

REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
APPEAL NO. 430 OF 2020

KCB INSURANCE AGENCY LIMITED..... APPELLANT

-VERSUS-

COMMISSIONER FOR DOMESTIC TAXES.....RESPONDENT

JUDGMENT

1. The Appellant is a limited liability company incorporated in Kenya. The Appellant provides an extensive range of insurance agency services and is regulated by the Insurance Regulatory Authority “the IRA” as an insurance agent.
2. The Respondent is a principal officer appointed under Section 3 of the Kenya Revenue Authority Act, Chapter 469 of the Laws of Kenya. Kenya Revenue Authority is charged with the mandate of assessment, collection and accounting of government revenue.
3. The Respondent carried out a compliance check of the Appellant’s tax records for the period 1st January 2015 to 31st December 2018.
4. Following the compliance check, the Respondent issued the Appellant with an Excise Duty and Value Added Tax (VAT) assessments hereinafter referred to as “the assessment” amounting to Kshs.110,084,888.00, inclusive of penalties and interest dated 19th September 2019.

5. The assessment related to VAT and Excise Duty treatment of the following income streams earned by the Appellant: (i) administration fees earned on provision of insurance agency services in respect to KCB Bank Kenya Ltd Risk Margin Fund and (ii) administration fees earned on administration of KCB Bank Group's Medical Scheme.
6. Following the assessment, the Appellant filed its Notice of Objection to the Respondent's assessment in its entirety vide a notice of objection dated 17th January 2020.
7. Subsequently, following a consultative meeting between the Appellant, the Appellant's agent and the Respondent's IRO team as well as email correspondence, the Respondent issued its Objection Decision vide a letter dated 5th August 2020 amending its original assessment slightly downwards to Kshs 107,046,316.00.
8. The Appellant, being dissatisfied with the Respondent's Objection Decision, notified the Tribunal of its intention to appeal against the said decision vide a notice of appeal dated 4th September 2020.
9. The Appellant filed its Memorandum of Appeal and Statement of Facts with the Tribunal on 18th September 2020.

THE APPEAL

10. The grounds for Appeal as presented in the Memorandum of Appeal are:

- i. That the Respondent erred in law and fact by imposing VAT on fees earned for the administration of KCB Bank's Risk Margin Fund contrary to the provision of Paragraph 10 of Part II of the First Schedule to the VAT ACT, 2013 which expressly exempted insurance agency services from VAT.
- ii. That the Respondent erred in law and fact by imposing VAT on medical administration fees earned on administration of KCB Group's medical scheme contrary to the provisions of Paragraph 10 of Part II of the First Schedule to the VAT Act 2013 which expressly exempted insurance agency services from VAT.
- iii. That the Respondent erred in law and fact by imposing Excise Duty on fees earned for administration of KCB Bank's Risk Margin Fund contrary to the provisions of the Excise Duty Act 2015, which expressly exclude all premium based commissions from charge to Excise Duty.
- iv. That the Respondent erred in law and fact by imposing Excise Duty on fees earned for the administration of KCB Bank's Group medical scheme contrary to the provisions of the Excise Duty Act, 2015.

- v. That the Respondent erred in law and in fact by holding that the effective date of the Finance Act 2018 is 1st July 2018 and thus Excise Duty rate applicable for the period 1st July 2018 to 20th September 2020 was 20%.
- vi. That the Respondent erred in law and fact by imposing late payment penalties based on an incorrect tax assessment contrary to the provisions of the Tax Procedures Act, 2015.
- vii. That the Respondent erred in law and fact by charging late payment interest based on an incorrect Excise Duty and VAT assessment contrary to the provisions of the Tax Procedures Act, 2015.

The Appellant's Case

11. The Appellant's case is premised on the hereunder material documents and proceedings:
 - a) The Appellant's Statement of Facts dated 18th September 2020 together with the documents filed therewith on the same date;
 - b) The witness statement of Evelyn Bosibori Nyankabaria dated 1st March 2021 filed on 5th March 2021 and adopted in evidence on 19th March 2021; and
 - c) The Appellant's written submissions dated 18th March 2021 filed on 19th March 2021 together with the attached copies of legal authorities.

