non-resident company and that under a contract signed by it and the appellant the said Reuters (UK) was to supply information and/or materials and support. According to the submissions by counsel for the parties, the particular information supplied to the applicant related to world financial markets delivered by direct satellite via a Reuters terminal. For this information the appellant paid fees as per the agreement entered into by and between the parties. According to the respondent, which the learned Judge accepted, the payment made by the appellant was in consideration of managerial, technical or consultancy services provided by Reuters (UK). The appellant, on the other hand, was of the view that this was not the position.

I feel if the information provided by the respondent was of a general nature and available ordinarily, as counsel for the appellant put it, it would not necessitate that the said appellant enters into such a detailed contract with the respondent to obtain and pay for it. In my view there was an element of skilled management and consultancy involved in the preparation and transmission of the requisite information by Reuters (UK) for ready publication by the appellant which compelled the appellant to go for this instead of obtaining the information from the various other sources which its counsel submitted about. The expartee involved must have prompted the applicant to enter into the contract referred to herein. In fact the appellant was put on guard by *Clause 3.1.(e)* of the said contract which spelt out payment of:

"*all applicable taxes and duties (including* <u>*withholding tax*</u> *but excluding income taxes on the income of the Reuters Group) payable in respect of the services so that after pay of such taxes and duties the amount received by now is not less than the service*", emphasis supplied.

and should have realized that such withholding tax was payable

I feel, by this clause, the respondent was alerting the applicant that the payments being made to the respondent by the appellant would attract withholding tax. I am not persuaded that the facts of the case of the <u>*Republic v. Commissioner of Income Tax*</u> *exparte SDV Transammi (Kenya) Limited Miscellaneous Application No. 21 of 2004* were similar to those of the appeal at hand. I also do not feel there was any ambiguity in the tax law – relating to this dispute. As the learned Judge so found, it was not open to her to adopt a purposeful approach to it. In the circumstances of this appeal and apart from my disagreement with the learned Judge on her purposeful approach to the dispute, I share her view that the respondent was justified in demanding withholding tax from the applicant and that she was right in holding in favour of the respondent. Tax law entails strict application and except that the application before the learned Judge was for Judicial Review, there is no question of the exercise of discretion by the Court when dealing with matters pertaining thereto. I would dismiss this appeal with costs.

Dated and delivered at Nairobi this 23rd day of October, 2009.

D. K. S. AGANYANYA

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JUDGE OF APPEAL

<u>JUDGMENT OF NYAMU, J.A.</u>

The appellant Messrs *STANBIC BANK KENYA LTD "Bank"* is a bank and the Respondent, is *KENYA REVENUE AUTHORITY "KRA"*.

This is an appeal from the judgment of the superior court (Wendoh, J) delivered on 23rd November, 2007 in respect of Nairobi Miscellaneous Application Number 1371 of 2005.

I had the advantage of reading the draft judgment of my brother and the presiding Judge, his Lordship Justice Aganyanya, J.A. While endorsing the final conclusion as my learned brother, I prefer reaching the

same conclusion for somewhat different reasons, hence this separate judgment. What gives rise to this appeal is a contract entered into between the respondent with a foreign entity, *Reuters* for provision of data and information in respect of which the bank makes payments. The bank in turn uses the information for daily publication. The appellant has over the years continued to access *Reuters* online services. *Reuters* is a service provider whose business includes supply of information particularly related to world financial markets and the service is delivered by direct satellite via a *Reuters* terminal.

By a letter dated 2nd September, 2002 addressed to the appellant's tax agent Messrs KPMG Kenya, KRA demanded from the agents payment of withholding tax on *Reuters* services for the period 1996 to 1999 on the ground that the payments made to *Reuters* constituted payment made to a non-resident person as consideration for technical services and that the information supplied to the Bank formed the basis on which many financial decisions were made and therefore the payments qualified to be taxed under the "*management*" or professional fee category pursuant to s*ection 35(1)* and *section 2* of the Income Tax Act.

By a letter dated 29th January, 2003 the bank's tax agents objected to the tax demanded stating that the services paid for were for provision of news and information and that the payments made, constituted subscription for publications. It is common ground that the tax demanded is in the sum of Kshs.7,954,342/= which comprises the principal tax, penalties and interest.

