REPUBLIC OF KENYA

TAX APPEALS TRIBUNAL

APPEAL NO.116 OF 2015

KENYA WILDLIFE SERVICE.....APPELLANT

VERSUS

THE COMMISSIONER OF DOMESTIC TAXES.....RESPONDENTS

JUDGEMENT

BACKGROUND

1. The Appellant is a State Corporation established under Section 6 (1) of the Wildlife Conservation Management Act 2013, Laws of Kenya, previously under Section 3(1) of The Wildlife (Conservation Management) Act CAP 376 of the Laws of Kenya and is resident in Kenya. The Appellant's mandate is to conserve, manage wildlife in Kenya and to enforce laws and regulations related thereto.
2. The Respondent is established under Section 3 of the Kenya Revenue Authority Act- Cap 469 of the Laws of Kenya and administers the Acts which are listed in the First Schedule to the Kenya Revenue Act among them the Value Added Tax Cap 476 (now repealed) of the Laws of Kenya (hereinafter referred to as VAT Act)

3. The Appellant filed its Memorandum of Appeal on 6th May 2013 together with their Statement of Facts. The Appellant prayed that the Respondent refrain from charging it tax on conservation fees and sought that the assessment be adjusted, The Appellant also prayed for directions to be provided on clear guidelines on conservation fees and the same be gazetted. The Appellant sought period of at least one year to reorganize their operations so as to

be in a position to implement the imposition of VAT on conservation fees in the event the Tribunal dismissed their Appeal.

4. The Respondent contends that on conducting a compliance check on the Appellant's records for the period January 2008 to February 2010 they discovered that the Appellant had not been paying VAT on park/gate entry fees charged to persons visiting national parks and game reserves for entertainment and leisure. The audit was conducted and demand issued on 8th February 2012 to the Appellant for failing to remit Value Added Tax of Kshs 1,458,159,616/=for Park/gate and picnic site fees paid to it as in the Respondent's view, this service constituted a taxable supply for VAT purposes.

5. The Appellant being dissatisfied with the assessment lodged an objection on 2nd March 2012 and after a series of meetings and discussions the Respondent revised the assessment on 20th March 2013 in accordance with section 32 A (5) (a) of the VAT Act Cap 476 (now repealed). As a result of the said revision, the Appellant issued a notice of intention to lodge an Appeal to the VAT Appeals Tribunal in accordance with section 33 (1) thereof against the Commissioner's decision confirming the assessment, which decision was communicated to the Appellant vide letter dated 20th March 2013 and served on the Appellant on 22nd March 2013 .

6. The Memorandum of Appeal and other requisite documents were lodged with the Secretary to the VAT Appeals Tribunal on 6th May

2013. The Respondent's opposed the Appeal and filed their Statement of Facts on 27th May 2013.

7. ISSUES FOR DETERMINATION

i) Whether the activities relating to collection of park/gate entry fees undertaken by the Appellant constitute a business or supply of goods and services as defined in Section 2 of the VAT Act

ii) Whether the Appellant, as a public body enjoys zero rated status on VAT? If so, is the subject matter of the Appeal zero rated?

iii) Whether the activities undertaken by the Appellant qualify to be considered as agricultural and animal husbandry activities?

iv)Whether the Appellant is exempt from Income Tax? If so, does the exemption amount to automatic reprieve from payment of Tax on other tax heads?

v) Whether the Respondent is estopped from demanding tax from the Appellant in view of their past conduct on treatment of collection of park/gate entry fees and picnic site fees without VAT remittance even if the same were to be found to be payable?

ARGUMENTS

8. The Appeal came up for hearing on 8th December 2015 when parties indicated that they required time to negotiate and the Appeal was rescheduled for hearing on 28th January 2016 to allow for the Alternative Dispute Resolution. On 28th January 2016 when the parties appeared before the Tribunal they indicated that no settlement had been reached and proceeded with the Appeal relying on their Pleadings without calling any witness.

