REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
APPEAL NO.58 OF 2016

LEWA WILDLIFE CONSERVANCY LIMITED.....APPELLANT

=VERSUS=

THE COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

JUDGEMENT

BACKGROUND

1. The Appellant is a limited liability company, limited by guarantee and incorporated in Kenya, in 1995. It is located in Isiolo County. It is responsible for managing and conserving wildlife resources in liaison with Kenya Wildlife Service. Therefore any visitor who enters into the conservancy is required to pay part entry fees, which are statutory fees gazetted by the Government of Kenya forestry into National parks and Natural reserves.

2. On the 11th day of September, 2016 the Respondent issued a Notice of intention to audit the Appellant in respect of various tax heads; i.e. Corporation Tax, PAYE, VAT and Withholding Tax for the period January, 2009 toDecember,2013.

3. Once the Audit was concluded, the audit findings were communicated to the Appellant through a letter dated 21st January, 2015. Among the audit findings was that the Appellant had not accounted for VAT on Park Entry Fees and Game Drives amounting to Kshs.102,701,688.45 inclusive of both the principal amount and interest.

4. The Appellant on 3rd March, 2015 responded and provided explanations on the unaccounted VAT on Park Entry Fees and Game Drives. One of the explanations was that the Appellant relied on a private ruling of the Respondent dated 16th February, 2001.

5. After a series of communication and correspondence between the Appellant and the Respondent, the Respondent issued a tax demand dated 11th January, 2016 and maintained that the VAT on Park Entry Fees of Kshs.88,590,236/= was due. The demand for VAT on Game Drives was dropped from the assessment.

6. The Appellant objected to the assessment on 31st March, 2016 on the basis that they relied on a private ruling of the Respondent that advised that VAT was not payable on park entry fees.

7. The Respondent gave its objection decision on 5th April, 2016 confirming the assessment of VAT on park entry fees as Kshs.88,590,236/= on the basis that between 2009 and 2013 park entry fees were taxable at the rate of 16% as the same were neither listed as exempt under the Third Schedule to the VAT Act Cap 476 of the Laws of Kenya (now repealed), neither were they zero rated under the Fifth Schedule of the VAT Act. Being dissatisfied with the objection decision, the Appellant lodged and filed this appeal on 17th May, 2016.

APPELLANT'S ARGUMENTS

8. The Appellant contends that in the year 2001, it sought clarity from the Respondent on the VAT treatment of its park entry fees. In response thereof, the Respondent wrote a letter dated the 16th day of February, 2001 and advised the Appellant that park entry fees among other fees were not subject to VAT. The Appellant submitted that it relied on the said guidance until the enactment of the VAT Act 2013, which came into operation on the 2nd day of September, 2013 when the Appellant started charging VAT on park entry fees.

9. The Appellant asserted that the VAT Act, 2013 made it clear that park entry fees are subject to VAT at the standard rate of 16% and the Appellant has been charging the same since the operation of the said statute.

10. The Appellant stated that under the repealed VAT Act, Cap 476, Laws of Kenya (Now Repealed), paragraph 15, of the Third Schedule, tour operation and agency fees, including hotel, holiday and other supplies made to travellers are exempt from VAT. Moreover, it submitted that park entry fees comprise consideration for tour operation services

which were exempt from VAT prior to 2nd day of September, 2013 and therefore the Respondent's letter of 16th February, 2001 was correctly based on the interpretation of the then VAT legislation.

11. The Appellant submitted that the Respondent's demand for taxes is unfounded, procedurally and administratively unfair, and is a violation of its Constitutional right as enshrined under Article 47 of the Constitution 2010.

RESPONDENT'S ARGUMENTS

12. The Respondent argued that between the years January 2009 to December 2013, VAT on park entry fees was taxable at the standard rate of 16% and that those services were not expressly tax exempt. They argued that tour operator services are exempt from VAT pursuant to Paragraph 15 of the Third Schedule of the VAT Act. They further submitted that park entry fees are not part of tour operator services as tour operator services accrue to a service provider and not a consumer of amenities. They also stated that clustering park entry fees as tour operator services is a misrepresentation of the law as a person can access the park and pay entry fees, for other activities like food and accommodation.