It is the Bank's contention that the payments are not subject to withhold tax as demanded by KRA as one of KRA's justification for the tax is that Reuters provided a technical service and the bank in turn uses the information to make financial decisions, and yet the services are not technical and are available on line to all willing users.

Aggrieved by the KRA's decision, the bank filed in the superior court, a judicial review application by way of a Notice of Motion dated 21st September 2007, seeking the following orders against the KRA:-

"*(a)An order of certiorari removing to this Court for purpose of the same being quashed the letter dated 2nd September, 2002 written by V.M. Muhatia for the Deputy Commissioner Large Taxpayer Office, Kenya Revenue Authority and addressed to Messrs KPMG Kenya and the letter dated 8th September, 2005 written by J.M. Ojee Senior Assistant Commissioner, Large Taxpayers Office, Kenya Revenue Authority and addressed to the Finance Director, Stanbic Bank Kenya Limited.*

(b) An order of prohibition to prohibit the respondent or any of its agents or any other party acting for an on behalf of the respondent from further demanding from the applicant or its agents the sum of Kshs.7,954,342.00 or any sum at all, with respect to this suit.

(c) An order of prohibition to prohibit the respondent from taking any recovery measures forced or otherwise against the applicant for the payment of the said sum of Shs.7,954,342.00 or any sum at all, with respect to this suit."

On 23rd November, 2007 and after a full hearing the superior court dismissed the judicial review application with costs to the KRA.

The appellant appeals to the Court against the said judgment of the superior court on the following grounds:-

"*(1) The learned judge erred in holding that in the circumstances of the case the meaning of the provisions of Section 35(1)(a) of the Income Tax Act was clear and unambiguous.*

(2) The learned Judge erred in fact by failing to hold that the service that the applicant took from Reuters was no more than a subscription for information which attracted no tax liability under Section 35(1)(a) of the Income Tax Act.

(3) The learned judge erred when she failed to hold that in substance the Judicial Review application here was on all fours with that in Republic verses Commissioner of Income Tax ex parte SDV Transammi (K) Ltd Misc. Application No. 212 of 2004 which was allowed by the High Court.

(4) The learned Judge clearly misdirected herself in law and in fact when she gave a purposive interpretation to the provisions of Section 35(1)(a) of the Income Tax Act after holding that in the circumstances of the case the provision was clear and unambiguous.

(5) The learned judge misdirected herself when after accepting that in law any ambiguity in tax legislation must be resolved in favour of the tax payer she went ahead to resolve a patent ambiguity in the provisions of section 35(1) (a) of the Income Tax Act in the circumstance of the case by looking for a purposive meaning which resolved the ambiguity in favour of the respondent.

(6) The judge erred in law and in fact when she failed to give any weight whatsoever to the undisputed facts that the tax claim, if at all properly founded under the Income Tax act, was in strict sense a liability of a third party which the Respondent was looking to recover many years after the liability arose".

It is common ground that *Reuters* Service Contract is a standard annual contract for *Reuters* Services and that the services as described in the contract were those provided to the bank in 1996 – 1999 period. What is in contest is whether the payments made are liable to attract withholding tax, under *section 35 (1)* of the Income Tax Act.

The appellant's case is that *section 35(1)* of the Income Tax Act, lists the payments that are subject to withholding tax when paid to a non resident person but this does not include payments made for provision of financial information by way of publication. The appellant contends that under the strict rule of statute interpretation, the payment cannot be taxed unless the taxing statute clearly imposes the tax upon it. The learned counsel for the appellant, Mr. Gichuhi in his submissions stated that the definition of the rubric "*management or professional fee*" is the process for instance of managing or professional administration of business concerns and this in turn, would mean that the provider *(Reuters)* is in control of the beneficiary of the information accessed, namely the bank. Mr. Gichuhi added that the only role *Reuters* plays is availing the information through a web page and this is what the bank pays for. The learned counsel for the appellant concluded by submitting that website information was not taxable during the relevant period but is now taxable following amendment to the relevant law in 2002 to include contractual and agency services. He stressed that the bank was only accessing widely available information which was compiled and availed to users at a fee and that the bank as user draws conclusions by itself without relying expressly on the information. Furthermore, the service would be correctly termed as technical if it is the type of skills and knowledge exercised by the provider of the service and not the user, of which the client such as the banks puts the services, it being merely general financial information which is neither advisory nor technical and the payment cannot possibly fall within the definition of "*management or professional fee*" in *section 35(1)(a)* of the Income Tax Act. By way of analogy Mr. Gichuhi compared the facts of the quoted case of REPUBLIC VS. COMMISSIONER OF INCOME TAX EX PARTE SDV TRANSAMI (KENYA) LTD where KRA's demanded withholding tax for online information in respect of royalties and the High Court held that the payments relating to online information on the movement of ships and shipping companies are not taxable under the same provision of Income Tax Act, and the Act did not have clear provision to charge on information offered online and therefore it was incorrect for the services being regarded as technical. He finally urged the court to find that any ambiguity in the interpretation of the relevant provisions of the tax law, should be in favour of the appellant as a tax payer, this being an accepted tax law principle adopted in many cases in Kenya and other comparable jurisdictions. He ended his submissions, by stressing that the Reuters information was available on the internet to all and sundry.