12. The Appellant identified for determination 6 issues as follows: -

- a) Whether administration fees earned by the Appellant in relation to insurance agency serviced offered to KCB Bank Risk Margin Fund ought to be chargeable to VAT;
- b) Whether administration fees earned by the Appellant on insurance agency services provided by the Appellant to KCB Group's Medical Scheme ought to be chargeable to VAT;
- c) Whether the premium-based administration fees earned by the Appellant in relation to services offered to KCB Bank's Risk Margin Fund ought to be chargeable to Excise duty;
- d) Whether the premium-based administration fees earned by the Appellant in relation to KCB Group's Medical Scheme ought to be chargeable to Excise Duty;
- e) Whether the Respondent's Excise duty assessment for the period 1st January 2015 to 30th November 2015 based on ambiguous provisions of the law was merited; and
- f) Whether the Respondent erred in law and fact by holding that the effective date of the Finance Act, 2018 is 1st July 2018 and thus Excise duty rate applicable for the period 1st July 2018 to 20th September 2018 is 20%.

a) Whether fees earned by the Appellant on administration of the KCB Bank Risk Margin Fund (RMF) are subject to VAT.

13. The Appellant contends the Respondent's treatment of its income earned from services provided to KCB Bank RMF as consultancy fees which are subject to VAT is erroneous.
14. The Appellant argues that its income from RMF relates to provision of services which are merely administrative in nature and which are permitted services that an insurance agent is licensed to provide.
15. The Appellant avers that RMF is made up of premiums ceded by customers of unsecured loans to cover KCB Bank for the risks related to death and permanent disability of the borrower arising from an accident. For each unsecured loan, every customer in all the banks in Kenya must pay a certain premium being 0.54% of the sum advanced as an unsecured loan. Out of the premiums paid, the Appellant earns a premium-based commission of 0.027%.
16. According to the Appellant, the premium-based commission received is for handling paperwork, reviewing and vetting claims submitted to confirm they are supported by all required documents, maintaining a register of all loan claims, providing KCB bank with a schedule of all paid loans claims and monitoring any activities relating to the RMF.

17. The Appellant argues that the VAT Act, 2013 does not define insurance agency services and thus, in accordance with trite rule of statute interpretation, the Tribunal is called upon to construe and interpret the word in accordance with its ordinary meaning, when such a word is not defined in statute.
18. In the absence of a definition of insurance agency services in the VAT Act, the Appellant relied on the provisions of the Insurance Act and Regulation 4 of the Insurance Regulation, 1986 to identify permitted insurance business.
19. Specifically, the Appellant referred to Regulation 4 of the Insurance Regulation, 1986 which stipulates services that are excluded from the ambit of insurance business and these include; services undertaken by a person being a carrier, a carrier's agent, forwarding agent, housekeeper etc. Further, the Appellant referred to the general meaning of an "*agent*" as defined in the Black Law's dictionary (4th Edition).
20. Based on the said Insurance Regulation, the Appellant avers that any business that is incidental to insurance business is a permissible service that can be rendered by any member of the insurance industry including agents such as the Appellant, provided they are not listed as excluded services in the Insurance Regulation.
21. The Appellant thus submits that the services it offers to KCB Bank RMF fall within the purview of ordinary insurance agency services and are not whatsoever in the nature of consultancy services.

22. The Appellant avers that the VAT legislation provides for taxation by exclusion. That is, all services are subject to VAT at the standard rate of 16% except if listed under the First or the Second Schedule of the VAT Act. Services that are explicitly listed under the First Schedule of the VAT Act are exempted from VAT while services that are listed under the Second Schedule of the VAT Act 2013 are taxed at the rate of 0%. All other services are subject to VAT at the standard rate of 16%.
23. Accordingly, the Appellant avers that it would be erroneous for the Respondent to seek to subject services that are listed under the First Schedule or the Second Schedule of the VAT Act of 2013 at the standard rate of 16%.
24. The Appellant reiterates that the VAT Act does not define insurance agency services and consequently, the court is called upon to construe and interpret the word in accordance with its ordinary meaning.
25. Relying on the Insurance Act and the Insurance Regulation, the Appellant argues that its scope of services rendered under the RFM Scheme falls under the permitted insurance agency services which are expressly exempted from VAT under Paragraph 10 of Part II of the First Schedule to the VAT Act 2013. The said provision (which has since been repealed following an amendment in the Tax Law Amendment Act 2020) granted a VAT exemption on supply of Insurance Agency, Insurance Brokerage, Securities brokerage services and tea and brokerage services.