9. The Appellant submitted that the Park entry/ Gate fees and Picnic site fees during January 2008 to February 2010 which constituted the audit period, were collected on behalf of the Government of Kenya pursuant to Section 7(a) of the Wildlife Conservation Management Act, 2013 which provides for functions of the Appellant to manage national parks, wildlife conservation areas, and sanctuaries under its jurisdiction. The Appellant further submitted that pursuant to Section 7(e) of the same Act, they collect revenue and charges due to the National Government from wildlife and as appropriate, develop mechanisms for benefit sharing with communities living in wildlife areas. It is the Appellant's case that the Commissioner of Domestic Taxes, Large Taxpayers office misapplied the law by treating collection of Park entry/ Gate fees and Picnic site fees as a business activity because it made it a supply in return for a payment as defined under Section 2 of the VAT Act, Cap 476 (now repealed).

10. The Appellant submitted that the services provided by them did not attract any VAT and that the confirmation of assessment on VAT under this tax head was improper hence this Appeal. The Appellant in its submissions contended that the activities undertaken by it do not constitute a business as defined by the repealed VAT Act, that the plain, natural and ordinary meaning of words must be accorded to any word under the primary rule of statutory interpretation. In their view, the Respondent failed to distinguish between a trading state corporation and non-trading state corporation. The latter being applicable to the Appellant as they collect revenue in the

collect revenue in the form of park entry and picnic sites fees which are meant to support the management of the parks and wildlife for the benefit of the people of Kenya as well as future generations to come.

11. To buttress their argument the Appellant submitted that it's function is a State mandated and not for profit or surplus, neither does it pay any dividends to the Government unlike trading corporations which remit their surpluses to the government or part of it to private owners. The Respondent on the other hand contends that the collections attracted VAT being a business service activity which the Appellant failed to remit pursuant to Section 6 of the VAT Act (now repealed.)

12. The Appellant also submitted that the park entry and picnic fees in question were collected as statutory fees gazetted by Legal Notice No. 207 of 2010 (Wildlife Conservation Management and National Parks Regulations 2010) and were therefore were bound by the gazetted amounts and lacked the mandate and authority to levy additional fees thereon, being a VAT charge, for purposes of collection and remittance to the Respondent .

13. The Appellant distinguished the repealed VAT Act, Cap 476 and the VAT Act 2013 where in the latter and subsisting Legislation, introduced a broader based VAT system on all services except those that are specified in the Schedules to the subsisting Act. According to the Appellant, with the repeal of the previous legislation, they have since started charging park entry and picnic

site fees inclusive of VAT in compliance with the subsisting law which according to the Appellant clearly provides and requires that all services provided by the Appellant be subjected to the VAT charge irrespective of the fact that these services provided by the Appellant on a not for profit motive.

14. The Appellant further submitted that in taxation there is no room for any intendment or presumption as to tax, words must be expressly and clearly stated and the definition of business has been clearly stated in the current law that these services are now subject to VAT. The Appellant relied on case law in support of their argument.

15. As an alternative and without prejudice to their submission that they were not liable under the repealed law to collect and remit VAT on collection of park entry and picnic sites fees, the Appellant also submitted that the principle of legitimate expectation and estoppel by conduct of the Respondent was available to them as previous audits had been conducted by the Respondent but no demands were made for VAT on collection of park entry and picnic sites fees for the period 2002 to 2006 and the period July 2011 to April 2014. They contended that the Respondent only assessed VAT on park entry and picnic fees for sums collected after 2nd September 2013, which has been confirmed by the Respondent and duly observed by the Tribunal that VAT period 2002 to 2006 was not assessed.

16. The Tribunal also observes that the Respondent assessed VAT on collection of park entry and picnic sites fees for sums collected after 2nd September 2013 omitting the period between July 2011 and August 2013. The Appellant contends that by not demanding VAT on park entry and picnic sites fees in the prior audits, the Respondent made a representation to the Appellant, which the Appellant relied on that these fees were not subject to VAT under the provisions of the repealed legislation. In their view it would be fallacious, illegal and contrary to the principle of legitimate expectation to renege from this representation. Thus, according to the Appellant, it's conduct meets the threshold of legitimate expectation and the Respondent is estopped from assessing or claiming VAT in view of it's conduct and relied on case law in support of it's argument.