For the respondent it was submitted the appellant entered into a contract with *Reuters UK* and that this fact was not in dispute and that under the Agreement the appellant was provided with Reuters Services as described in the contract. In particular, Mr. Matuku, the learned counsel for the respondent said that the Reuters Services were provided electronically via terminals installed by Reuters at the appellants premises and that the information was about World's Financial Market among other services. In his

submission, Mr. Matuku put forward the point that the terminals that are used to access the information received by the appellant from *Reuters (UK)* and that the charges levied by *Reuters (UK)* were based on the scope of the information that the appellant desired and the owner of the terminals provided.

The respondent's case is firstly, that the information supplied by *Reuters* is of a technical nature and it falls under the definition of "*Management or professional fees*" which is the meaning provided for under the Income Tax Act Cap 470 of the Laws of Kenya.

Secondly, that the information so provided by Reuters is tailored in such a manner that it is of great value to the appellant in the making of critical financial decisions.

Thirdly, the information provided was not the kind of information the appellant would ordinarily access through the internet.

Finally, the respondent contended that the payments upon which the tax liability was pegged was made to Reuters in recognition of the technical services that Reuters offered to the appellant. The respondents put found the argument that "*Management or Professional fee*" meant – *a payment made to a person, other than a payment made to an employee by his employer as consideration for managerial, technical or consultancy services however calculated* and that this was the state of the law during the relevant period (1996-1999).

The respondent's conclusion, is that the above position should be contrasted with the period after 1999, when in the year 2000 the legal position was altered and the scope and the meaning of "*management or professional fee*" under the Income Tax Cap 470 was expanded to include "*agency and contractual services*" following the addition of the words "*agency*" and "*contractual*" respectively to the definition.

The critical clause after the year 2000 now reads:

"*a payment made to a person, other than a payment made to an employee by his employer as consideration for managerial, technical, agency contractual or consultancy services*"

In a nutshell, the respondents final contention is that the relevant provisions of the law both before and after the year 2000 covered the payments made to *Reuters* by the appellant because the services also formed part of the definition in 1999, those services being of the nature of technical or/and consultancy services.

I have carefully considered the issues and arguments raised by both parties as outlined above.

It is not in dispute that during the relevant period the appellants had entered into annual contractual arrangements with *Reuters* both before and after the year 2000 and that those contracts have been exhibited as "*OJEE 1*" and *BA2*". It is also not in contest that the annual contracts were standard contracts with almost identical terms.

A careful perusal of the contracts reveals that the services or products described in the contracts and which Reuters and the appellant agreed on are:-

- Information

- Materials (hardware and software)

- Reuters Business Information products

- Other services

Information is defined in the contract as:

"*the information (in whatever form including images, still and moving, and sound recordings) contained in the services"*

Information provider is defined as:-

"*a client of ours or other third party including any stock, futures or commodities exchange whose information is contained in the services".*

Maintenance is defined as under:-

"*a sub-set of support which includes the use of reasonable efforts by us or our nominee to maintain the materials in good operating conditions and or to restore the service repairing correcting or replacing the materials".*

Materials means:-

"*hardware and/or software and related documentation supplied by the Reuters group"*

Order form means:-

"*one standard form whether in written form or electronic form) listing the services ordered by you and accepted by us*".