26. According to the Appellant, the Respondent erred in law by relying on a generic provision of the law, Paragraph 2 (a) of Part II of the First Schedule to the VAT Act 2013, to bring to charge the RFM services to VAT when there existed a more specific provision in law which exempted the services from tax.
27. That the said provision relied on by the Respondent exempts from VAT the following services;
- “insurance and reinsurance services, excluding the following-*
- (a) Management and related insurance consultancy services;*
- (b) Actuarial services; and*
- (c) Services of insurance assessors and loss adjusters”*
28. The Appellant avers that the Respondent conveniently disregarded the fact that the RFM services to KCB were provided by the Appellant, acting in the capacity of an insurance agent whose services were expressly exempt from VAT during the period under review.
29. According to the Appellant, the legal relevance of the provisions of Paragraph 10 of the First Schedule of the VAT Act was to provide a generic exemption of all services rendered by the Appellant.
30. The Appellant submitted that the Respondent in arriving at its decision should have relied on the provision of Paragraph 10 of Part II of the First Schedule to the VAT Act as opposed to relying on provisions of Paragraph 2 of Part II of the First Schedule to the VAT Act 2013.

31. In support of this assertion, the Appellant cited decided precedents on when a subject should be chargeable to tax and avers that to infer taxing obligations where none exists under law would be contrary to well established legal principles.
32. To buttress its case, the Appellant cited Lord Russel of Killowen in upholding this position in **Duke of Westminster V Commissioner of Inland Revenue (1) (1933-1935) 19 TC 490** by stating thus:
- “The Subject is not taxable by inference or by analogy but only by plain words of a statute applicable to the facts and circumstances of his case.”*
33. That Similarly, in **Partington Vs Attorney General (1896) LR 4 HL 100** cited in **Pevans East Africa Limited & Another V chairman Betting Control and Licensing Board & 7 others (2017) eKLR**, the House of Lords held that:
- “As I understand the principle of all fiscal legislation is this; if the 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.”*
34. To further support its case, the Appellant cited a similar holding by the Courts in Kenya in the case of **Republic Vs Kenya revenue Authority Exparte Bata Shoe Company (Kenya) Limited (2014) eKLR** where the Court expressed itself as follows;

“This brings me to the role and interpretation of tax laws. Payment of tax is an obligation imposed by the law. It is not a voluntary activity. That being the case, a taxpayer is not obliged to pay a single coin more than is due to the taxman. The tax man on the other hand is entitled to collect up to the last coin that is due from a taxpayer.”

35. The Appellant thus submits that to impose VAT at the rate of 16% by inference would be a far stretch and lacks any legal merit.

b) Whether the fees earned by the Appellant on administration of KCB Group's medical scheme is subject to VAT.

36. The Appellant disputes the Respondent's assertion that the services rendered in relation to KCB Group's medical scheme are administrative in nature and thus subject to VAT.

37. The Appellant avers that similar to services provided in the case of Risk Management Fund, the Appellant by being an insurance agent medical intermediary ensures administration of medical claims on behalf of the KCB group. The Appellant also provides medical administration services to KCB Group which include inter-alia; quarterly review meetings, staff presentations and health talks, settlement of medical claims, payments to health service providers and procurement of medical insurance to brokers and underwriters.

38. It is the Appellant's assertion that these medical administration and intermediary services are rendered in its capacity as an insurance agent and

are part of the licensed business activities and do not form part of excluded business.

39. The Appellant thus submits that the Respondent erred in law and fact by imposing VAT on medical administration fees of Kshs 43,055,088.00 whilst the said services fall within insurance agency services expressly exempted from VAT under Paragraph 10 of the First Schedule to the VAT Act, 2013

c) Whether the fees earned by the Appellant on administration of KCB Bank's Risk Margin Fund are subject to Excise Duty.

40. The Appellant disputes the Respondent's claim that RFM income is not premium income but fees from administrative services since KCB Bank is not an underwriter, and neither is the Appellant.
41. The Appellant argues that under the current arrangement, the insurance risk lies solely with KCB, the holder of the unsecured loans who is the insured party. The Appellant avers that since the type of risk covered, that is death, permanent injury, or disability of the loanee is not a mandatory risk required to be underwritten under the Insurance Act, the amounts paid are premiums meant to cushion KCB Bank in the event of any of the insured risk crystallizing.
42. Accordingly, the Appellant submits that being premium based commission, the fees from managing the RFM falls outside the ambit of "other fees" subject to Excise Duty by virtue of the provision of Part III of the First Schedule to the Excise Duty Act that defines "*other fees*" as:

“includes any fees, charges or commissions charged by financial institutions relating to their licensed financial institutions but does not include interest on loan, or return on loan, or an insurance premium or premium based or related commissions.”

d) Whether the fees earned by Appellant on administration of the KCB Group’s Medical Scheme are subject to Excise Duty.

