

REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
APPEAL NO. 526 OF 2019

KCB BANK KENYA LIMITED.....APPELLANT

VERSUS

COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

JUDGMENT

BACKGROUND

1. The Appellant is a limited liability company incorporated in Kenya under the Companies Act. Its principal business activity is the provision of banking, financial and related services which are regulated by the Central Bank of Kenya.
2. The Respondent is a principal officer of the Kenya Revenue Authority, a body established under the Kenya Revenue Authority Act, Cap. 469 of the Laws of Kenya, and is charged with the responsibility of collection and administration of revenue on behalf of the Government of Kenya
3. The Respondent carried out an excise duty audit after which the Appellant was issued with an assessment on 19th July 2019 on account of unpaid excise duty amounting to Kshs. 760,395,044.00.

4. The assessments were based on analyses of the Appellant's financial statements for the period August 2013 to October 2017.
5. The Appellant lodged a notice of objection on 19th August 2019 and the Respondent issued its Objection Decision on 18th October 2019.
6. In its Objection Decision, the Respondent demanded excise duty in respect of:
 - i. Fees and commissions from non-resident sources in respect of money transfer services with Western Union Network (France) SAS, MoneyGram Payment systems Inc., Ria Financial Services (Continental Exchange Solutions) and World Remit Ltd.
 - ii. Management fees earned from Chase Bank.
 - iii. Commission from sale of shares.
 - iv. Appraisal fees.
7. The Appellant filed its Appeal against the Objection Decision on 29th November 2019. After filing the Appeal, parties engaged in discussions under the Alternative Dispute Resolution (ADR) Mechanism.
8. As a result of these discussions, the Respondent vacated its excise duty claim on fees and commissions earned from non – resident sources and commissions earned from sale of shares. The Appellant conceded to paying excise duty on the management fees earned from Chase Bank. The Respondent also vacated its assessment on the excise duty on appraisal fees for the period of August 2013 – July 2014 which were time barred under the Tax Procedures Act. However, the parties were unable to reach a consensus on the dispute in respect of loan appraisal fees for the period of August 2014 – October 2017.

9. The parties filed a consent on 18th February 2021 indicating that the matter was partially settled.
10. The Appellant filed its written submissions and bundle of authorities on 25th February 2021.
11. The Respondent filed its Statement of Facts and written submissions on 17th December 2019 and 8th March 2021 respectively.

APPELLANT'S CASE

12. The Appellant set out its case in support of the Appeal through its Memorandum of Appeal and Statement of Facts both dated 28th November 2019 together with its written submissions and witness statement both dated 11th February 2021. Its grounds of appeal (excluding those relating to the matters settled in the ADR) are THAT:-
 - i.* The Respondent erred in law and fact in finding that appraisal fees fell under the ambit of “other fees” as defined by the Excise Duty Act and thereby subjecting the fees to excise duty.
 - ii.* The Respondent erred in law in failing to appreciate that appraisal fees is part of interest and thus exempt from the Customs and Excise Act and the Excise Duty Act.
 - iii.* The Respondent, alternatively and without prejudice erred in law and fact in failing to appreciate that the appraisal fees were a “return on loan”.

- iv. The Respondent erred in levying a late payment penalty and interest as a result of the fact that excise duty was not payable on exported services, commissions on sale of shares, management fees and appraisal fees.
 - v. That this Honourable Tribunal has jurisdiction to hear this appeal.
13. As stated hereinabove, most of the issues set out in the Appellant's grounds of appeal were settled during the ADR and only the issue of excise duty on loan appraisal fees for the period August 2014 to October 2017 remained for determination before the Tribunal.
14. Vide its written submissions dated 25th February 2021, the Appellant submitted that the issues for determination before the tribunal were as follows:
 - i. Whether in the absence of a definition of interest in the Excise Duty Act (EDA), the definition of interest in the Income Tax Act (ITA) could be applied?
 - ii. Alternatively and without prejudice to the foregoing, whether in any event, the appraisal fees constitute a return on loan?
15. The Appellant submitted that it was not in dispute that the term "interest" is not defined in Part III of the First Schedule to the EDA thus, the definition of the term "interest" as defined in the ITA should be applied. Section 2 of the ITA defines interest as:-

“interest payable in any manner in respect of a loan, deposit, debt, claim or other right or obligation, and includes a premium or discount by way of interest.”

16. The Appellant argues that when the definition of interest as provided in the ITA is applied, the appraisal fees fall within the definition of interest and is therefore excluded from the definition of “other fees” in Part III of the fifth Schedule to the EDA. Consequently, excise duty is not chargeable.
17. The Appellant relied on the case of **Co-operative Bank of Kenya Vs Commissioner of Domestic Taxes, TAT Appeal No. 45 of 2017** in which the Tribunal held *that:-*

“The Taxman responsible for administration of a tax regime cannot purport to assert that taxes imposed on the same taxpayer conducting a particular business can then be administered as two completely different revenue streams and are not intertwined. In the absence of a definition of “interest” in the Excise Duty Act, the Tribunal finds that the operational definition is found in the Income Tax Act.”

18. The Appellant also relied on the case of **Barclays Bank of Kenya Ltd Vs Commissioner of Domestic Taxes, TAT NO.137 OF 2016**, where the Tribunal similarly applied the definition of interest in the ITA and concluded that the Respondent’s attempt to charge excise duty was erroneous. The Tribunal held that:-

“From our understanding of the parties opposing submissions, the issue in contention under this limb of Appeal boils down to what the term “interest” entails and whether it encompasses other lending fees or not. Unfortunately, the repealed Customs

and Excise Act did not provide a definition of what interest entails. Neither was the amendment introduced by the Finance Act, 2013 into the Fifth Schedule of the repealed Customs and Excise Act clear as to the scope of what fell under “other fees”. This clearly points to the presence of a lacuna in the law as it was at the time of the assessment.”

19. The Appellant further submitted that a return on loan is also excluded from the definition of “other fees” in Part III of the First Schedule to the EDA. Also, that appraisal fees, loan commitment and processing fees are proceeds received by it as a result of disbursing a loan and therefore excluded from other fees.

RESPONDENT’S CASE

20. The Respondent set out its case through its Statement of Facts and Written Submissions dated 17th December 2019 and 8th March 2021 respectively. It acknowledged that parties had reached a consent on most of the issues in dispute and only the issue on loan appraisal fees was pending determination.
21. The Respondent submitted that loan commitment fees and processing fees do not constitute interest as contended by the Appellant but fall within the definition of “other fees” as set out in the EDA. It relied on the Central Bank of Kenya’s survey of bank charges and lending rates which provides for the various costs associated with a loan in addition to interest. This document provides that in addition to interest costs,

other costs include commitment /facility fee, processing fee etc., which are termed as general costs.


22. The Respondent submitted further that based on the aforesaid documents by the Central Bank of Kenya and the Kenya Bankers Association, it was evident that the Kenya Banking Industry acknowledges that loan commitment and processing fees and other general costs are different from interest. The Appellant cannot therefore argue that for purposes of excise duty, interest includes loan commitment and processing fees and fees for bills discounting. It submitted that industry practise has shown that interest is a separate charge from other costs or charges in terms of definition and treatment.

23. The Respondent relied on the case of London and Eastern Co.-vs-Berriman (1946) 1 All ER 255, where Lord Simmons stated that:-

“It is only by reference to the industry that the meaning can be ascertained.... It remains a question of evidence what the words mean in the industry. They are a term of art and it is by those skilled in the art that I must be instructed.”


24. It was the Respondent’s submission that the Finance Act 2013 defined “other fees” to exclude interest. Interest is however not defined in the Customs and Excise Act (CEA). The Income Tax Act as relied on by the Appellant cannot be used to define terms used in the CEA unless provided in the statute. Further, the ITA provides for taxation of income while excise duty is chargeable on excisable goods and services.

25. The Respondent further relied on Article 210 of the Constitution of Kenya, 2010 and stated that one cannot transfer the intendment or express provisions of one tax statute to another tax statute that is silent on the said provision. The fact that the definition of “other fees” in CEA as amended by the Finance Act, 2013 was different from the definition of other fees under the EDA, which clearly shows that the intention of the legislature under the two Acts was not the same.




ISSUES FOR DETERMINATION

26. The parties entered into a partial consent on 17th February 2021 and settled most of the issues in the Objection Decision issued by the Respondent on 18th October 2019.



27. The parties could not agree on excise duty on loan appraisal fees but agreed that the amount be reduced from principal tax of Kshs. 313,724,092/- to Kshs. 176,306,241.00 which was referred back to the Tribunal for determination.



28. Both parties confirmed this position vide their written submissions dated 25th February 2021 and 8th March 2021, in which they stated that they had consented on all issues save for the determination of the applicability of excise duty on loan appraisal fees.

29. The Tribunal has identified the following issues for determination:-

- i. Whether loan appraisal fees are “other fees charged by financial institutions” as provided in paragraph (4) of Part II of the First Schedule to the Excise Duty Act, 2015.
- ii. Whether loan appraisal fees are “interest” and whether the definition of interest in the Income Tax Act can be applied to determine whether the loan appraisal fees are “interest” for the purposes of the Excise Duty Act.
- iii. Whether the Respondent was justified in levying excise duty on loan appraisal fees for the period August 2014 to October 2017.

ANALYSIS AND FINDINGS

- i. Whether loan appraisal fees are “other fees charged by financial institutions” under the repealed Customs and Excise Act and as provided in paragraph (4) of Part II of the First Schedule to the Excise Duty Act, 2015.
30. The Appellant submitted that loan appraisal fees charged by the Bank included negotiation commissions, processing fees and arrangement commissions in respect of loans and credit facilities. It argued that these fees were part of interest and were thus exempt from both the repealed CEA and the Excise Duty Act, 2015 (EDA).

31. In the alternative, the Appellant submitted that appraisal fees were a return on loan in which case the Bank amortized the fees over the entire term of the loan and were thus exempt from excise duty.
32. The Respondent on the other hand maintained that loan appraisal fees fell under the ambit of “other fees” as defined in EDA and were thus not exempt. It clarified that the fees were normally charged on a one-off basis and not amortized for the entire loan period as alleged by the Appellant.
33. Part II of the First Schedule to the EDA is the governing law on what amounts to excisable services. It enumerates the services as follows:-

“1. Mobile cellular phone services shall be charged excise duty at the rate of ten percent of their excisable value.

2. Other wireless telephone services shall be charged excise duty at the rate of ten percent of their excisable value.

3. Excise duty on fees charged for money transfer services by cellular phone service providers, banks, money transfers agencies and other financial service providers shall be ten percent of their excisable value.

4. Excise duty on other fees charged by financial institutions shall be ten percent of their excisable value”

34. With loan appraisal fees not expressly enumerated as forming part of the excisable services and also having not been expressly exempted under Part B of the EDA, the issue before the Tribunal is the determination of whether loan appraisal fees form part of “other fees charged by financial institutions” as provided in paragraph (4) above.
35. It is the Tribunal's view that the nature of loan appraisal fees is the determinant factor in this matter. Whereas the Appellant argues that it is interest or return on loan, the Respondent avers that it is “other fees”.
36. In the absence of a definition of “interest” or “other fees” in the repealed CEA and the EDA, the Appellant argued for the application of the definition in the ITA to which the Respondent was opposed on the grounds that Income Tax and Excise Duty are two different tax regimes. Fortunately, the above matters have been previously argued and decided by the Tribunal as set out hereunder.

ii. Whether loan appraisal fees are “interest” and whether the definition of interest in the Income Tax Act can be applied to determine whether the loan appraisal fees are “interest” for the purposes of the repealed Customs and Excise Act and the Excise Duty Act, 2015.

37. The Appellant submitted that the definition of “interest” in the Income Tax Act as was applied by the Tribunal in the cases of Co-operative Bank of Kenya v Commissioner of Domestic Taxes (TAT Appeal no.45 of 2017), Barclays Bank of Kenya Ltd v Commissioner of Domestic

Taxes (TAT no.137 of 2016) and the Stanbic Bank Kenya Ltd v Commissioner of Domestic Taxes (TAT no.176 of 2016) in which Tribunal decided that appraisal fees, loan commitment and processing fees fall within the definition of interest which is specifically excluded from “other fees” . The Respondent's claim for excise duty is therefore erroneous.

38. Notwithstanding and without prejudice to the foregoing, the Appellant submits that appraisal fees, loan commitment and processing fees are proceeds received by it as a result of disbursing a loan and therefore excluded from “other fees”.

39. The Tribunal notes that as a matter of fact it has in several cases already applied the definition of “interest” in the Income Tax Act as set out below:-

A. In Co-operative Bank of Kenya v Commissioner of Domestic Taxes (TAT Appeal no.45 of 2017), the Tribunal at paragraphs 67 and 68 held that:-

“67. The taxman responsible for administration of a tax regime cannot purport to assert that taxes imposed on the same taxpayer conducting a particular business can then be administered as two completely different revenue streams and are not intertwined. In the absence of a definition of “interest” in the Excise Duty Act, the Tribunal finds that the operational definition is found in the Income Tax Act

68. Under the Income Tax Act, interest is defined at Section 2 of the Income Tax Act as follows:-

“interest” (other than interest charged on tax) means interest payable in any manner in respect of a loan, deposit, debt, claim or other right or obligation, and includes a premium or discount by way of interest and commitment or service fee paid in respect of any loan or credit”

B. In Barclays Bank of Kenya Ltd -vs- Commissioner of Domestic Taxes (TAT no.137 of 2016) the Tribunal similarly applied the definition of “interest” in the Income Tax Act and concluded that the Respondent’s attempt to charge excise duty was erroneous. The Tribunal at paragraphs 65 to 69 held as follows:-

“65. From our understanding of the parties opposing submissions, the issue in contention under this limb of Appeal boils down to what the term “interest” entails and whether it encompasses other lending fees or not. Unfortunately, the repealed Customs and Excise Act did not provide a definition of what interest entails. Neither was the amendment introduced by the Finance Act, 2013 into the Fifth Schedule of the repealed Customs and Excise Act clear as to the scope of what fell under “other fees.” This clearly points to the presence of a lacuna in the law as it was at the time of the assessment.

66. In the circumstances, the Tribunal will be guided by the definition of interest in Section 2 of the Income Tax Act which states that “interest means interest payable in any manner in

respect of a loan, deposit, debt, claim or other right or obligation and includes a premium or discount by way of interest and commitment of service fee paid in respect of any loan or credit...”. In our assessment the definition adopted by the Income Tax Act is instructive and alive to the fact that the term interest encompasses all other lending fees.

67. The Tribunal is also guided by the case of Greenwood Trust Co. –vs- Common Wealth of Massachusetts 971F2d 818 (1992) as relied on by the Appellant wherein it was held;

“Federal common law brings us to precisely the same result. Several courts, in analyzing the language of Section 85 of the Bank Act, have had little trouble in construing the term “interest” to encompass a variety of lender-imposed fees and financial requirements which are independent of a numerical percentage rate.”

68. Similarly, in the case of CIR vs Genn & Co. (Pty) Ltd 20 SATC 113, the court held that “it could not justify a difference in treatment between the interest on the loans and the raising fees, since the raising fees together with the interest formed in effect one consideration that the taxpayer had to pay for the use of the money for the period of the loan. This, we find and hold to be reasonable logic, one especially applicable to the current set of facts in this appeal given that the repealed Act did not exactly classify what “other fees” include.”

69. *In the premise, we find that the lending fees in question here form part of the interest, which as per the express terms of the amendments into the Fifth Schedule of the repealed Act are out rightly excluded from the scope of the Customs and Excise Act. The arrangement fees and the negotiation fees among other lending fees, in our view fall outside the purview of the repealed Act and the Respondent's attempt to collect taxes in this respect was erroneous."*

C. In Stanbic Bank Kenya Ltd –vs- Commissioner of Domestic Taxes (TAT no.176 of 2016) the Tribunal in determining whether loan administration fees are a form of interest applied *the principle of in pari materia*. The principle states that *where statutes are of the same matter on the same subject, that is are so related as to form a system or code of legislation, such statutes are to be taken together as forming one system and as interpreting and enforcing each other*. In J.K. Steel Ltd. Vs Union of India [1969] 2 ACR 481 it was held that *cognate and pari materia legislation should be read together as forming one system and as interpreting and enforcing each other*. In discussing when statutes can be deemed to be *pari materia*, the court in United Society v. President of Eagle Bank of New-Haven, 7 Conn. 456 (1829) stated *inter alia*, that:

"Statutes are in pari materia which relate to the same person or thing, or to the same class of persons or things. The word

‘par’ must not be confounded with the word similis. It is used in opposition to it, as in the expression magic pares sunt quamsimiles, intimating not likeness merely, but identity. It is a phrase applicable to the public statutes or general laws made at different times and in reference to the same subject.”

“126. Tribunal is of the view that the Income Tax Act is so closely related to the Excise Duty Act that it can be considered to be in pari materia. Thus, the definition of interest provided in the Income Tax Act can be used to define interest under the Customs and Excise Act where the later does not provided its own definition....”

“127. Thus, in applying the definition found in the Income Tax Act, the Tribunal finds that the fees which included loan commitment and loan appraisal fees fall within the ambit of interest and are therefore not subject to Excise Duty as per the provisions of the law as it then was.”

40. The Tribunal finds no reason to depart from this position.

iii. Whether the Respondent was justified in levying excise duty on loan appraisal fees for the period August 2014 to October 2017.

41. Having found that appraisal fees are “interest” and not “other fees”, the Tribunal finds that's the Respondent has no basis for levying excise duty.

FINAL ORDERS

42. In view of the above findings, the Tribunal issues the following Orders:-

- i. The Objection decision dated 18th October, 2019 is hereby upheld to the extent of the compromise arrived at in the Consent dated 17th February, 2020 and adopted by the Tribunal on the 18th February, 2021 as a Partial Judgement.
- ii. The Appeal be and is hereby allowed as relates to Objection decision on Excise duty on appraisal fees.
- iii. Each Party shall bear its own costs.

43. It is so ordered.

DATED and DELIVERED at NAIROBI this 28th day of May, 2021.



PATRICK LUTTA
CHAIRPERSON



HELEN BILA
MEMBER



ELISHAH NJERU
MEMBER



MWAI MBUTHIA
MEMBER



HABON FARAH
MEMBER