Reuters Business Information products means:-

"*Reuters Business briefing products Reuters Insurance Briefing, Reuters Business alert and any other product which we notify you is a Reuters Business Information Product"*

Service/Service(s):-

"*include the provision of informal or and /or material and support"*

Service Fees Means:-

"*the fee charged by us or the supply of the services as specified in the relevant Order Form(s) and/or related schedule, including fees for specialist data services".*

Software means:-

"*software or any part of it and related documentation whether it is an ancillary part of a service and enables such service to be used or whether the rental of such software itself constitute the Service Software also includes upgrades, grades and enhancements."*

In addition to the above definition the contracts provide in clause 3(e) that appellant agrees to pay both the service fees as defined above including:-

"*all applicable taxes and duties (including withholding tax but excluding income tax on the income of the Reuters Group)……………."*

From the definition of the services as outlined above it is clear to me that the services provided by *Reuters* are technical, specialized and consultancy services. It is also quite evident that the services are offered on the basis of an order communicated to Reuters by the other contracting party – in this case the appellant.

Surely the range of services as described in the annual contract above, are fairly wide and includes technical support, lease of equipment and provision of specialist data services and all these are in my

view, embraced by the terms technical and consultancy services set out in *section 35 (1) (a)* of the Income Tax Act. Just to take two illustrations Reuters Business Alerts, constitutes specialized information that is uniquely provided by Reuters. The Bank may by order ask for any special Reuters Business Product or request for any technical backup relating to Reuters special equipment. For this reason, I reject the appellant's contention that payments were not covered by the law governing the taxation of the services prior to the year 2000. In fact what emerges from the definitions above, is a whole range of technical and consultancy services and one does not have to go outside the ordinary dictionary meaning of the words technical or consultancy. The ordinary and natural meaning of the two terms clearly cover the services and payments as defined in the Income Tax Act *section 35* and *5 (2)* even without the year 2000 amendments.

It is clear to me that the products offered are of a special nature otherwise why would the appellant pay for them, year in year out, if as it contends, there are freely available to every Tom, Dick, and Harry on the internet, and why would Reuters (UK) want to enter into contracts for the provision of services that are freely available on line, unless they are special and valuable to the buyers! Indeed, *Reuters* itself, describes some of the products as business products and it supplies them to its customers as a business. In addition, the support and maintenance services including the leasing of terminals are clearly technical. One would be entitled to ask how *Reuters* would have remained in business for years providing free information on the internet. *Reuters* is not a charity!

Moreover, the information covered by the contract includes specialist date services, which in turn embraces consultancy services with *Reuters* as the consultant for the services.

I am of the view that the appellants contention that the services were neither technical or of a specialist nature is clearly not supported by the definition of services as per the contract between the parties.

I also think that, contrary to the contentions of the appellant, that the superior court strained the meaning of the words appearing in the tax law is not correct at all because there was no ambiguity in the first place. However, I do find fault with the contradictions expressed in the superior courts judgment at page 16 as follows:-

"*Is there any ambiguity in the provisions of law relied upon? I find none. In adopting a purposeful approach, I am of the considered view that the services rendered by Reuters (UK) to the applicant do fall under the "management and professional fees" category as the services rendered by Reuters (UK) were technical and consultancy."*

With respect to the Court, since the superior court did not find any ambiguity in the interpretation, it was not necessary to adopt a purposeful approach in the first place? A purposeful approach would only have been called in aid if there was ambiguity in the interpretation of a statute other than a tax statute.

This is a contradiction and also an error in terms of tax law. Tax laws are construed strictly and the issue of adopting a purposeful approach as regard tax laws and statutes should never ever arise. I therefore uphold the appellant's argument that reference to a purposeful approach in the same breath,was incorrect in law.

However, this does not take the appellant out of the woods, because whereas the courts view in adopting a purposeful approach was erroneous, the court nevertheless did in an admirable manner give the correct meaning to the services and concluded they were embraced by the terms "technical" and "consultancy" by nature and as per the meaning attributed to them by the Income Tax Act and as per the ordinary meaning of the two terms as per the *1995 Act*.