43. The Appellant disputes the Respondent’s claim that the fees earned on administration of KCB Group’s Medical Scheme are subject to Excise duty, being administrative in nature and thus falling under “other fees” as per the Excise Duty Act.
44. The Appellant avers that the medical administration fees are premium based income and thus expressly excluded from the purview of the Excise Duty vide provisions in the Excise Duty Act 2015, which became effective 1st December 2015.
45. According to the Appellant, subjecting premium based fees earned by the Appellant from managing KCB’s Group medical scheme to Excise Duty goes contrary to the provisions of the Excise Duty Act, 2015 that excludes premium based fees from the scope of Excise Duty.

e) Whether the Respondent applied the correct Excise Duty rate in computing tax due for the period 1st January 2015 to 30th November 2015.

46. The Appellant avers that without prejudice to this Appeal and the grounds thereof of this Appeal, the Excise Duty assessment for the period 1st January

2015 to 30th November 2015 relates to a period which was marked with ambiguities and uncertainties and ought not to stand in law.

47. The Appellant argues that while the repealed Customs and Excise Act Cap 472 of the laws of Kenya provided for a definition of “other fees” this definition was ambiguous and could not be implemented.
48. The Appellant relied on the judgment the case of **Cooperative Bank (K) Ltd versus Commissioner of Domestic Taxes Appeal number for 45 of 2017** that has similar facts. In its ruling, the Tribunal agreed that the introduction of Excise Duty on “other fees” by the Finance Act of 2012 was riddled with a lot of ambiguity and it would therefore be unjust to impose tax based on ambiguity.
49. The Appellant further argued that it is a general principle of law that in matters involving taxation where there is ambiguity in the law, the tax law must be resolved in favour of the taxpayer. This has been decided in various tax decisions including the case of **Republic vs Kenya Revenue Authority & another Ex-parte Fontana Limited 2014 eKLR** where Justice G.V Odunga held that:

“The law is clear that in cases of an ambiguity in a tax legislation, the same must be resolved in favor of the taxpayer and not the Public Revenue Authorities which are responsible for implementation...”

50. The Appellant further submits that the Excise Duty assessment for the period between 1st January 2015 to 30th November 2015 relates to a period when

Excise Duty law was coupled with uncertainties and ambiguities as to its application and implementation and therefore ought not to stand in law. Further, the Appellant avers that in the unfortunate event that the Tribunal finds that the income under this Appeal is subject to Excise Duty, the income of Kshs 43,684,202.00 relating to 1st January 2015 to 30th November 2015 ought to be excluded from the excisable amount.

f) Whether the Respondent erred in law and fact by holding that the effective date of the Finance Act 2018 is 1st July 2018.

51. The Appellant avers, that without prejudice to the Appeal submitted, the Respondent erred in raising its assessment for the period 1st July 2018 to 20th September 2018 and applying the Excise Duty rate of 20% provided for in the Finance Act 2018.
52. According to the Appellant, this period was marked by uncertainty on whether the provision of the 2018 Finance Act seeking to backdate the increased rate of Excise Duty of 20% effective 1st July 2018 had any legal standing constitutionally.
53. The Appellant argues that despite the Finance Act 2018 having an effective date for the changes in the Excise Duty rate as 1st July 2018, the same could not be applied retrospectively based on the High Court's decision in the case of **Okiya Omtatah Okiiti v Cabinet Secretary, National Treasury & 3**

others [2018] eKLR “The Okiya Case” which vide the Judgment delivered on 19 September 2018 held that:

“...the Provisional Collection of Taxes and Duties Act, Act number 44 of 1959 (PCTDA) is unconstitutional and therefore invalid, null and void. Thus, the provisions of the Finance Bill 2018 or any other provision of the Bill could not be implemented before the Bill becomes the Finance Act after it goes through the legislative process laid out in the Constitution for approval and adoption by Parliament and assent by the president.”

54. Based on the High Court's judgement, the Appellant submits that in the unfortunate event that the Tribunal finds that the income under this Appeal is subject to Excise Duty, a rate of 10% ought to be applied on the income of Kshs. 37,873,753.00 for the period 1st July 2018 to 20th September 2018.