17. The Respondent has in it's submissions refuted the Appellant's submissions and restated that the activities undertaken by the Appellant were a service as defined under Section 2 of the VAT Act CAP 476 (now repealed) and the current legislation thus attracting VAT as no exemption had been granted nor are the Appellants stated in the schedule as providing exempted services. The Respondent also submitted that the service provided by the Appellant is a business as provided for within the meaning of Section 6 of the repealed VAT Act and thus a taxable service. The Respondent contended that the Appellant did not remit the fees collected as park entry and picnic sites fees to the principal, being the Government, a fact confirmed by the Appellant in their Memorandum of Appeal. This action, in it's view constituted

collection of fees on it's own behalf and applied the collections to it's own use as captured in it's Financial Statements.

18. It is the Respondent's submissions that the Appellant is not entitled to Zero rated status as claimed as the VAT demanded does not relate to imports and purchases but relates to services which are taxable and relied on Article 210 of the Constitution of Kenya 2010. The Respondent submitted that the exemption accorded to the Appellant during the period 2003 to 2008 was under the Income Tax Act and was not renewed, and is inconsequential to this Appeal as the disputed assessment by the Respondent relates to amounts that accrued under the VAT Act and not the Income Tax Act which are distinct and separate.

19. The Respondent also submitted that the park entry and picnic sites fees though gazetted are considered to be inclusive of VAT and therefore the VAT element ought to form part of the Gazetted fee structure. They refuted the argument by the Appellant that there was no legal rule of statutory interpretation existing and which permits or permitted the Appellant to apply the terms relating to agriculture and animal husbandry to their activities as provided for in the Wildlife (Conservation and Management) Act Cap 376 which provision was introduced by amendments to the Act No. 16 of 1989, Section 3.

ANALYSIS

20. Having considered the submissions by the parties, The Tribunal noted that the Section 7 of the Wildlife Conservation and

Management Act 2013, an incomplete extract appended to the Memorandum of Appeal, was assented to on 24th December 2013 and came into effect on 10th January 2014 and the tax dispute for determination related to a demand for payment of Tax covering the period January 2008 to February 2010. The initial demand being made on 2nd March 2012 and the confirmed assessment made on 20th March 2013 for the sum of Kshs. 1,458,159,616/= being VAT on park entry/gate fees and picnic site fees. Legislation ought not to be enacted to regulate past conduct but future acts and ought not to affect past transactions carried on the basis of existing law. With regard to taxes an event which is continuing and not complete when the new Legislation comes into force allows for retrospective application of the new legislation on the continuing default. The financial year for purposes of tax computation is 1st January to 31st December of the previous year. The tax payer is required by law to file returns by 30th June of the following year. The action of collection of park entry/gate fees and picnic site fees is therefore confined to each financial year. Any default to remit any taxes under this head would be treated as a default once for all and cannot be construed to be a continuing process to warrant the application of continuing default principle as is the case in matters relating to hire-purchase-agreements.

21. The Value Added Tax Act No. 32 of 2013 was assented to on 14th August 2013 and commenced on 2nd September 2013. It is trite law that any legislation cannot act or be applied retrospectively and therefore the provisions of VAT Act 2013 cannot be applied while considering if VAT was due or payable with regard to park entry

and picnic sites fees collected during the period January 2008 to February 2010, which is the audit period that was considered by the Respondent and VAT levied thereon. The effective law during this period was the VAT Act, CAP 476 (now repealed). The Tribunal therefore finds that the Applicable laws for purposes of determining this Appeal are VAT Act CAP 476, now repealed and the Wildlife (Conservation and Management) Act Cap 376 which provision was introduced by amendments to the Act No. 16 of 1989, Section 3. Having stated legislation cannot be applied retrospectively any attempt to rely on legislations that was not in force in the period in dispute would amount to travesty of justice and contravention of laid down principles on application of Fiscal statutes.

22. The Tribunal is clear that the Appellant provided services during the audit period as provided for under Section 3A of the Wildlife Conservation and Management) Act Cap 376, (now repealed) and which expressly provided the functions of the Appellant as :- ***The functions of the Service shall be to—***

(a) formulate policies regarding the conservation, management and utilization of all types of fauna (not being domestic animals) and flora;

(b) advise the Government on establishment of National Parks, National Reserves and other protected wildlife sanctuaries;

(c) manage National Parks and National Reserves;

(d) prepare and implement management plans for National Parks and National Reserves and the display of fauna and flora in their

natural state for the promotion of tourism and for the benefit and education of the inhabitants of Kenya;

(e) provide wildlife conservation education and extension service to create public awareness and support for wildlife policies;

(f) sustain wildlife to meet conservation and management goals;

(g)conduct and co-ordinate research activities in the field of wildlife conservation and management;

(h) identify manpower requirements and recruit manpower at all levels for the Service for wildlife conservation and management;

(i) provide advice to the Government and local authorities and landowners on the best methods of wildlife conservation and management and be the principal instrument of the Government in pursuit of such ecological appraisals or controls outside urban areas as are necessary for human survival;

(j) administer and co-ordinate international protocols, conventions and treaties regarding wildlife in all its aspects in consultation with the Minister;

(k) solicit by public appeal or otherwise, and accept and receive subscriptions, donations, devices and bequests (whether movable or immovable property or whether absolute or conditional) for the general or special purposes of the Service or subject to any trust;

(l) render services to the farming and ranching communities in Kenya necessary for the protection of agriculture and animal husbandry against destruction by wildlife.

23. The Tribunal has noted that the services under the repealed Act were undertaken for and on behalf of the Government of Kenya which included accepting and receiving subscriptions as provided

for under Section 3A(k) of the Wildlife (Conservation and Management) Act Cap 376(now repealed) being guided by the provisions of the forestated legislation, the name of the Appellant is instructive as to who they provide the services for. The park entry and picnic sites fees are gazetted by the Minister for the time being in charge of Forestry and Wildlife who by Regulations, categorizes the parks and conservation areas and sets the fees for entry into National parks Managed by the Appellant as contained in Regulations 10 and 11 of The Wildlife (Conservation and Management) (National Parks) Regulations, 2010. This constitutes a service.

24. The Tribunal having determined that there is a service, the next issue for determination would be whether and if so, when did the service become taxable? Whereas it is not in dispute that the rates are set by the Government of Kenya and the Appellant are not at liberty to vary the Statutory fees without an amendment or review to the Regulations. Section 6 of the VAT Act, CAP 476 (now repealed) did not include statutory fees as services that were taxable and there is no leeway to charge any additional fees on the park entry and picnic sites fees by the Appellant in view of the provisions of Regulation 11 of the Wildlife (Conservation and Management) (National Parks) Regulations, 2010. If indeed the intention of parliament was to levy VAT or any other additional tax on the park entry and picnic sites fees, nothing would have been easier than to include the same in the Regulations. The Appellant therefore could not deduct any amount as VAT from the

park entry and picnic sites fees collected for remittance to the Respondent.

25. The submission by the Respondent that the Appellant was engaged in a business with regard to the collection of park entry and picnic sites fees is incorrect as the repealed VAT legislation did provide for charging of VAT in broad terms as is the case in the Value Added Tax Act No. 32 of 2013. Further, it is clear that the service provided was for and on behalf of the Government and not on the Appellants own behalf or benefit. If the service was provided for its own behalf this would have been construed as a business and they would be liable to pay tax as there would be a commercial gain. The authorities' cited by the Appellant support the finding by the Tribunal that the legislation must be clear and there is no intendment that can be inferred if not expressly stated in the legislation.

26. The Tribunal is not convinced by the Respondent's submissions and neither was there any demonstration of an instance where statutory fees are subjected to VAT under the repealed legislation. If the tax was payable the tax should have been levied on the Principal, who is the Government of Kenya and not the Agent, the Appellant, who was collecting the fees on it's behalf.

27. The Tribunal has been able to establish that the Appellant has paid VAT where the law required them to do so for services which are of a commercial nature as provided for under Section 7(d) of the establishing Act. This is confirmed by the fact that the dispute

before the Tribunal presently relates only to park entry and picnic sites fees and not the other heads of income which are operated by the Appellant for commercial purposes.

28. The Respondent contended before the Tribunal that there was no evidence of remittance of the collections of park entry and picnic sites fees by the Appellant to the principal authority. The Tribunal finds this argument to be irrelevant as it is the Principal who guides the agent on how to apply collections. Further to the forgoing and as provided for in the establishing Act, the Appellant draws funding from the consolidated fund which is in the exclusive control of the Principal, the Government of Kenya, and funds are disbursed once a budget as drawn by the Appellant has been interrogated by the principal and rationalized if necessary. The Tribunal has determined that in view of the work structure between the Principal and the Appellant, it has time and again authorized the Appellant, as their Agent, to apply the collections from park entry and picnic sites fees towards its operational expenses. As a result of this arrangement the principal has only provided for the shortfall in the annual budgetary allocation to the Appellant.

29. The Tribunal considered the argument by the Appellant on entitlement to zero-rating and found not tenable as the fees collected are Statutory fees collected by the Appellant on behalf the Government of Kenya and do not attract tax in view of the provisions of Section 6 of the VAT Act, Cap 476(now repealed).

30. The Appellant argued it enjoyed tax exemption during the period 2003 to 2008, which the Tribunal confirmed related to Income Tax only and there is no analogy that can be made with tax due from Income Tax which would then allow them to enjoy the privilege. Exemptions are tax head specific and entity specific and not analogous. The Tribunal therefore finds that this claim by the Appellant must fail.

31. The Appellant argued that they were entitled to tax exemption as the service they provided fell under the category of agriculture and animal husbandry which are both exempt from tax. The Tribunal finds that animal husbandry is the branch of agriculture concerned with the care and breeding of domestic animals such as cattle, dogs, sheep and horses. The Appellant did not and does not undertake such activities as the services envisages a domestic setting and not the wild where the Appellant has been mandated by law to provide a service of wildlife conservation and therefore the exemption envisaged by the law cannot be extended and does not arise.

32. The findings by the Tribunal above clearly preclude the principle of legitimate expectation and estoppel. However, the fact that the Respondent did not demand for tax previously does not mean that they are estopped, unless doing so would be in breach of specific provisions of law.

FINDINGS

33. The Tribunal finds that liability to pay tax is not pegged on ability to pay and this ground of Appeal is not available to the Appellant

and should the Tribunal have found the sums demanded payable, the Appellant would have been liable.

CONCLUSION

34. The Tribunal having entered a finding that the service provided was not a business and therefore did not attract VAT, the Appellant was well within their right to appeal the decision of the Respondent and consequently it is our considered view that the Respondent acted contrary to the VAT Act, CAP 476, (now repealed) in levying and demanding tax on park entry and picnic sites fees as the prevailing legal regime did not provide for the same. The interest charged thereon is also not tenable in view of the finding that VAT was not due and payable. The Appeal succeeds and the confirmed tax demanded pursuant to the audit under reference **P000606676H/03/2012** for the sum of **Kshs. 1,458,159,616/=** be and is hereby expunged.

Each party shall bear it's costs.

DATED and DELIVERED at NAIROBI this 16TH day of NOVEMBER 2016

In the presence of:-

JAMES MULILI (PKF) .....for the Appellant

FREDRICK TONGITICH .....for the Respondent

.....
MOSES BUYUKA OBONYO
CHAIRPERSON

.....
FRANCIS KIVULLI
MEMBER

.....
DANIEL TANUI
MEMBER

.....
BONIFACE DIMMO
MEMBER

.....
LILIAN RENEE OMONDI
MEMBER