The Income Tax stipulated as follows:-

"Management or Professional" meant:-

a payment made to a person, other than a payment made to an employee by his employer as

consideration for managerial, technical or consultancy services however calculated."

The ordinary and natural meaning of the two terms technical and a "*consultancy"* is what is important in making a determination whether or not prior to the year 2000 withholding tax was payable for the range of products or services as described elsewhere in this judgment.

The Oxford Advanced Learners Dictionary Sixth Edition gives the meaning of the two words as follows:-

"Technical"

1. Connected with the practical use of machinery, methods etc in science and industry.

2. Connected with skills needed in a particular job, sport, art etc.

3. Connected with a particular subject and therefore difficult to understand if you do not know about that subject.

4. Connected with the details of a law or set of rules."

The range of services as described elsewhere in the judgment, fall squarely with meaning 1 and 2 above.

"*Consultancy"*

1. A company that gives expert advice on a particular subject to other companies, people or organizations.

2. Expert advice that a company or person is paid to provide or a particular subject

Again here, the special data or products by Reuters clearly fall under meaning (2) above.

With the above in view it is incorrect for the appellant to contend that it is only in the expanded definition as provided in the year 2000 amendments to the Income tax, which would cover them and that the KRA is demanding the tax retrospectively after the incorporation of the words *agency* and *contractual* in the year 2000. In my view, the incidence of liability for withholding tax was there both before and after the year 2000. The only distinction after the 2000 amendments is that tax is payable in all situations where there is a contractual or agency relationship. There is also no basis whatsoever for the contention that the superior court did strain the meaning of the two critical words namely *technical* and *consultancy*. The superior court gave the words the ordinary and dictionary meaning.

In my interpretation of the law, it is quite evident that I have not sought any assistance from outside a dictionary in ordinary use. Moreover, I have not strained the meaning of the words in order to achieve any particular result. I have simply adopted the ordinary meaning of the words used in the relevant tax statute. This is because as regards tax law the issue of intention or intendment does not arise. If there is any ambiguity, and I did not detect any in my analysis, the same must be construed in favour of the tax payer. In tax law, the converse is also true that if the meaning is clear, that tax is chargeable, the issue of what was intended is not the function of the court and where tax liability is expressed and located by law the courts must uphold the taxman's position.

Having found no ambiguity or obscurity in the relevant tax law namely *section 35* and *section 2* of the Income tax, I now turn to examine the law of construction of tax statutes.

Take the case cited by the learned counsel for the appellant Mr. Gichuhi, KANJEE NARANJEE V INCOME TAX COMMISSIONER [1964] EA 257. In this case the Privy Council held":-

"*If the language of a Revenue Act is obscure, the tax payer is entitled to demand that his liability to a*

higher charge should be made out with reasonable clearness, before he is adversely affected. Dictum of Viscount SIMONDS in SCOTT V RUSSELL *[1948] 2 ALL EA 1 applied"*

Although I fully endorse the construction principle enunciated in the case it is not relevant to the matter before me and is certainly not in favour of the appellant at all.

The cited case of JAFFERALI ALIBHAI V C.I.T. [1961] EA 61 dealt with the principle that after a repeal of tax statute, a subsequent Act on the same subject may be looked to, in order to see what is the proper construction to be put upon the earlier Act, where the earlier Act is ambiguous. Again, I approve the principle but it does not apply to the situation before us and is certainly not in favour of the appellant at all.

The case of SCOTT V RUSSELL [1948] 2 ALL ER 1 appears to have formed the bedrock of the construction of tax law in this country and elsewhere and therefore I find it useful, to reproduce the maxim first expressed by *Lord Simon's* in these words:-

"*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 taxed unless the words of the taxing statute unambiguously impose the tax upon him"*

In the matter before me I have elsewhere in this judgment faulted the trial Judge in purporting to use a purposeful approach to interpret or construe the relevant tax law against this principle. She expressed an obvious contradiction because she had not found any ambiguity. Nothing turns on her misdirection.

The case of *WOOLWICH EQUITABLE BUILDING SOCIETY V. INLAND REVENUE COMMISSIONER 1992 3 IN. L.R. 366,* dealt with the claim of refund of moneys paid pursuant to a demand which was *ultra vires* the power of the I.R.C. The right of recovery by the tax payer of such moneys was recognized but again this has no application to the subject matter of this appeal.

