

**REPUBLIC OF KENYA**  
**IN THE TAX APPEALS TRIBUNAL**  
**TAX APPEAL NO. 359 OF 2018**

**LG ELECTRONICS AFRICA LOGISTICS**  
**FZE KENYA BRANCH ..... APPELLANT**

**=VERSUS=**

**THE COMMISSIONER OF DOMESTIC TAXES..... RESPONDENT**

**JUDGEMENT**

**BACKGROUND:-**

1. The Appellant, LG Electronics Africa Logistics FZE Kenya Branch (hereinafter referred to as “**LG**”, “**The Branch**”) is the Kenyan Branch of LG Electronics Africa Logistics FZE (hereinafter referred to as “**LG Dubai**”), a company incorporated and registered in Dubai.
2. The Respondent is established under the Kenya Revenue Authority Act (Cap 469), Laws of Kenya, charged with the mandate to collect and administer tax revenue on behalf of the Government of Kenya.
3. The Respondent requested for the Appellant’s trial balances, Value Added Tax (“VAT”), Corporate Income Tax (“CIT”) and Withholding Tax (“WHT”) schedules, and financial accounts to enable it conduct a tax audit for the period of January 2010 to December 2016.

4. Following the said review, the Respondent notified the Appellant of its assessment vide its letter dated 18<sup>th</sup> January 2018. The Respondent assessed Corporate Income Tax at Kshs.1,766,917,466/= VAT at Kshs.325,649,691/= and WHT at Kshs.18,144,598/=
5. The parties then engaged in various consultative meetings and discussions between the period of February 2018 to June 2018 following which, the Respondent issued its notice of assessment vide its letter dated 5<sup>th</sup> July 2018 and demanded payments of the assessed CIT, VAT and WHT to the tune of Kshs.2,304,325,000/=:, Kshs.325,649,991/= and Kshs.3,685,144/= respectively
6. Being dissatisfied with the Respondent's assessment, the Appellant through its tax agents objected to the Respondent's findings vide a letter dated 3<sup>rd</sup> August 2018.
7. Thereafter, various discussions were held between the Appellant, the Appellant's Tax Agent and the Respondent following which the Respondent amended its initial assessment on CIT to Kshs.202,230,104/=:, VAT to Kshs.80,774,657 and WHT to Kshs.3,685,144 all inclusive of penalties and interest. The Respondent confirmed the said amended assessment on CIT, VAT, and WHT vide its Objection Decision dated 2<sup>nd</sup> October 2018.
8. The Appellant conceded the amended assessment on CIT and proceeded to settle its liability on CIT in full on 12<sup>th</sup> October 2018. However, being

aggrieved by the Respondent's Objection Decision in respect of VAT and WHT, the Appellant filed its Notice of Appeal dated 1<sup>st</sup> November 2018, giving rise to this Appeal.

## **THE APPEAL**

9. The Appellant lodged this Appeal vide a Memorandum of Appeal dated 14<sup>th</sup> November 2018 based on the following grounds ;

- i. That the VAT assessment by the Respondent for the period between January 2010 to May 2013 is time-barred and should be vacated in its entirety;
- ii. That the transactions between the Appellant and its head office do not constitute a supply of services for VAT purposes and should therefore not be subject to VAT;
- iii. That the Respondent has erred in law and fact by imposing VAT at the standard rate of sixteen percent (16%) on marketing services provided by the Appellant to the head office. The Appellant submits that even if the Respondent's position was taken to be correct, the Respondent has erred in law and fact by not appreciating that where the marketing services provided by the Appellant to its head office constitute a supply, they should be treated as exported services and thus taxable at zero rate for VAT purposes;
- iv. That the Respondent erred in law and fact by finding that the recipient of the marketing services performed in Kenya are independent distribution companies and the Kenyan public and thus subject to VAT at sixteen percent. The Respondent has failed to appreciate that even if the Appellant is deemed to be providing

services to the local distributors and the Kenyan Public the output VAT should be zero on the basis that the consideration for such supplies is zero;

- v. That the Respondent has erred in law and fact by relying on the **Coca Cola Central East and West Africa versus Commissioner of Domestic Taxes (Appeal No. 11 of 2012)** in confirming its assessment which case is distinguishable from the present case and as such does not apply as a binding precedence;
- vi. That the Respondent erred in law and fact by finding that the marketing agents provided marketing services to the Appellant and the Appellant should have accounted for withholding tax.
- vii. That the Respondent erred in law by assessing the Appellant on payments from overseas .The Respondent has failed to appreciate that the Appellant did not have any withholding obligations as it did not make payments to the marketing agents.
- viii. That the Respondent has erred in law by imposing a 10% penalty of Kshs.291,634/= based on an incorrect assessment.
- ix. That the Respondent has erred in law by imposing interest of Kshs.477,183/= based on an incorrect assessment.
- x. That the Respondent confirmed the notice of assessment without due regard to all records explanations and information provided by the Appellant thereby failing to appreciate all the issues presented by the Appellant before confirming the Assessment.

10.The Appellant prays that that the Objection Decision be annulled and varied in such a manner that may appear just and reasonable by the Tribunal.



11. The Respondent in response to the Appeal prays that the Tribunal upholds its decision to charge tax amounting to Kshs. 84,459,801/= inclusive of interest under Section 38 of the Tax Procedures Act, 2015 and that the Appeal be dismissed with costs to the Respondent.

## **APPELLANT'S CASE**

12. The Tribunal has perused the Appellant's Statement of facts dated 14<sup>th</sup> November 2018 and the documents annexed thereto as well as the Appellant's oral and written submissions on record wherein the Appellants have submitted in support of the Grounds of Appeal raised in its Memorandum of Appeal.
13. First and foremost, the Appellant contends that the VAT claim for the period between January 2010 to May 2013 is time-barred pursuant to section 29 (1) (5) of the Tax Procedures Act No. 29 of 2015 which provides that a default assessment shall not be made after five years immediately following the last date of the reporting period to which the assessment relates unless in the case of gross or wilful neglect, evasion or fraud by a taxpayer.
14. The Appellant submitted that the statutory limit of five-years is binding on the Respondent and the VAT assessment from the said period should be declared null and void.
15. Moving on to the subsequent grounds of appeal, the Appellant's position is that the transactions conducted between it and the non-resident head office do not constitute supply of services for purposes of VAT under VAT Act, 2013.
16. The Appellant has submitted that the marketing services it provides are contracted for, paid for and provided for the use and benefit of the Appellant's head office as part of the head office strategy that eventually enables the head office to push sales in the Kenyan market. That it does not carry on the business of local distribution of LG branded items in Kenya

neither does it provide services to non-related third party entities in Kenya. The Appellant contends that legally, a branch is considered an extension of its foreign head office and not as a separate legal entity.

17. The Appellant invokes Section 977 (1) of the Companies Act 2015 which provides that ;

*‘ a branch is not a distinct entity from its parent but rather an extension of the foreign company that wishes to be registered as such to carry on business in Kenya. ’*

In addition to the above the Appellant cited various sections of the VAT Act, 2013 including Section 2 which defines person to mean

*“an individual, company, partnership, association of persons, trust, estate, the Government, a foreign government, or a political subdivision of the Government or foreign government”.*

Section 2 also defines “supply of services” to include;

*the performance of services for another person*

According to the Appellant, a supply of services inter-alia arises when there is a performance of services for another person. The Appellant thus argues that there cannot be supplies as defined in the VAT Act between the Appellant and its head- office as they are one and the same person. The Appellant further submitted that it cannot contract on its own as it is not a legal entity and thus all contracts have to be signed by the head office and the suppliers.

18. To discredit the concept of self -supply, the Appellant submitted under the VAT law, the concept of self- supply for purposes of VAT in relation to a branch and head office can only arise in relation to supply of imported services as espoused under Section 10 of the VAT, Act 2013.

19. The Appellant relies on the case of Republic versus Kenya Revenue Authority Ex- parte Cooper K- Brands Limited [2016] eKLR where Justice Odunga was guided by the decision in Vestley vs. Inland Revenue Commissioners[1979] 3 All ER at 984 where the Court held that a citizen cannot be taxed unless he is designated in clear terms by a taxing Act as a taxpayer and the amount of his liability is clearly defined.
20. Secondly, the Appellant argues that even though the services provided to its non-resident head office are found to constitute a supply of services under the VAT Act, 2013, the same are exported services within the ambit of section 2 of the Act, which attract VAT at the rate of 0%.
21. The Appellant has submitted that the Respondent's assertion that the Appellant supplies marketing services to the Kenyan Public and Kenyan distributors by marketing and creating demand for the products sold by Kenyan distributors, can only be substantiated by answering the following questions:-
- i. Who is a consumer for purposes of exported services and how is the consumer to be ascertained?*
  - ii. What is the key test in establishing whether services are exported or not: Is it the place of performance of the services, the location of the payer or the location of the consumer?*
  - iii. Having established who the consumer is and the key test for ascertaining whether services are exported, who reserves the taxing rights in relation to exported services?*
22. Having outlined the above questions, The Appellant went on to state that Kenyan VAT legislation does not provide guidance on how to determine 'use' or 'consumption'. That in the absence of such guidance, reliance is placed on decided cases as well as international best practices.

23. While relying on the case of **Commissioner of Domestic Taxes versus Total Touch Cargo Holland ( Income Tax Appeal No. 17 of 2013)** which held that the contractual relations are to be ascertained by having regard to existing service contracts, the Appellant submitted that to infer or assign non-existent contractual obligations between itself and the Kenyan Public goes against the principles of the Law of Contract. There is no evidence of any contract and or business agreement that indeed the services rendered by the Appellant are to improve and manage sales by independent distributors in the Kenyan market.

24. The Appellant further invoked the Organization for Economic Cooperation and Development International Value Added Tax/ Goods and Services Tax Guidelines (Hereinafter referred to as “OECD VAT/GST Guidelines”) at paragraph 3.53 which provides that:-

*“The supplier may also be required under the terms of the business agreement to provide services or intangibles directly to a third party. As long as there is no evasion or avoidance, the customer remains the customer identified in the business agreement and it is this customer’s location that determines the place of taxation. The mere direct provision of the supply to a third party business does not, in itself, affect that outcome. Accordingly, the general rule should be applied in such a way that the supplier makes a supply free of VAT to a foreign customer even if the third party business is located in the same jurisdiction as the supplier...”*

25. According to the Appellant, the Kenyan distributors are third parties in so far as its arrangement with its head office is concerned and therefore the customer remains LG Dubai. To buttress the position above, the Appellant also cited the cases of **Osteria Ice Cream Limited versus Junction Limited (2011) eKLR** on the duty of court to interpret and enforce contracts but not rewrite them; and **Vodafone Essar Cellular Ltd v CCE** where it was held

that your customer's customer is not your customer and when a service is rendered to a third party at the behest of your customer, the service recipient is your customer and not the third party.

26. The Appellant proceeded to submit that having established that the consumer is ascertained by reference to the business agreement, the key consideration in establishing whether services are exported is neither the place of performance of the services nor the location of the payer but rather the location of the consumer in accordance to Section 2 of the VAT Act, 2013. Further, Regulations 13(2) (a) of the VAT Regulations, 2017 which provides that the documentation proof for an exportation of services shall be;

*'a copy of invoice showing the recipient of the supply to a person outside Kenya.'*

That the copies of invoices as well as the proof of payment shows that the services provided are rendered to the Appellant's head office, which is outside Kenya. The Appellant reiterated paragraph 3.53 of the OECD Guidelines (cited above) that it is the customer's location that determines the place of taxation.

27. In support of its position above, the Appellant relied on the cases of **F.H Services Kenya Limited vs Commissioner of Domestic Taxes (Appeal No. 6 of 2012)**, **Commissioner of Domestic Taxes versus Total Touch Cargo Holland (2018) eKLR** (hereinafter "The Total Touch Case") and **Paul Merchants Ltd v CCE, Chandigarh (2012(12)) TMI 424- CESTAT** where the courts unanimously agreed that the test of exported services is not the place of performance of services but the location of the consumer.
28. The Appellant then went on to submit that having established who the consumer is and the key test for ascertaining whether services are exported, then the question that remains is who reserves the taxing

rights in relation to exported services? The Appellant invoked the principle of neutrality observed by the OECD VAT/GST Guidelines which adopts the “destination principle” and provides that, as a general rule, the country with taxing rights over internationally traded services should be the country of the customer’s location. The total tax paid in relation to a supply is determined by the rules applicable in the jurisdiction of its consumption and all revenue accrues to the jurisdiction where the supply to the final consumer occurs.

29. The Appellant has urged this Tribunal to rely on the ***Total Touch Case*** and **Panalpina Airflo Limited vs Commissioner of Domestic Taxes (2019) eKLR** while drawing a distinction between the present case and the decision of the VAT Appeals Tribunal in **Coca-Cola Central East and West Africa Ltd vs Commissioner of Domestic Taxes (VAT Appeals Tribunal Appeal No. 11 of 2013)**.
30. Thirdly, the Appellant has submitted that in the event that the Appellant is deemed to be providing services to the local distributors and the Kenyan Public, the output VAT should be zero. Local distributors do not make any payments to the Appellant for the alleged services. Accordingly VAT liability should be based on zero consideration as the open market value cannot form the basis of the VAT liability on the grounds that the independent distributor companies and the Appellant are not related. The Appellant based their argument on Section 13 (1) of the Act which provides that;-

*‘Subject to this Act, the taxable value of a supply, including a supply of imported services shall be:-*

- a) The consideration for the supply; and*
- b) If the supplier and the recipient are related, the open market value of the supply.’*

31. In their submissions, the Appellant have also prayed that if indeed the marketing services are found to be subject to VAT under the VAT Act,



2013, that the charges to its head office be treated as VAT inclusive based on the fact that the Appellant is not contractually able to pass on the VAT liability to LG Dubai but will have to finance any VAT from management fees previously received from Dubai.

32. The Appellants base the above prayer on Regulation 5 of the VAT Regulations, 2017 and prays that the same be computed as per the formula provided therein being:-

*$B=A/(1+t)$  where  $A$  is the total amount charged for supply inclusive of VAT,  $B$  is the taxable value and  $t$  is the tax rate.*

33. On the ground of withholding tax, the Appellant have submitted that the Respondent erred in finding that the marketing agents provided marketing services to the Appellant making them liable to pay WHT.
34. The Appellant stated that promotional activities are performed by distributors and marketing agents with which the Appellant has no agreement or contract. All invoicing for services offered by the marketing agents were charged to LG Dubai and not the Appellant. Further, on the occasions that the invoices were mistakenly invoiced to the Appellant, the same were forwarded to LG Dubai for settlement.
35. That WHT legislation does not require that WHT is paid by the person to whom the invoice is addressed but by the person who makes the payment for the invoice. To this, the Appellant produced sample swift payments from LG Dubai. Further, payment is a pre-requisite requirement for WHT to apply and as demonstrated by the Appellant's books, it has not incurred any expense in regards to payment for the services.
36. Based on the foregoing, the Appellant has prayed that the Tribunal vacate the Respondent's assessment on WHT in its entirety.
37. The Appellant further submits that the penalty of 10% imposed on WHT is incorrect as it is in contravention of the provisions of section 84 of the Tax Procedures Act which provides for a shortfall penalty. The



Appellant holds the position that the Respondent has not alleged or demonstrated that the Appellant knowingly provided misleading information or omitted any matter from the statement to the Respondent.

## **RESPONDENT'S CASE**

38. The Respondent responded to and opposed the Appeal vide its Statement of Facts dated 13<sup>th</sup> December 2018 bolstered up by its written submissions 24<sup>th</sup> September 2019. At the onset, the Respondent contends that the issue of the VAT assessment being time-barred does not arise. The Objection Decision is issued in line with section 31 (4) of the Tax Procedures Act.
39. The Respondent argues that LG Dubai through its Permanent Establishment being the Appellant, did not register for VAT as required by section 34 of the VAT Act and therefore the Commissioner notified the Appellant of the assessment through its letter dated 18<sup>th</sup> January 2018 and demand letter dated 5<sup>th</sup> July 2018.
40. On the question of whether supply of services rendered are subject to VAT, the Respondent has laid out, following its investigations, the flow of services to establish the strategy and who the services are aimed at; wherein the Appellant supplies marketing services to its head office, LG Dubai. That the latter sells LG products to Kenyan distributors, who then re-sell to the Kenyan market at an agreed price.
41. The Appellant is assigned the task of all marketing activities and advertising of LG products including brand building and enhancement within the region which covers 13 countries. The Appellant works with marketing and advertising firms to ensure brand visibility in the market through billboards, electronic and print media. They also monitor market share and oversee product placement, engage with distributors, facilitate local training on LG products, brand activation, promotions and offers and supervision of merchandising staff. The Respondent states that the marketing activities are for the Kenyan audience and are meant to influence consumers in the

Kenyan market. To that end, the marketing services provided by the Appellant to its head office are not export services but are provided for use and consumption locally in Kenya

42. The Respondent has put it to the Tribunal that the arrangement between LG Dubai and the Appellant is a calculated arrangement to avoid the charging of VAT. That in an ordinary transaction, once a third party distributor purchases goods from LG Dubai, they would be forced to incur the marketing costs associated with trying to sell the product. This would affect the price point of the product and the prices of the LG products will be higher. However, in the present case, the LG Dubai circumvents this scenario by assuring the distributors of markets for their products and are forced to accept a lower fixed margin
43. The Respondent maintains that regardless of the payer of the services being outside Kenya, the services of advertising were never exported, because they were in fact used and consumed locally by Kenyans who the target audience and therefore do not fall under Section 2 of the VAT, Act 2013.
44. To buttress their position, the Respondent cites Section 8 of the VAT Act, 2013 which provides that a supply of services is made in Kenya if the place of business of the supplier from the services is in Kenya. The Respondent also quotes Regulation 20 of the VAT Regulations as follows:-
- “20 (1) Except as is otherwise provided in the Act, services shall be deemed to have been supplied in Kenya-*
- a) Where the supplier has established his business or has a fixed physical establishment in Kenya and the services are physically used or consumed in Kenya regardless of the location of the payer;*
45. It is the Respondent’s position that to the extent that the Appellant is the service provider domiciled in Kenya, with a registered place of business

in Kenya and the service is performed at the risk of the Kenya environment and with Kenyan resources then the spirit of VAT law applies in that Kenya should benefit from activities in which value is added to products domestically.

46. The Respondent has further submitted that reliance on the OECD guidelines only applies when there is no clarity or if there is ambiguity in the local legislation per the decision of the Tax Appeals Tribunal in **Airflo Ltd vs Commissioner of Domestic Taxes (Appeal No.115 of 2016)**. It is its position that the VAT Act is clear in respect of the issues the subject of this Appeal.
47. The Respondent fully relies on the VAT Tribunal's decision in **Coca-Cola Central East and West Africa Ltd vs Commissioner of Domestic Taxes (VAT Appeals Tribunal Appeal No. 11 of 2013)** (hereinafter referred to as "the Coca-Cola case") where the VAT Tribunal held that the place of use and consumption is what matters. The Respondent submits that the Coca-Cola case is similar in facts and issues to the present Appeal and invites the Tribunal to adopt the said decision. Among others, the Respondent in its submissions reproduced the Ruling where the Tribunal held as follows:-

Paragraph 117;

*'as we have said above, if the Respondent can demonstrate that a service supplied by a person with a fixed place of business in Kenya has been physically consumed in Kenya, the issue of exported service should never arise. In our view, consumption of a service like advertising marketing and sales production is an abstract concept which connotes the hearing of a thing, the enjoyment of a thing, the seeing of a thing, the feeling of a thing, the perception of a thing; and when that thing is physically heard, seen, enjoyed, felt or perceived, that thing has been physically consumed.....'*

Paragraph 118

*'from that perspective it is clear in our minds that if we are correct in our conceptualization of what a consumption of a marketing and sales promotion service is, a payer of a service or a person who requisitions a service is not a consumer of the service unless he himself is hearing the service...*

*In our opinion, the service rendered by the Appellant is not consumed by Export, a company domiciled in the Dubai, which pays for and requisitions the service or the households there; for the simple reason that the service is heard, seen, enjoyed, perceived et al, by persons and households resident in Kenya.*