13. The Respondent submitted that its letter dated the 16th day of February, 2001 did not amount to a private ruling and further that the Appellant has failed to produce the letter that elicited the said Respondent's response and therefore the Respondent cannot comprehend the information that the Appellant sought. It asserted that the said letter was a simply ordinary correspondence between the parties herein and the tribunal should not attach much weight to it.

14. Moreover the Respondent submitted that the letter dated the 16th day of February, 2001, did not and cannot oust the express provisions of the repealed Vat Act, Cap. 476 of the Laws of Kenya (Now Repealed). They argued that the Act takes precedence over the said letter. They relied to the following authority; ***Mombasa Civil Appeal No.157 of 2007, between Commissioner Customs and others versus Amit Ashok Doshi and two others, where the judges held that where the commissioner made a ruling based on a wrong testing of the sample provided and the taxpayer acted on the same, it was on a balance preferable that the law should be as it is. It is not in the interest of***

consistent application of the law that errors should be sanctified as principle.

15. The Respondent stated that section 65 of the Tax Procedures Act, 2015, provides that a private ruling issued in accordance with section 65 is binding on the commissioner. That prior to 2015, letters issued by the Commissioner were not binding but were subject to the law.

16. The Respondent argued that in the circumstances the letter of 16th February, 2001 did not create any legitimate expectation. Holding otherwise would mean that the Vat on park entry fees was not taxable in light of the provisions of the said Act. They further argued that article 210 (1) of the Constitution provides that any waiver or variation of taxes due can only be done by legislation and its letter of 16th February, 2001 is not legislation.

THE HEARING

17. When the matter came up for hearing on the 25th day of August, 2016 the parties with due regard to the nature of the dispute informing the Appeal opted not to call for any oral testimony through witnesses but rather opted for the determination of the appeal through oral submissions.

18. The parties were subsequent to the hearing of the appeal by way of oral submissions directed at the instance and consent of the very parties to file and serve upon each other with written submissions. Both parties duly compiled and filed their written submissions.

ANALYSIS

19. The Tribunal, having carefully considered the pleadings herein together with the parties submissions is of the respectful view that the issue for its determination is as follows;

    a) Whether the Respondent's letter dated 16th February, 2001 created legitimate expectation on the Appellant that park entry fees was not chargeable to tax.

20. The Tribunal has studied the authority relied on by the Respondent i.e Mombasa Civil Appeal No.157 of 2007, stated above. The same is distinguishable from the present Appeal in that the relevant statute under consideration in that Appeal, being The East African

Community Customs Management Act, 2004, very express, clear with no ambiguity. The issue therein was a breach of statutory duty and it was held that it was not lawful and estoppel could not be issued against the Commissioner to prohibit him from correcting an unlawful act .In the instant Appeal, the VAT Act , Cap.476 of the Laws of Kenya (now repealed) was not expressly clear as to what constitutes "tour operator services".

21. The Tribunal takes cognizance of the fact that tax legislation ought to be clear and unambiguous. There is no intendment on tax law. There is various case law on the same. The tribunal will refer **to J.R. Misc. Application No. 460 of 2013, *ex-parte*, Universal Corporation Limited, R vs Kenya Revenue Authority,** where Justice Majanja, expressly stated that in taxation cases, it is important to regurgitate the principles guiding tax legislation, and restated the case of R vs Commissioner Of Domestic Taxes Large Tax Payers Office, ex-parte, Barclays Bank Of Kenya Limited (2012) e KLR, where it was held thus:-

"The approach to this case is that stated in the oft cited case of Cape Brandy Syndicate v In land Revenue Commissioners (1920), KB 64 as applied in T.M. Bell v Commissioner Of Income Tax (1960) EALR 224 where Ronald J. stated, "in a taxing Act, one has to look at what is clearly said. There is no room for intendment as to tax. Nothing is to be read in, nothing to be implied. One can only look fairly into 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, to be."

22. The Tribunal notes that the Respondent did not demand for the taxes for close to a period of twelve years until the VAT Act, 2013 which came into operation on the 2nd day of September, 2013 which expressly excluded tour operator services. This reinforces the fact that the VAT Act Cap 476 of the Laws of Kenya (now repealed), was indeed not very express as to what constitutes tour operator services. Indeed the VAT Act 2013 never clarified the interpretation of tour operator services, as it merely removed it and it became exempt and vatable.

23. The Tribunal states that VAT was possibly payable but in the absence of clear interpretation of what constitutes tour operator services the Tribunal's hands are tied. The Respondent has not provided an alternative opinion as to what constitutes tour operator services during the period prior to audit, which the tribunal can avail itself to.