Concerning the application of the Organization for Economic Co-operation and Development ("OECD") guidelines my opinion is that this Court has in the past had occasion to consider the point, and the position is that unless an international instrument has been domesticated, the local courts would apply it only where there is ambiguity or a gap in the domestic law. As regards this point this country has fully embraced the *Bungalore – Latimer House principles* which constitute a shared heritage of the Commonwealth which in turn reflects the position as above – see the cases of *R. M. (Infant) JOSEPHINE KAVINDU V. ATTORNEY GENERAL* HCCC 135/2001 O.S and the Court of Appeal decision of *MARY RONO V. JANE RONO & ANOTHER Civil Appeal No. 66 of 2002*.

Having found as I did above that there was no ambiguity, obscurity or a gap in the interpretation of the relevant tax law, I respectfully find that the "*OECD"* has no application in the circumstances.

Finally Collins English Dictionary page 337 cited by the appellant defines a "*consultant"* thus

"*2 A specialist who gives expert advice or information"*

While still on the principles of tax, even in the context of this case it is important to emphasise that one of the other important principles is the principle of certainty and in this regard I have chosen to restate it as *Adam Smith* did in the *Wealth of Nations:-*

"*The tax which each individual is bound to pay ought to be certain, and not arbitrary. The time of payment, the manner of payment, the quantity to be paid, ought all to clear and plain to the contributor and to every other person."*

With respect, in the situation before the Court, this definition assists the taxman and not the appellant as held elsewhere in this judgment because essentially the products or information sought by the appellant from *Reuters* are of a specialized nature and this is why in the first place the appellant became a

subscriber and also leased *Reuters* equipment.

In the result I uphold the judgment of the superior court except its reference to a purposeful approach of construction of a taxman's statute which I have faulted as above and reasserted the correct view.

In summary, my determinations are as follows:-

(1) Ground (1) the appeal fails on the basis of the analysis of the nature of services and the conclusion that they constitute technical and consultancy services.

(2) Ground (2) fails for the same reasons as in 1. The payment is in consideration of services provided as per section 35 1 (a) of the Income Tax.

(3) Ground (3) where a High Court case, is cited, firstly, the case is not binding on this Court and secondly the nature of services are clearly distinguishable from the case before us, as the case was grounded on agency services not covered before 2000.

(4) Ground (4). I have upheld this ground but my view is that the superior court's misdirection is not fatal since the Court's ultimate finding was that the meaning of the two critical words namely technical and consultancy was clear and unambiguous and the superior court interpretation on this was correct.

(5) Ground 5 has been sufficiently covered in my analysis of the tax law before and after 2000. The recovery of tax arrears is distinct from retrospective application of law and we have made a determination that the tax as demanded was recoverable even under the pre year 2000 definition of the law and therefore retrospective application did not arise at all.

The above notwithstanding I do salute the dissent of my learned brother Justice Visram, J.A. I therefore, consider it appropriate to try and explain what I consider to be the position of dissenting judgments should occupy in our jurisprudence. First in my view, dissenting judgments constitute an expression of independence, freedom of thought and intellect and, second, they may lay the basis for future development of the law. Third, they may provide a firm base for future generations not to contain themselves in straight jackets, but to always remember that at the end of the day, that much sought justice might after all not be in the thunder of the majority judgment, but in the silent breeze of the minority judgment!

Charles Hughes, a one time U.S. Supreme Court Chief Justice is often quoted as having said:-

"*dissenting opinions constitute an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believe the Court to have betrayed.*"

A dissenting judgment should never stir up anger but instead encourage a brotherhood of service to the law and society.

In the result, I find no merit in the appeal and the same is dismissed with costs to the respondent.

DATED and DELIVERED at NAIROBI this 23rd day of October, 2009.

J.G. NYAMU

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

JUDGMENT OF VISRAM, J.A

The facts giving rise to this appeal are well stated in the judgments of my brothers Aganyanya and Nyamu, JJ. A, and I will not repeat them. It is with great respect to my brother Judges that I am unable to agree with them, hence this dissenting judgment.