48. The Respondent states that the VAT Tribunal addressed each of the above cases in the Coca-cola case and found that they would not be right to determine that the services offered by the Appellant are not consumed in Kenya.
49. While addressing the question of WHT , the Respondent submitted that their investigations revealed that the Appellant worked with marketing and advertising agents in Kenya for purposes of advertising the LG brands on local Kenyan electronic and print media. The marketing agents then invoiced the Appellant for the services provided. However, WHT was not operated when the payments were made to the marketing agents.
50. The Respondent maintains that all the invoices for the services by the agents were addressed to the Appellant who then forwarded the invoices to LG Dubai. The Respondent has pointed out in their submissions that it is curious that the Appellant charged VAT on these invoices.
51. The Respondent has submitted that the fact that payment was done by the Head Office does not extinguish the requirements for operations of WHT on payments made. That any contracts signed between the Head Office and the service providers also bind the Appellant and hence the reason why service providers invoiced the Appellant. That the Appellant cannot contract on its own since it is not a legal entity and thus all contracts have

to be signed between head office and the suppliers, however, the suppliers don't differentiate between the Appellant and LG Dubai.

52. The Respondent thus argues that the Appellant's Appeal is devoid of merit and prays that it ought to be dismissed with costs to the Respondents and that the VAT tax liability of Kshs. 84,459,801/= be upheld together with additional interests and penalties until payment is made in full.

### **ISSUES FOR DETERMINATION**

53. The Tribunal, upon analyzing all the material on record and the issues raised by the respective parties has identified the following issues for determination;-

- a) Whether the VAT assessment of the period of January 2010 and May 2013 are statutorily time-barred?*
- b) Whether marketing services provided by the Appellant to LG Dubai are exported services?*
- c) Whether the Appellant should have accounted for WHT for the services by the marketing Agents?*

### **ANALYSIS AND FINDINGS**

***Whether the VAT assessment of the period of January 2010 and May 2013 are statutorily time-barred?***

54. The legality of the VAT assessment dated 5<sup>th</sup> July 2018, particularly for the period of January 2010 to May 2013 has been disputed by the Appellant on grounds that it is time barred.

55. To determine the above, the Tribunal invokes Section 3 of the Tax Procedures Act, 2015 which gives the following definitions;-  
***“assessment” means a self-assessment, default assessment, advance assessment, or amended assessment, and includes any other assessment made under a tax law***

*“amended assessment” means an amended assessment made by the Commissioner under section 31;*

*“default assessment” means a default assessment made by the Commissioner under section 29;*

56. The Appellant submits that as it did not file any self-assessment, the commissioner could only issue a default assessment as dictated under Section 29(1) of the Tax Procedures Act, 2015. That pursuant to section 29 (5) of the Act, the time limit for issuance of such default assessment is Five (5) years except in cases of wilful neglect, evasion or fraud by the taxpayer. Therefore, by giving its assessment for the period of January 2010 to May 2013, the Respondent’s assessment is time barred.

Section 29 of the Tax Procedures Act provides;-

*29(1) Where a taxpayer has failed to submit a tax return for a reporting period in accordance with the provisions of a tax law, the Commissioner may, based on such information as may be available and to the best of his or her judgement, make an assessment (referred to as a "default assessment") of:-*

- (a) the amount of the deficit in the case of a deficit carried forward under the Income Tax Act (Cap. 470) for the period;*
- (b) the amount of the excess in the case of an excess of input tax carried forward under the Value Added Tax Act, 2013 (No. 35 of 2013), for the period; or*
- (c) the tax (including a nil amount) payable by the taxpayer for the period in any other case.*

*(2) The Commissioner shall **notify in** writing a taxpayer assessed under subsection (1) of the assessment and the Commissioner shall specify—*

- (a) the amount assessed as tax or the amount of a deficit or excess of input tax carried forward, as the case may be;*



- (b) the amount assessed as late submission penalty and any late payment penalty payable in respect of the tax, deficit or excess input tax assessed;*
- (c) the amount of any late payment interest payable in respect of the tax assessed;*
- (d) the reporting period to which the assessment relates;*
- (e) the due date for payment of the tax, penalty, and interest being a date that is not less than 30 days from the date of service of the notice; and*
- (f) the manner of objecting to the assessment.*

*(5) Subject to subsection (6), an assessment under subsection (1) shall not be made after five years immediately following the last date of the reporting period to which the assessment relates.*

*(6) Subsection (5) shall not apply in the case of gross or wilful neglect, evasion or fraud by a taxpayer*

57. To the above assertion, the Respondent submits that the commissioner pursuant to Section 31(4) has powers to amend the assessment. The aforementioned provision states;-

The Commissioner may amend an assessment:-

- (a) in the case of gross or wilful neglect, evasion, or fraud by, or on behalf of, the taxpayer, at any time; or*
- (b) in any other case, within five years of—*
  - (i) for a self-assessment, the date that the self-assessment taxpayer submitted the self-assessment return to which the self-assessment relates; or*
  - (ii) for any other assessment, the date the Commissioner notified the taxpayer of the assessment.*



58. From a reading of the above provisions and perusal of the documents, it is quite evident that the Respondent indeed as under Section 29(2) of the TPA Act notified the Appellant of its findings vide the letter dated 18<sup>th</sup> January 2018 and later issued the assessment letter dated 5<sup>th</sup> July 2018 for the tax period of year 2010-2016, which facts are not disputed. The Tribunal is in agreement with the Respondent that the commissioner under Section 31(4) has powers to amend the assessment. Nevertheless, it is also apparent that the demand letter the Respondent places reliance on was also issued outside the statutory period of five years. Placing reliance on the demand letter therefore cannot act as a timeline-cure for the assessment issued on 5<sup>th</sup> July 2018.

***Whether marketing services provided by the Appellant to LG Dubai are exported services?***

59. Having vividly set out the parties' assertions above, the question before the Tribunal becomes who is the consumer of the marketing services provided by the Appellant. This then informs the question of whether the services are indeed exported.

60. Section 2 of the VAT Act, 2013 defines the following:-

**“export”** means to take or cause to be taken from Kenya to a foreign country, a special economic zone enterprise or to an export processing zone

**“service exported out of Kenya”** means a service provided for use or consumption outside Kenya.

61. The shortfall in the above section particularly in interpretation of use and consumption is evident. Fortunately, a litany of cases and the internationally accepted OECD Guidelines throws light on this aspect.

62. The Tribunal is bound by the position held by the High Court in the recent decision of **Commissioner of Domestic Taxes versus Total Touch**

Cargo Holland (2018) eKLR that in establishing whether services are exported, the place and or location of the performance of the services is not material, but the where the consumption of the services is located. This decision is fortified in the case of Paul Merchants Ltd v CCE, Chandigarh (2012(12)) TMI 424- CESTAT and F.H Services Kenya Limited vs Commissioner of Domestic Taxes (Appeal No. 6 of 2012). The above is a map in the applicability of Section 2 of the VAT Act, 2013

63. There is no difficulty in understanding that the Appellant is contracted by its head office for the provision of marketing services which then increase sales for the Kenyan distributors. In determining the issue at hand, reference to the OECD Guidelines which provide that identity of the ultimate consumer is determined by the service agreement and the customer of the services has the taxing rights over the said services.
64. The Tribunal also appreciates that from the facts and evidence adduced, there is no nexus between the Appellant and the Kenyan distributors, contractually. In the **Total Touch case (Supra)** the court while disagreeing with the Appellant's position stated:-

*“...the Appellant held the view that failure of KAHL to carry out cooling, scanning and palletizing of the Kenyan farmers produce would result in that produce not being of merchantable quality when it eventually arrived at the European destination. The produce would then not be sellable to the foreign consumers. **However, there is no evidence or even suggestion that any of the Kenyan farmers had a contract or an agreement with Kenya Airfreight Handling Limited (“KAHL”) or with the Respondent to ensure that the produce was prepared to be of merchantable quality in Europe. The service contract existed between the Respondent to facilitate the export of horticultural produce and flowers for consumption and use by persons outside Kenya**” (Emphasis added)*

65. In the foregoing, it is correct to hold that the marketing services provided by the Appellant are to its head office and not to the Kenyan distributors and the same can therefore not be given the meaning of Section 8 of the VAT Act, 2013(cited above)

***Whether Appellant should have accounted for WHT for the services by the marketing Agents?***

66. It is not disputed that withholding tax was not operated on the payment of services made to the marketing agents. The Appellant argues that the payments were made from its non- resident head office as it was the requisitor of the services.

67. In opposition to the above, the Respondent avers that the fact the payment was done by the head office does not extinguish requirement for the payment of withholding tax. In addition to, the marketing agents work with the Appellant to execute the subject services.

68. Section 3(1) of the Income Tax Act, cap 470 provides:-

***“Subject to, and in accordance with, this Act, a tax to be known as income tax shall be charged for each year of income upon all the income of a person, whether resident or non-resident, which accrued in or was derived from Kenya.”***

22. Both parties agree that the services rendered were marketing and advertising services with respect to LG products in Kenya. The subject payments therefore relate to professional fees and fall under the income described in section 10 of the Income Tax. The afore-mentioned provision states:-

***(10) ‘For the purposes of this Act, where a resident person or a person having a permanent establishment in Kenya makes a payment to any other person in respect of -***

*(a) a management or professional fee or training fee;*

*....the amount thereof shall be deemed to be income which accrued in or was derived from Kenya:*

*Provided that—*

- 1. this section shall not apply unless the payment is incurred in the production of income accrued in or derived from Kenya or in connexion with a business carried on or to be carried on, in whole or in part, in Kenya;*
- 2. this section shall not apply to any such payment made, or purported to be made, by the permanent establishment in Kenya of a non-resident person to that non-resident person*

69. Section 34 provides:-

*“Tax upon the income of a non-resident person not having a permanent establishment in Kenya which consists of—*

*(a) Management or professional fee*

*Shall be charged at the appropriate non-resident rate in force at the date of payment of such income and shall not be charged to tax under subsection (1)*

Section 35 (3)

*‘Subject to subsection (3A), a person shall, upon payment of an amount to a person resident or having a permanent establishment in Kenya in respect of—...*

*(f)management or professional fee or training fee, the aggregate value of which is twenty-four thousand shillings or more in a month:’*

70. A cursory perusal of the Income Tax Act dictates there is no provision of taxation of income paid by a non- resident not having a permanent establishment in Kenya.

71. Rule 2 of the Income Tax (Withholding Tax) Rules, 2001 defines a payer as a **“person who deducts withholding tax for the purposes of these Rules”** Following, it is does matter who pays for the services.

72. The three reference point made for taxation on income tax to be imposed is the payer, the payee and the place of accrual or derivation. Thus, in determining whether the marketing services are subject to Withholding tax, the Tribunal has in mind that in the instant case, that although the invoices are directed to the Appellant, there is no contractual obligation to warrant consideration of the services provided. Further the invoices adduced demonstrate that the head office makes payments to the marketing agents. As discussed above, the language of the income tax does not subject payments made by non-resident persons not having permanent establishment in Kenya to withholding tax.

73. Without prejudice to the above the Tribunal would not be serving justice if it failed to acknowledge that the Appellant conceded to payment of Kshs. 202,230,104/= in corporation Income Tax. Following, it is clear that income accrued and expense was incurred. from its books of accounts, the Respondent ought to impose the relevant expenses incurred by the Appellant to withholding tax in accordance with the Income Tax Act, cap 407.

74. Finally, in the foregoing, the penalty imposed by the Respondent on withholding tax virtue of Tax Procedures Act, 2015 fails.

## **FINDINGS**

24. With respect to issues for determination, the Tribunal therefore orders as follows:-

- I. The Tribunal allows the Appeal in part.

- II. The Objection Decision on VAT is set aside and annulled.
- III. The Respondent to impose withholding tax on the Appellant's expenses as applicable.
- IV. Each party to bear its own costs.

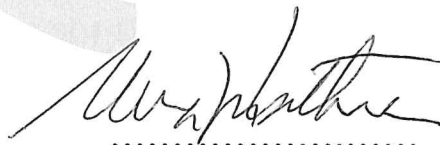
**DATED and DELIVERED at NAIROBI this 31<sup>st</sup> day of March, 2020**



.....  
**PATRICK LUTTA**  
**CHAIRPERSON**



.....  
**HELEN BILA**  
**MEMBER**



.....  
**MWAI MBUTHIA**  
**MEMBER**



.....  
**ELI NJERU**  
**MEMBER**