24. It is worth noting that the Respondent's argument that there was no letter produced by the Appellant in response to its letter of 16th February, 2001 is wanting. The absence of the letter seeking advice is not prejudicial to the extent expressly clear as to the issues under consideration. The Tribunal will refer to its full tenor. In any event there was no repudiation of the letter of advice by the Respondent prior to the audit period.

25. The Tribunal notes that the Respondent's letter dated the 16th day of February 2001, was addressed to the Appellant and stated as follows;

Value Added Tax Department
16th February, 2001
VAT/ADM/72/L/VOL.II/(19)

The Finance Manager,
The Lewa Wildlife Conservancy,
P.O. Box 49918,
NAIROBI.

Dear Sir,

RE: GAME PARK ENTRY FEES AND OTHER VAT ISSUES
We are in receipt of your letter dated 8th February 2000 and hereby advise that the VAT status on the issues raised in the said letter is clarified as follows;-
The following activities are not taxable:-

- *Game Park Entry Fees*
- *Livestock grazing*
- *Thatch sales*
- *Hire of aircraft by staff*

The following activities are taxable:-

- *Hotel services such as game drives, sightseeing tours, transfers to and from airports/railway stations, nature walks*

- *Filming by foreigners is a taxable activity but where the invoice is in the name of a foreign company, no tax shall be charged.*
- *Camping fees*
- *Complimentaries*

The input tax on the following shall be apportioned:-

- *Vehicle spare, fuels and oils for tractors and graders.*
- *Fixed assets acquisition*
- *Workshop Tools*

The input tax on the following shall be deducted in full:-

- ***Hotel and Restaurant supplies especially drinks (wines and spirit, beer and soft drinks).***
- ***Vehicles used for Game Drives sightseeing tours.***

Yours faithfully,
B.N.NYONGESA (MRS)
ASSISTANT COMMISSIONER

26. The tribunal is of the considered view that the Respondent's letter is explicit in its contents and the Appellant acted on it for over a period of twelve years. The Respondent does not deny its existence. It is irrelevant that there could have been no letter seeking their opinion. The Respondent has capacity and the required expertise to interpret tax legislation and advise the taxpayer on the same. In any event the tribunal notes that the Respondent did not repudiate the said letter for the said period of twelve years. It acted with indolence in respect with its letter of advice dated the 16th day of February, 2001.The Respondent took no action for a period of over twelve years to address the collection of VAT taxes on game park entry fees. The law is clear that it does not aid the indolent.

27. In the circumstances of this Appeal, the Respondent's letter of 16th February,2001 is the genesis of the principle of legitimate expectation. The same created an expectation on the Appellant that the taxes were not payable. The tribunal refers to the case of Akaba Investments Limited vs. Kenya Revenue Authority, (2007) e KLR, where Justice Nyamu J. held that legitimate expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably

expect to continue. The tribunal therefore makes a finding that there was legitimate expectation on the part of the Appellant herein.

28. The tribunal makes it clear that a letter, policy , ruling could not override the express provisions of law at the material period. However it has been clearly stated and a finding made that there was no clear provision that made it expressly clear as to the interpretation of tour operator services in the repealed VAT ACT Cap. 476 Laws of Kenya.

The upshot of the foregoing is that the Appellant's appeal dated the 17th day of May, 2016 is merited and is hereby allowed and consequently the following orders are issued;

i) The Respondent's demand against the Appellant for VAT on park entry fees for the period January, 2009 to 2nd September, 2013 when the new VAT Act came into operation, is set aside.

ii) There shall be no orders as to costs.

THESE ARE THE ORDERS OF THIS HONOURABLE TRIBUNAL.

DATED AND DELIVERED AT NAIROBI THIS 7th DAY of December, 2016.

In the presence of:-

JAFARI MBAYE and
FRIDAH MWIRIGI for the Appellant

KENNETH KIRUGI and
ELIZABETH KAHINDI for the Respondent

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ERIC NYONGESA WAFULA
CHAIRERSON

.....
JOSEPHINE K. MAANGI
MEMBER

.....
JOLAWI O. OBONDO
MEMBER

.....
BONIFACE A. DIMMO
MEMBER

.....
ABDULBASID AHMED
MEMBER