Very simply put, the issue in this appeal is whether payment to a non-resident company who provides on-line subscription service qualifies to attract withholding tax under *Section 35 (1) (a)* of the Income Tax Act ("the Act"). Reuters (UK) is a non-resident company that provides on-line information on financial markets, stocks and related matters of interest to banks, financial institutions and others. Essentially, what Reuters does is to collect and collate information available from several sources; package it in a way that is meaningful to its customers; update the same regularly; and deliver it by direct satellite via a Reuters Terminal. Many banks and financial institutions subscribe annually to access this information. Anyone can do so. Between the years 1996 – 1999, Stanbic Bank Kenya Ltd ("Stanbic"), the appellant, was one such subscriber. It entered into a contract, in a standard form known as "Reuters Services Contract"; paid the required subscription fee; and had access to on-line financial information and news.

It is the respondent's contention that the subscription fee paid to Reuters is subject to withholding tax, because it is a payment to a non-resident for "technical services". The respondent contends that the information which it delivered to Stanbic was used by the latter to make financial decisions. This, the respondent says, constitutes "management or professional fee" under *Section 35 (1) (a)* of the Income Tax Act. The respondent says that during the relevant period (1996 – 1999) the appellant failed to remit the withholding tax on those fees, and is claiming Kshs.7,954,342/= which comprise not just the tax, but also penalties and interest.

Section 35 (1) (a) of the Act states as follows:

"*A person shall, upon payment of an amount to a non-resident person not having a permanent establishment in respect of:*

(a) a management or professional fee, except a commission paid to a non-resident agent in respect of flowers exported from Kenya and auctioned in any market outside Kenya;

(b) ……....

(c) ………

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

The key words, in the above section, are "management or professional". Did Stanbic pay Reuters for a service that can be classified as "management or professional"? During the material period those two critical words were defined in Section 2 of the Act as follows:

"*… a payment made to a person, other than a payment made to an employee by his employer as consideration for managerial, technical or consultancy services …"*

In the year 2000 that section was amended as follows:

"*a payment made to a person, other than a payment made to an employee by his employer as consideration for managerial, technical, <u>agency</u>, <u>contractual</u> or consultancy services"* *(emphasis mine).*

So, here, we are concerned with the law as it existed before the year 2000, and not the amended law as stated above. This is because the material period for which withholding tax is claimed is 1996 – 1999. It is trite law that legislation cannot be applied retroactively to penalize a citizen, either with criminal or civil liabilities.

Coming back to *Section 35 (1) (a)* of the Act, the issue that will determine whether Stanbic was liable to remit withholding tax to the respondent, is whether the fee to Reuters constituted management or professional fee, which is a fee for "managerial, technical or consultancy" service. Let us examine what these words mean.

A "manager", according to the Oxford English Dictionary is:

"*a person controlling or administering business; a person controlling activities of a person, team".*

The word "managerial" is, of course, the adjective to the noun Manager. Surely, it would be absurd to suggest that Reuters provided managerial services to Stanbic. It neither "controlled" nor "administered" Stanbic's business.

The term "technical" is defined by the aforesaid dictionary as:

"*of the mechanical arts and applied sciences; of a particular subject, craft etc; using technical language; in strict legal sense."*

We must ask ourselves what is so "technical" about the service that Reuters provided to Stanbic? All it did was to compile news and information from different sources relating to international financial markets under one window, and pass it on electronically to whoever wanted it, and to use it in whatever manner they chose. Such a service is of particular interest to banks and other busy organizations who simply want to click on one window, and immediately access the information. The respondent seems to have come to the conclusion that this is technical service because Stanbic used the information to make financial decisions. Of course, people use all kinds of information, from all kinds of sources, to make decisions. That in itself does not turn that service into a technical service. In my humble view, all Reuters did was to provide financial information, not necessarily technical service.

The learned counsel for Stanbic, Mr Gichuhi, made reference to the Organization for Economic Co-operation and Development ("OECD") guidelines on the interpretation of tax treaties. In its paper entitled *Tax Treaty Characterization Issues Arising from E-Commerce* published on 1st February, 2001, OECD made important and relevant observations on the interpretation of the term "technical services", as follows:

"*39. Services are of a technical nature where special skills or knowledge related to a technical field are required for the provision of such services. Whilst techniques related to applied science or craftsmanship would generally correspond to such special skills or knowledge, the provision of knowledge acquired in fields such as arts or human sciences would not.*

40. The fact that technology is used in providing a service is not indicative of whether a service is of a technical nature. Similarly, the delivery of the service via technical means does not make the service technical.