The Appellant's Prayer

55. The Appellant prays that:
- i. This Appeal be allowed;
 - ii. The Objection Decision of the Respondent demanding taxes amounting to Kshs 107,046,316 be annulled or varied in such a manner that may appear just and reasonable to the Tribunal;
 - iii. The cost of and incidental to this Appeal be awarded to the Appellant; and
 - iv. Any other orders that the Tax Appeals Tribunal may deem fit.

THE RESPONDENT'S CASE

56. The Respondent's case is premised on the hereunder filed documents and proceedings before the Tribunal:

- a) Respondent's Statement of Facts dated and filed on 14th October 2020 together with the documents attached thereto.
- b) The witness statement of Judith Mulimbo dated and filed on 9th March 2021 that was adopted in evidence on 10th March 2021.
- c) The Respondent's submissions dated and filed on 17th March 2021.

57. The Respondent avers that its position in the Objection Decision issued on 5th August 2020 was sound in law and proceeded to identify and submit on issues that are substantively similar to those identified by the Appellant.

a) Whether the fees earned by the Appellant on administration of the Risk Margin Fund (RMF) is subject to VAT

58. The Respondent reaffirmed its position as contained in the Objection Decision which sought to charge VAT on fees earned by the Appellant on administration of the RMF. In support of its decision, the Respondent avers that it reviewed the service level agreement between the Appellant and the finance division of KCB Group. From the review, the Respondent found that Appellant administers the KCB RMF, and its functions are as to receive, vet claims and approve or reject as appropriate, receive and vet claims for refunds arising from erroneous payment, loan cancellation among others.

59. The Respondent avers that on further interrogation, it found that the premiums paid for unsecured loans are held in a fund by KCB and managed by the Appellant with regards to the claims made. According to the Respondent, since neither KCB nor the Appellant are underwriters, the payments made to the RFM cannot be expressly termed as premiums despite being referred to as such.
60. Instead, the Respondent argues that the services rendered by the Appellant to KCB Bank RMF are in the nature of insurance consultancy services and therefore Vatable. These fees, the Respondent notes, are not in the list of zero-rated or exempted services under the Schedules and are also not part of insurance or reinsurance services which are exempt from VAT under Paragraph 2 of Part II of the First Schedule under VAT Act, 2013.
61. The Respondent maintains that the aforesaid provision exempts from VAT the following services, while providing an exclusion is thus;
“insurance and reinsurance services excluding the following (a) management and related insurance consultancy services; (b) Actuarial services; and (c) Services of insurance assessors and loss Adjusters.”
62. It is the Respondent’s assertion that services provided by the Appellant to KCB with regard to the RMF are in the nature of insurance consultancy services and therefore fall within the management and related insurance consultancy services that are excluded from VAT exemption above, thus subject to VAT.

63. The Respondent thus submits that the income of Kshs 270,754,538.00 is deemed chargeable to VAT at 16% as per Section 5 of the VAT Act which provides that;

Charge to tax (1) A tax to be known as value-added-tax shall be charged in accordance with the provisions of this Act on a taxable supply made by a registered person in Kenya, (b) the importation of taxable goods and (c) a supply of imported taxable services.

b) Whether the Fees earned by the Appellant on administration of KCB Medical Scheme is Subject to VAT.

64. The Respondent reaffirms its position as contained in the Objection Decision, that fees earned by the Appellant on administration of KCB Medical Scheme are subject to VAT. The Respondent notes that KCB has an inhouse medical scheme for which the Appellant carries out administrative services.

65. According to the Respondent, services offered by the Appellant are administrative in nature and cannot be said to be premium based commissions. These fees, the Respondent argues, are administrative services which are neither exempt from VAT nor Zero-rated.

66. The Respondent thus submits that in the absence of VAT exemption, the income of Kshs 43,055,088.00 earned by the Appellant from administration of KCB Group's medical scheme is chargeable to VAT in accordance with Section 5 of the VAT Act.

c) Whether the Fees earned by the Appellant on administration of the Risk Margin Fund are Subject to Excise Duty.

67. The Respondent contends that the Appellant's claim that the fee on administration of the KCB Bank's RFM is premium based commission which is exempted from Excise duty is erroneous.

68. The Respondent avers that it reviewed the Appellant's records in relation to incomes earned and its chargeability to Excise Duty for the period 1st January 2015 to December 2018 as per the amendment made to the 5th Schedule of the Customs and Excise Duty Act by the enactment of Finance Act 2013, and the Excise Duty Act 2015 whose commencement date was 1st December 2015.

69. According to the Respondent, administration fees constitute "other fees" which are chargeable to Excise Duty as per the provisions of Paragraph 8 of Part III of the 5th Schedule to the Customs and Excise Duty Act Cap 472 (now repealed).

70. The repealed Act provided that Excise Duty shall be charged on other fees charged by financial institution at 10%, and the Act defined financial institutions to include those licensed under the Insurance Act such as the Appellant.

71. The Respondent further avers that the Appellant's income was subject to Excise Duty under the repealed Customs and Excise Act even after the definition of 'Other fees' was amended by the Finance Act 2013 to refer to

“any fees charged or commissions charged by financial institutions relating to the licensed financial institution but does not include interest or loan or return on loan on an insurance premium or premium based on related commissions”.

72. According to the Respondent, once the Customs and Excise Duty Act was repealed, the Excise Duty Act 2015 whose commencement date was 1st December 2015 came into effect with similar provisions in place.
73. The Respondent contends that the RMF is a fund in the books of account of KCB composed of premiums paid by KCB customers for the purpose of securing unsecured loans. Consequently, the Respondent avers that the monies paid to the Appellant for the management of the KCB RMF is a normal business charge for which any loss is allowable deduction. The balance forms a normal margin in the business of loans and therefore cannot be said to be premium based.
74. In response to the challenge on imposition of Excise duty for the period 1st January 2015 to November 2015 based on the now repealed Customs and Excise Duty Act, the Respondent reiterates that the income earned at this time fell under the ambit of other fees charged by a financial institution as described earlier and is therefore Vatable.

d) Whether the fees earned by the Appellant on administration of the KCB Group Medical Scheme are subject to Excise Duty.

75. The Respondent contends the Appellant's assertion that the fees earned from administration of the KCB Group Medical Scheme is premium based commission thus exempt from Excise Duty is misplaced.

76. According to the Respondent, the Appellant earns a standard fee for these services which further disputes the claim that they are premium based. Further, the Respondent avers that the nature of the income earned by the Appellant in this case is clear and not ambiguous, being income earned for administration of an in-house medical scheme thus subject to Excise Duty.

e) Whether the Respondent applied the correct Excise Duty rate in computing tax due from 1st July 2018.

77. The Respondent avers that the Excise Duty rate applicable for the period 1st July 2018 to 20 September 2018 is 20%. According to the Respondent, the rate of Excise Duty was increased from 10% to 20% vide an amendment by the Finance Act 2018. The Respondent avers that the effective date of the Finance Act, 2018 regarding the issue at hand was provided in Section 1 of the Finance Act and was specified to be 1st July 2018.

78. In response to the Constitutionality of retrospective application of a tax law, the Respondent avers that tax is imposed by statute and that the legislature has the power to give retrospective effect to a taxing statute as was done in the case at hand.

f) Whether the Respondent erred in charging late payment penalties and interest on the tax.

79. The Respondent avers that the taxes in question were found to be owing and therefore charged interest and penalties as per the provisions of the Tax Procedures Act which provides for the following;

Section 38. Late Payment Interest

Subject to Section (2) a person who fails to pay a tax on or before the due date for the payment of the tax shall be liable for late payment interest at a rate equal to one percent per month or part of a month on the amount unpaid for the period commencing on the date the tax was due and ending on the date the tax is paid.

80. That Section 83 of the Tax Procedures Act provides that a person who fails to pay tax on the due date shall be liable to pay a late payment penalty of five percent of the tax due and payable.
81. In light of the provisions above, the Respondent avers that subjecting the taxes to penalties and interest was well within the law.

The Respondent's Prayer

82. The Respondent prays that the Tribunal upholds the Objection Decision dated 5th August 2020 as the same was proper as provided under the Value Added Tax Act, Customs and Excise Act as amended by the Finance Act 2013, Excise Duty Act 2015 and the Tax Procedures Act, 2015 and the taxes demanded therein are due and payable.

ISSUES FOR DETERMINATION

83. After considering the pleadings filed by the parties, the evidence as adduced through the witness statements for the separate witnesses for the parties and the written and oral submissions of both parties, the Tribunal found the issues falling for determination to be as follows: -

- i. Whether the fees earned by the Appellant on administration of the Risk Margin Fund are subject to VAT.
- ii. Whether the fees earned by the Appellant on the administration of KCB Group Medical scheme are subject to VAT.
- iii. Whether the fees earned by the Appellant on administration of the Risk Margin Fund are subject to Excise Duty.
- iv. Whether the fees earned by the Appellant on the administration of KCB Group Medical scheme are subject to Excise Duty.
- v. Whether the Respondent applied the correct Excise Duty rate in computing tax due from 1st July 2018.
- vi. Whether the Respondent erred in charging late payment penalties and interest.

ANALYSIS AND DETERMINATION

84. The issues (i) and (ii) are inter-related while similarly issues (iii) and (iv) are equally inter-related and to that extent shall be appropriately dealt with and determined together as opposed to being separate issues. That in effect brings to four the issues that call for the Tribunal's determination.

i) Whether the fees earned by the Appellant on administration of both the Risk Management Fund and the KCB Group Medical Scheme are subject to VAT?

85. The Appellant's witness to wit Evelyn Bosibori Nyankabaria who is the Underwriting and Claims Manager within the KCB Group unequivocally indicated under Paragraph 7 of her witness statement dated the 1st day of March 2021 the services ordinarily offered by the Appellant in relation to this Appeal to constitute the following: -

*“(a) Administration of medical claims on behalf of the KCB Group; and
(b) Provision of insurance agency services with regards to the Risk Margin Fund (RMF) Premium which services include the following: -*

- *Handling paperwork in relation to the RMF;*
- *Reviewing and vetting all claims submitted to check they are supported;*
- *Maintaining a register of all loan claims;*
- *Providing KCB with a schedule of all paid loan claims; and*
- *Monitoring any activities relating to the RMF’*

86. The Appellant's witness further indicated in her witness statement that the Appellant earns a fee known as administration fees for rendering of the services above.

87. The material fact that came out during the hearing of the matter and more particularly from the evidence adduced by the separate witnesses was that as relates to the services offered by the Appellant to the KCB Bank Kenya

Limited and KCB Group there is no third-party underwriter that assumes a risk either for the fund or the medical scheme. The Risk Margin Fund is maintained by the KCB Bank Kenya Limited while the KCB Group maintains an in-house medical cover for its employees and staff.

88. The customers taking unsecured loans with KCB Bank Kenya Limited pay a premium fee to secure the bank against any risks arising from any default in the full discharge of the loan as a consequence of death, illness or physical disability. The amount is retained by the Bank in what has been termed as a Risk Margin Fund that is administered by the Appellant for a fee.
89. It is manifestly clear from the services rendered by the Appellant to the KCB Bank Kenya Limited and the KCB Group in relation to both the Risk Margin Fund and the Medical Scheme, respectively, that the services are of the nature of management services.
90. The Appellant not being an agent of any disclosed insurance underwriter in relation to the services rendered on its part to both KCB Bank Kenya Limited and the KCB Group with regard to the administration of the Risk Margin Fund and the Medical Scheme we find the Respondent's assertion that the services rendered by the Respondent are in the nature of management and consultancy services to be more apt. The administration fees earned by the Appellant cannot in the circumstances be deemed to be commission fees based on insurance premium.

91. The Tribunal agrees with the Appellant's assertion and submission that the VAT legislation provides for taxation by exclusion and that other than services listed under the First and the Second Schedule of the VAT Act, 2013 all other services are taxable at the standard rate.

92. Paragraph 2 of Part II of the First Schedule to the Value Added Tax Act, 2013 provides as follows with regard to exemption of the nature of services as provided by the Appellant: -

Insurance and re-insurance services excluding the following: -

a) Management and related insurance consultancy services;

b) Actuarial services; and

c) Services of insurance assessors and loss adjusters.

93. We, in the circumstances, find that the services rendered by the Appellant to both the KCB Bank Kenya Limited and the KCB Group in relation to the Risk Margin Fund and the Medical Scheme, respectively, are not exempt services and the Appellant is liable to charge to VAT as relates to such services.

ii) Whether the fees earned by the Appellant on administration of both the Risk Margin Fund and the KCB Group Medical Scheme are subject to Excise duty?

94. On the basis of the foregoing analysis as to the nature of the services rendered by the Appellant in relation to the administration of the Risk Margin Fund and the KCB Group Medical Scheme that were considered to

be management and consultancy fees that are not based on any premiums deemed payable to any underwriter, the Tribunal agrees with the Respondent that the Appellant earns management fee. The contract indicated to have been executed between the parties that provides for the manner in which the fee payable to the Appellant was determinable was not made available in evidence before the Tribunal and to that extent the Tribunal did not have the benefit of properly ascertaining the manner and parameters informing the management fee payable to the Appellant for its services.

95. In pursuant to Part III of the First Schedule to the Excise Duty Act 2015, Excise duty is payable in respect of other fees which are defined to include:

“other fees” includes any fees, charges or commissions charged by financial institutions relating to their licensed financial institutions, but does not include interest on loan or return on loan or fees or commissions earned in respect of a loan or any share of profit or an insurance premium or premium based or related commissions
(Emphasis ours)

96. It is now trite law that insurance agents are deemed as financial institutions and the fees payable to the Appellant as a consideration for the management services rendered in relation to the administration of the KCB Bank Kenya Limited’s Risk Margin Fund and the KCB Group Medical Scheme are in the circumstances chargeable to Excise duty.

97. It is significant at this stage that while affirming the foregoing finding to point out that the assertion by the Appellant that there was ambiguity as to what constituted other fees and to an extent financial institutions following the enactment of the Finance Act, 2012 was revisited by the Tribunal in **African Banking Corporation Limited =Vs= The Commissioner of Domestic Taxes, TAT Appeal No. 197 of 2019** when the Tribunal unequivocally found that there was no ambiguity and/or uncertainty as to what constituted other fees following the enactment of the Finance Act, 2012. The Tribunal found as follows with regard to the judgment relied upon by the Appellant in the **Cooperative Bank of Kenya Limited =Vs= The Commissioner of Domestic Taxes, TAT Appeal No. 45 of 2017: -**

"The Tribunal found that its previous decision had been given per incuriam because in its analysis of facts, it did not weigh the plain words used in the law against their meanings to determine whether they invited any uncertainty and therefore ambiguous."

iii) Whether the Respondent applied the correct Excise Duty rate in computing tax due from 1st July 2018.

98. Pursuant to the Finance Act, 2018 the rate applicable for Excise Duty on the services rendered by the Appellant was increased from 10% to 20% with effect from the date when the Act was to come into force and which date was specifically provided in the Act to be 1st July 2018.

99. The effective date for the Finance Act, 2018 was challenged in *Okiya Omtatah Okiiti =Vs= Cabinet Secretary, National Treasury & 3 Others (2018) eKLR* when Justice W.A Okwany, inter-alia, made the following declaratory Order: -

“A declaration that the Finance Bill, 2018, or any parts or provisions thereof, including on taxation, cannot be implemented before the Bill becomes the Finance Act after it goes through parliamentary legislative process laid out in the Constitution for approval and adoption by Parliament and assent by the President.”

100. The Finance Act, 2018 was subsequently published under Special Issue of the Kenya Gazette Supplement No. 121 on 21st September 2018 and to that extent the Tribunal agrees with the Appellant that the rate of Excise duty applicable to the services rendered on its part as between 1st July 2018 to 20th September 2018 was 10% and not the enhanced rate of 20%.

101. The rate of Excise duty increased to 20% was to take effect from the 21st day of September 2018 subsequent to the Act having been assented to by the President and gazetted.

iv) Whether the Respondent erred in charging late payment penalties and interest.

102. The failure to remit any accrued tax liability timeously has statutory underpinning consequences. Section 38 of the Tax Procedures Act provides for late payment interest in the following terms: -

(1) Subject to subsection (2) a person who fails to pay a tax on or before the due date for the payment of the tax shall be liable for late payment interest at a rate equal to one percent per month or part of a month on the amount unpaid for the period commencing in the date the tax was due and ending on the date the tax is paid.

103. In pursuant to Section 83 of the Tax Procedures Act any late submission of a tax return attracts a late submission penalty. The Respondent was in the premises enjoined by statute to demand and charge late payment penalty and interest on the VAT and Excise duty not timeously remitted by the Appellant.

FINAL DECISION

104. On the basis of the foregoing analysis, the Tribunal makes the following Orders:

- i) The Objection Decision dated 5th August 2020 as relates to VAT in the aggregate sum of Kshs. 60,065,117.00, inclusive of penalty and interest is hereby upheld.
- ii) The Appellant is liable for Excise Duty on the services rendered in respect of the KCB Bank Kenya Limited's Risk Margin Fund and the KCB Group Medical Scheme.
- iii) The Excise duty payable for the period 1st July 2018 to 20th September 2018 shall be charged at the rate of 10%.
- iv) Each party shall bear its own costs.

105. It is so ordered.

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



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ERIC M. WAFULA
CHAIRMAN



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CATHERINE N. MUTAVA
MEMBER



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ABRAHAM K. KIPROTICH
MEMBER



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GABRIEL M. KITENGA
MEMBER