

REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
APPEAL NO. 183 OF 2017

INTELLECAP ADVISORY SERVICES PRIVATE LIMITED.....APPELLANT

VERSUS

COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

JUDGMENT

BACKGROUND

1. The Appellant is a limited liability company registered in Kenya as a branch of New Initiatives and Africa Intellicap- India (the Parent Company).
2. The Respondent is a principal officer of Kenya Revenue Authority, the Authority is an agency of the Government established under the Kenya Revenue Authority Act for purposes of assessing, collecting and accounting for government revenues.
3. In July 2017, the Respondent carried out a verification exercise in respect of VAT, following which the Respondent raised an assessment of Kshs. 13,411,829/- on account of VAT in respect of services offered by the Appellant to the Shell Foundation and World Bank for the period December 2015 to June 2017.
4. The Appellant objected to the assessment on the basis that the Appellant did not render any taxable services to the Shell Foundation or to the World Bank and that the funds received from these organisations ought not to be subjected to VAT.

5. By its objection decision made on 16th October 2017 the Respondent affirmed its assessment of Kshs. 13,411,829/-.
6. The Appellant being aggrieved by the objection decision proceeded to file the present Appeal.

THE APPEAL

8. The grounds of Appeal as set out in the Memorandum of Appeal dated 7th December, 2017 filed before the Tribunal on the 8th December, 2017 are as follows: -
 - (a) The assessment is erroneous and excessive.
 - (b) The Respondent has failed and/or neglected to consider pertinent information in rendering its objection decision.
 - (c) The Appellant stands to suffer irreparable economic harm unless the relief is granted.
 - (d) It is in the interest of justice to grant the relief sought.

THE APPELLANT'S CASE

9. The Appellant's case is premised on the hereunder documents filed before the Tribunal:-
 - a) The Statement of Facts filed on the 8th December, 2017 together with the documents attached thereto.
 - b) The appellant's written submissions dated 23rd January, 2020 together with the legal authorities filed therewith on the 24th January, 2020.
10. The Appellant contends that its parent company, New Initiatives and Africa Intellicap-India entered into an agreement with Shell Foundation, a registered charity, the terms of which were that Shell Foundation would

provide funding to the Appellant's parent company to finance replication of its work in Africa.

11. By a commitment letter dated 4th September 2015 Shell Foundation, agreed to provide donor funding to the Appellant to finance the Appellant's operations in East Africa. The Appellant produced a copy of the Commitment Letter.
12. The Appellant asserts that under the Commitment Letter the funds were to be split between the core cost, which included manpower, upfront investment in tools, digital platforms and research with payments being linked to completion of certain milestones defined in the Contract. The Appellant asserts that as proof of the achievement of each milestone, the Appellant would prepare a report. Shell Foundation would then approve the report following which the Appellant would receive the agreed funds.
13. The Appellant further contends that by an Agreement dated 20th March 2017 the Appellant entered into an agreement with the World Bank where the World Bank would finance the Appellant's initiative; SANKALP Africa summit 2017. The World Bank in addition sponsored various delegates to the summit. The Appellant produced a copy of a Contract dated 4th March 2017 in support of this assertion.
14. The Appellant contends that the funds received on the projects have formed the basis of the Respondent's assessment because the Appellant inadvertently declared the funds as zero-rated sales while filing its VAT returns.
15. The Appellant contends that these funds were in fact grants and were therefore not received as a result of a sale or any taxable transaction and are therefore not subject to VAT.

16. In its submissions the Appellant framed three issues for determination which formed the basis of its submissions namely:

- (a) Whether the Appellant made a supply of services to Shell Foundation?
- (b) Whether the transaction between the Appellant and the World Bank amounted to a supply of service subject to VAT; and
- (c) Whether there was a legal basis for assessing VAT

a) Whether the Appellant made a supply of services to the Shell Foundation

- 17. The Appellant asserts that the objectives of Shell Foundation include creating and scaling business solutions to two major global development challenges: access to energy and sustainable mobility.
- 18. The Appellant contends that in 2014 Shell Foundation, while working with the Appellant's parent company, discovered a gap in the market for combined industry services and market infrastructure in Africa.
- 19. Shell Foundation had successfully partnered with the Appellant's parent company in India to increase the flow of capital to early strategic enterprises and for creation of support for emerging high-impact sectors. Accordingly, the Foundation elected to provide a charitable grant to the Appellant's parent company to aid in replication of the parent company's work in East Africa.
- 20. The Appellant asserts that the contract between the Appellant's parent company and Shell Foundation provided that the parent company would spend the grant of USD 1 Million in setting up a registered branch office. The funding was to be split between the core cost which included manpower and upfront investments into tools, digital platforms and research. The parties agreed that the funding provided by shell Foundation

would provide an anchor to secure additional capital with an aim that the branch office would have chief viability within five years.

21. The Appellant therefore contends that the relationship between Shell Foundation and the Appellant's parent company was born out of a contract and was the basis upon which the Appellant received funds from Shell Foundation.
22. The Appellant submits that from the wording of the contract dated 8th September 2015 between itself and Shell Foundation the funds which were to be dispatched to the Appellant and which form the crux of this dispute were not given in exchange for a service as contemplated in the VAT Act and cannot therefore be said to be subject to VAT. The Appellant relies on the cases of:

- a) *Republic V Commissioner of Domestic Taxes Large Taxpayer's Office Ex-Parte Barclays Bank of Kenya Ltd [2012] eKLR* where the court stated that:

"The approach of to this case is that stated in the oft cited case of *Cape Brandy Syndicate v Inland Revenue Commissioners [1920] 1 KB 64* as applied in *T.M. Bell v Commissioner of Income Tax [1960] EALR 224* where Roland J. stated, "...in a taxing Act, one has to look at what is clearly said. There is no room for intendment as to a tax. Nothing is to be read in, nothing it to be implied. One can only look fairly at the language used... If a person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be."

As this case concerns the interpretation of the Income Tax Act, I am also guided by the dictum of *Lord Simonds in Russell v Scott [1948]*

2 ALL ER 5 where he stated, *“My Lords, there is a maxim of income tax law which, though it may sometimes be overstressed yet ought not to be forgotten. It is that the subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax upon him”*.

b) Eldo City Limited v Corn Products Kenya Ltd & another [2013] eKLR where it was stated as follows:-

“It is trite law that in deciding disputes, it is the court’s duty to give effect to the intention of the parties. *The parties’ intention is discernible from the documents and conduct of the parties.* However, onerous a document or contract may be, the court’s duty is to give effect to it. In the case of *Smith –vs- Cook (1891) AC 297 at 303* the court held: -

“The duty of the court is to give the natural meaning to the language of the deed unless it involves some manifest absurdity or would be inconsistent with some other provision of the deed and would therefore be contrary to the intention of the parties as appearing upon the face of the deed.”

23. The Appellant argues that although the Respondent relies on the fact that the Appellant was issuing invoices to assert that the relationship between the Foundation and the Appellant was of a business nature; the invoices were in fact raised for accounting purposes only.
24. The Appellant contends that there was an express provision in the Foundation’s Administrative Protocol as provided in Appendix 2 of the Contract that the request for payment were not to be submitted to the Foundation in the form of invoices.

25. The Appellant therefore submits that the invoices were not raised for a service offered and should therefore not be construed as such. The Appellant relies on the payment schedule set out in Clause 7 of the Contract which provides for the project milestones that the Appellant had to fulfil in order to receive payment. The Appellant argues that for all intents and purposes the funds received were seed capital to set up operations in Kenya.
26. The Appellant further submits that the Contract provides certain conditions for the Grant including requiring the parent company not to alter or make changes in ownership or control of the Appellant without the prior approval of the Foundation(Clause 17); the prohibition of the use of the funds for any other purpose other than what is outlined in the Contract (Clause 18) as well as a precondition requiring the parent company to furnish the Foundation with the Memorandum and Articles of Association and the most recent audited financial statements.
27. The Appellant submits that in a normal business contract for provision of services, the recipient of the service would not dictate how the money paid for the service is to be used.
28. The Appellant further submits that extrinsic evidence whether oral or written cannot be used to show the intention, contradict, vary or add to the terms of a written contract; and that therefore the Respondent cannot use the invoices raised to construe a transaction or a requirement for payment for services allegedly provided in Kenya.
29. The Appellant asserts that the contention by the Respondent that the Appellant offered services to a third party in Kenya and charged the Foundation for the services rendered is not plausible. The Appellant submits that if there was any agreement of such nature it would have been expressly stated in the contract between the Appellant and the Foundation.

30. The Appellant therefore submits that the Respondent cannot impose an obligation to pay tax on funds received from the Foundation simply on the suspicion that the funds were meant to pay for a service offered to a third party to the contract under which the funds were disbursed.

b) Whether the transaction between the Appellant and the World Bank amounted to a supply of services subject to VAT

31. The Appellant asserts that the World Bank is an international financial institution that provides loans and grants to support various investments. The Appellant organises the Sankalp Forum, which is a platform that brings together business leaders, investors and entrepreneurs for networking, collaboration and partnerships. The Appellant seeks financial assistance from various quarters to cover the costs of organising the forum.
32. The Appellant contends that although the contract entered into on 21st March 2017 with the World Bank states that the World Bank contracted to purchase a service from the Appellant which service was described as the “Sankalp Africa Summit 2017”; the funds received from the World Bank were aimed at covering the cost of hosting the event and were not in any way connected to a direct service offered to the World Bank.
33. The Appellant further submits that the payment terms in the Contract state that the World Bank was financing the project and that the funds were to be disbursed upon signing of the Contract. The final payment was to be paid upon submission of a “World Bank Approved Project Report.” The Appellant therefore submits that the funds received from the World Bank were a donation to finance a project and not a payment for services supplied.

c) Whether there was a legal basis for assessing VAT

34. The Appellant submits that the Respondent is a creature of statute which can only exercise the powers conferred on it by the enabling Act.

35. The Appellant then contends that the Value Added Tax Act 2013 defines a supply of services as:

“...anything done that is not a supply of goods or money, including-

a) the performance of services for another person.

b) the grant, assignment, or surrender of any right.

c) the making available of any facility or advantage; or

d) the toleration of any situation or the refraining from the doing of any act.”

36. The Appellant submits that the Contract between the Foundation and the Appellant involved the supply of money. The Appellant argues that the Foundation contracted the Appellant’s parent company to replicate its work in Africa; and that the contract did not require the parent company or the Appellant to supply any service to the Foundation nor was the Contract aimed at financing services offered by the Appellant to local entities.

37. The Appellant relies on the case of ***Republic v Kenya Revenue Authority & Another Ex-parte Fontana Limited [2014] eKLR*** which cited with approval ***Kanjee Naranjee v Income Tax Commissioner [1964] EA 257*** to argue that any tax imposed on a subject is dictated by the terms of legislation and that the taxing authority must satisfy itself that the transaction fits within the definition of a statute.

38. The Appellant therefore submit that the funds received from the World Bank and the Foundation are donations for which no services was expected in return. Accordingly, the Appellant contends that the contract with the Foundation and with World Bank do not attract a VAT obligation.

39. The Appellant further argues that to uphold the VAT assessment on funds received from the Foundation and the World Bank is tantamount to rewriting the contract between the parent company and the Foundation. The Appellant relies on the case of ***National Bank of Kenya Ltd Vs Pipelastic Samkolit (K) Limited*** where the Court of Appeal held that “***a court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contracts unless coercion, fraud or undue influence are pleaded and proved.***”
40. The Appellant therefore submits that it did not offer any vatiable services to the World Bank or to Shell Foundation and that it did not also offer any service to a local entity with the intention that the World Bank or the Foundation would pay for such services.
41. The Appellant therefore argues that the assessment lacks a basis in law and prays that the Tribunal vacates the assessment in its entirety and grants any such orders as it deems fit.

The Appellant's Prayers

42. The Appellant prays that:

- a) The assessment and demand of Kshs. 13,411,829/- by the Respondent be vacated.
- b) The Honourable Tribunal be at liberty to make any such orders as it deems necessary in the circumstances.
- c) Cost of the application be in the cause.

THE RESPONDENT'S CASE

43. The Respondent's case is premised on the following documents filed before the Tribunal:-
- a) The Respondent's Statement of Facts dated and filed on 3rd February, 2021 together with the documents attached thereto.
 - b) The Respondent's written submissions dated 4th February, 2021 together with the legal authorities filed on the same date.
44. The Respondent contends that the Appellant was established to offer business consultancy services and advisory services targeting small and medium enterprises in Kenya and the East African region.
45. The Respondent contends that the Appellant organised the Sankalp Africa Summit, 2017 in Kenya and then issued invoices to organisations like Shell Foundation UK and the World Bank for consultancy services offered in Kenya through the summit.
46. The Respondent avers that it carried out a VAT verification exercise which was triggered by a high VAT credit of Kshs. 4,062,535/- as at December 2016. The Respondent issued notices to verify the VAT credit on 8th May 2017 and 28th July 2017. The results of the verification were shared with the Appellant through an assessment notice dated 3rd August 2017 which was objected to by the Appellant through an objection letter dated 1st September 2017. The Respondent issued its objection decision vide a letter dated 16th October 2017 confirming its assessment.
47. The Respondent contends that the contract between the Appellant and the World Bank clearly states that the World Bank was a purchaser while the Appellant is a contractor for the services.

48. The specific services purchased by the World Bank had been described as the Sankalp Africa Summit 2017 which was to commence on 20th March to 30th June 2017. The Respondent contends that the services to be offered to the World Bank required professional skills, personnel and technical resources.
49. The Respondent contends that the consideration for the services was USD 40,000.00; and that this entire amount should have been subject to VAT under Section 5(1)(a) of the Value Added Tax Act, 2013 (the VAT Act).
50. The Respondent further asserts that appendix 1 in the Letter of Commitment dated 4th September 2015 from the Shell Foundation shows that the Commitment Letter was for provision of services by the Appellant which included the Sankalp Africa Summit.
51. The Commitment Letter was from 10th August 2015 to 9th August 2017 for a consideration of USD 1,000,000. The Respondent contends that the Appellant raised various invoices to Shell Foundation for consultancy services offered which the Foundation paid for. Accordingly, the Appellant provided consultancy services and therefore the entire amount of USD 1,000,000 should be subject to VAT.
52. The Respondent disputes that the payments made by the World Bank to the Appellant were grants and contends that the contract and invoices issued indicate that the payments were received for services rendered during the Sankalp Africa Summit 2017 held in Kenya. The Respondent contends that the final consumers of these services were the various people and organisations who attended the summit organised by the Appellant. The Respondent relies on the copy of the Contract and the invoices issued to the World Bank. The Respondent also produced an extract from the Appellant's website showing more details on the summit.

53. The Respondent further averred that the Agreement between the Appellant and Shelf Foundation has been drafted to show a donor/grant and grantee/recipient relationship. However, the agreement and the invoices issued to Shelf Foundation show that the payments were for fees based on services offered by the Appellant. The Respondent refers to Appendix 1 of the Agreement and asserts that Appendix 1 clearly shows that the Appellant will offer services related to enterprise development, advisory services and market infrastructure and organise to the Sankalp Africa Summit.
54. The Respondent disputes the Appellant's assertion that it inadvertently declared the funds are zero-rated while filing its VAT Returns and argues that the payments were from consultancy services offered. The Respondent avers that the invoices issued by the Appellant clearly show that these were for consultancy fees which were acknowledged and declared as income by the Appellant while filing for income tax in the year 2016. The Respondent has produced copies of the returns filed and the Appellant's sales analysis respectively.
55. The Respondent further asserts that the supply by the Appellant constituted consultancy services that were made in Kenya and whose final consumers were in Kenya and therefore fell within the ambit of Section 5(1) of the VAT Act, 2013 which states that:

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

(a) a taxable supply made by a registered person in Kenya.

(b) the importation of taxable goods; and

(c) a supply of imported taxable services.”

56. The Respondent contends that the Appellant issued invoices to other organisations for the Sankalp Africa Summit held in Kenya without charging

VAT. The Respondent submits that the invoices were for service which were consumed locally by the participants of the Summit and therefore taxable at the standard rate. The Respondent produced copies of the invoices referred to.

57. The Respondent relies on **VAT Appeal No. 11 of 2013, Coca Cola Central, East and West Africa Limited v Commissioner of Domestic Taxes** as cited in **Commissioner of Domestic Taxes v Total Touch Cargo Holland [2018] eKLR** in which the VAT Tribunal stated that:

“To consume means to use up values means to put to a particular purpose to take up something”.

...

“Consumption or use of a service is not determined by reference to the payer of the service or location of the payer of the service or location of the person who is requisitioning for the service. What is pertinent is the location of the consumer.”

58. The Appellant asserts that the services in this case were finally used or consumed in Kenya.
59. The Respondent further relies on Section 11, Part 2 of the First Schedule of the VAT Act, 2013 which states:

“The supply of—

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

(b) social welfare services provided by charitable organizations registered as such, or which are exempted from registration, by the Registrar of Societies under section 10 of the Societies Act (Cap.

108), or by the Non- Governmental Organizations Co-ordination Board under section 10 of the Non-Governmental Organization Coordination Act (Cap. 134) and whose income is exempt from tax under paragraph 10 of the First Schedule to the Income Tax Act (Cap. 470), and approved by the Commissioner of Social Services:

Provided that this paragraph shall not apply where any such services are rendered by way of business.”

60. The Respondent contends that although Shell Foundation is a renowned charitable organisation, the services provided by the Appellant were rendered by way of business and therefore do not meet the criteria for exemption.
61. The Respondent therefore submits that the Appellant is asking the Tribunal to approve an illegality that will lead to a loss of revenue to the Government.

The Respondent's Prayers

62. The Respondent prays that the Tribunal finds that:
- a) The Appellant is to pay the Respondent Kshs. 13,411,829/- in respect of VAT for the period December 2015 and June 2017 together with interest and penalty accrued.
 - b) The Appeal lacks merit and the same should be dismissed with costs.

ISSUES FOR DETERMINATION

63. After considering the submissions of both parties the Tribunal framed the issues for determination as follows:

- (a) Whether the transaction between the Appellant and the World Bank and Shell Foundation amounted to supply of services.
- (b) Whether the Respondent erred in demanding VAT from the Appellant.

ANALYSIS AND FINDINGS

a) *Whether the transaction between the Appellant and the World Bank and Shell Foundation amounted to supply of services.*

- 64. The Appellant offered consultancy services to Shell Foundation and the World Bank during the period December 2015 to June 2017. It was its contention that it did not offer any taxable services and the funds received from them ought not to have been subjected to VAT. The Respondent on the other hand argued that the payments received from the two organizations were for services rendered by the Appellant and therefore subject to VAT.
- 65. The Appellant submitted that the payment received from the World Bank was a donation and not a payment for services. It says that the Contract between the Bank and the Appellant was for financing a project, (Sankalp Africa Forum 2017) and not for supply of any services in return by the Appellant. What the Appellant was in effect telling the Tribunal was that the funds received from World Bank were a donation and not taxable because the bank was not getting any services in exchange from the Appellant. This despite existence of a contract between the Appellant and World Bank.
- 66. The Tribunal was reluctant to treat the funding received from the World Bank as a grant when the contract of services and invoices were clear that the payment were consideration received by the Appellant. Furthermore, even if the World Bank were to enjoy a privileged tax status, such status

could not be transferred to the Appellant. Taxable services were delivered and consumed in Kenya and were not exempt supplies.

67. Similarly, in the case of funds received from Shell Foundation, the Appellant argued that the funds were a grant to its parent company made for purposes of replicating its work in Africa and not for exchange of any services between the Foundation and the Appellant. The Tribunal examined the Contract and found that the services the Appellant was funded to “investigate market demand for combined services (advisory support, incubation, convening and investment banking) and market infrastructure, (data, research and industry benchmarking) to spur the growth of efficient investment ecosystem in Africa”. In the view of the Tribunal services fell in the category of consultancy services which were paid for by Shell Foundation on achievement of certain milestones. The Tribunal found it irresistible to find that these consultancy services were offered in the course of business by the Appellant.

68. The Tribunal turned to Section 2 of the VAT Act to determine whether the services supplied by the Appellant were taxable supplies. The Section defines supply of services as follows:

“Supply of services” means anything done that is not a supply of goods or money, including—

(a) the performance of services for another person.

(b) the grant, assignment, or surrender of any right.

(c) the making available of any facility or advantage; or

(d) the toleration of any situation or the refraining from the doing of any act.”

69. The Act further defines a “taxable supply” as

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

70. The Tribunal weighed the services offered by the Appellant and for which it received funds against these definitions and found that they fell on all fours within the definition of the term “taxable supply”. Based on the foregoing, the Tribunal determined that the services delivered by the Appellant and for which it received funding from the World Bank, and Shell Foundation were taxable.

b) Whether the Respondent erred in demanding VAT from the Appellant.

71. The Appellant submitted that it did not offer any taxable services to the World Bank or to Shell Foundation and that it did not also offer any service to a local entity with the intention that the World Bank or the Foundation would pay for such services and therefore the assessment lacked legal basis.

72. In the view of the Tribunal, it is immaterial who pays for the supply, or for that matter, the location of the taxpayer. Of consequence with respect to supply of services is the location where the supply of services is produced and whether it is produced during business carried out by that person.

73. A similar position was held in **Commissioner of Domestic Taxes v Total Touch Cargo Holland [2018] eKLR** where it was stated that:

“Consumption or use of a service is not determined by reference to the payer of the service or location of the payer of the service or location of the person who is requisitioning for the service. What is pertinent is the location of the consumer.”

74. The Tribunal is reluctant to agree with the Appellant's assertion that it was not offering its services the intention that the World Bank or the Foundation would pay for such services given that written contracts existed between the organisations and the Appellant. In this regard, the Tribunal found it irresistible to make the finding that consultancy services offered by the Appellant in Kenya were taxable.

75. Section 5(3) of the VAT Act places the liability of paying VAT on the person making the supply. It provides that:

"5(3) Tax on a taxable supply shall be a liability of the registered person making the supply and, subject to the provisions of this Act relating to accounting and payment, shall become due at the time of the supply."

76. In view of the foregoing, the Tribunal determined that the Respondent did not err in demanding VAT from the Appellant.

FINAL DECISION

77. After analyzing the facts as presented by both parties in its submissions and supporting documents therewith, the Tribunal determined that the Appeal lacks merit and must fail.

78. The Orders that recommend themselves and which the Tribunal makes are as follows: -

- i) The Appeal is hereby dismissed.
- ii) The Objection decision dated 16th October 2017 is hereby upheld.
- iii) Each party to bear its costs.

79. It is so ordered.

DATED and DELIVERED at NAIROBI on this 23rd day of July, 2021.



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ERIC N. WAFULA
CHAIRMAN



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CATHERINE N. MUTAVA
MEMBER



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GABRIEL M. KITENGA
MEMBER



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ABRAHAM K. KIPROTICH
MEMBER