41. Many categories of e-commerce transaction similarly involve the provision of the use of, or access to data and software. The service of making such data and software, or the functionality of that data and software, available for a fee is not, however, a service of a technical nature. The fact that the development of the necessary data and software might itself require substantial technical skills is irrelevant as the service provided to the client is not the development of that data and software (which may well be done by someone other than the supplier) but rather the service of making the data and software available to that client. For example, the mere provision of access to a troubleshooting database would not require more than having available such a database and the necessary software to

access it. A payment relating to the provision of such access would not, therefore, relate to a service of a technical nature." (emphasis mine)

I find the above definition and illustration relevant and useful, and I adopt the same. Thus, having regard to the ordinary meaning of the word technical, and the interpretation provided by OECD, I am of the view that Reuters did not provide any technical service to Stanbic.

Finally, with regard to the term "consultancy", the aforesaid dictionary defines a "consultant" as:

" *a person who gives professional advice".*

Reuters does not give any professional advice, simply information of a generic nature which subscribers use to formulate their own decisions. There is no personalized consultation of any kind. Every subscriber pays the same fee, and receives the same information. Again, I think it would be absurd to classify Reuters as the consultant of all its subscribers including Stanbic.

In my humble view, therefore, the online information service provided by Reuters was not "managerial, technical or consultancy", and accordingly did not attract any withholding tax. I would wish to repeat again what I said in the case of *Commissioner of Income Tax vs Westmont Power (K) Ltd* *(2006) I EA 54* that taxation laws that have the effect of depriving citizens of their property by imposing pecuniary burdens resulting also in penal consequences must be interpreted with great caution. It is paramount that their provisions must be express and clear so as to leave no room for ambiguity. Any ambiguity in such a law must be resolved in favour of the tax payer and not the public revenue authorities which are responsible for their implementation.

In *Republic vs Commissioner of Income Tax ex parted SDV Transami (K) Ltd* *(Misc. Application No. 212 of 2004)*, Ojwang, J considered a similar issue where Kenya Revenue Authority made demands for withholding tax in respect of fees that the respondent paid for on-line information on the movements of ships and shipping containers, among other things. The learned judge stated as follows:

"*It is my understanding that a royalty is a payment made to the creator of an industrial 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. By virtue of the Income Tax Act (Cap. 470), s. 35 (6), where a Kenya-based person makes such payments to a non-resident person, he is required to retain withholding tax, and to remit the same to the Commissioner of Income Tax.*

Does this state of the law 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? I do not think so and, with respect, I would consider the Commissioner of Income Tax wrong in point of law, in treating payment for mere access to neutral information as payment for a regenerative scientific formula. Payment of such a kind cannot constitute royalties; and therefore it is wrong in law to require that the applicant should make deductions of withholding tax, when it pays for such website information. If the Commissioner of Income Tax would consider it appropriate that payments made for such information be the subject of withholding tax, he would, I think, have to wait for the enactment of legislation bringing the same within the scope of such tax. As of now, I would hold that the Commissioner had misapplied the law, and on this account the applicant is justifiably aggrieved." (emphasis mine)

In my view, the facts in the *Transami case* are similar to the facts before me. Although that decision is not binding on this Court, I am highly persuaded by it, and accept its *ratio decidendi*.

I find that there is no clear language in *Section 35 (1) (a)* of the Income Tax as it existed in the statute books at the material time that would have required Stanbic to withhold tax on the on-line information service provided by Reuters. The fact that Reuters' form contract may have implied so, is neither here nor there. It is a standard "form" contract used everywhere in the world, and is intended to cover them in

places or jurisdictions which impose such an obligation in clear language. In any event, a tax payer's liability to tax arises from what is stated clearly in our law, and not from what is stated or implied in forms or documents issued by non-residents.

Accordingly, and for reasons stated, I would allow this appeal, with costs. However, the orders shall be as per the judgments of the majority Aganyanya and Nyamu, JJ.A.

Dated and delivered at Nairobi this 23rd day of October, 2009.

ALNASHIR VISRAM

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR