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Background

VAT is a consumption tax charged under the Value Added Tax Act, 2013 on supply of goods and services. The supplies are categorised into either zero-rated supplies, exempt supplies or standard rated supplies. The tax is charged on the value added at different stages of production and at different levels of the distribution of goods or services.

The VAT Act requires that a person who in the course of business makes taxable supplies or expects to make taxable supplies whose value is five (5) million shillings or more within a period of twelve (12) months or is about to commence making taxable supplies whose value is expected to exceed five million shillings within a period of twelve months, shall be liable for registration and apply to the commissioner for registration.

Taxpayers are required to account for the tax at the time of supply and file and make payment not later than the 20th day of the following month in which the supply occurred. However, for imported goods, tax is collected at the point of importation by the Commissioner of Customs and Border Control.

VAT in Kenya is based on the destination principle and therefore allows for zero rating of exports. Generally, all goods and services are taxable unless expressly provided for under the Act as exempt supplies. The objective of exempting certain supplies is to lower the costs of essential goods and services or to promote certain investments.

The Value Added Tax Act provides for the imposition of value added tax on goods and services made in, or imported into Kenya. Due to the need to generate more revenue locally to finance the Budget, Kenya introduced sales tax in 1973 by enacting the Sales Tax Act in 1973. The general rate of the tax was at 10% and was applicable on goods manufactured in Kenya by registered manufacturers or goods imported into Kenya. The manufacturers of the goods that were subject to the sales tax were required to be registered

by the Commissioner. In addition to the general rate of tax, some few goods were subject to specific rate of tax.

The tax base of the sales tax was narrow as it was charged at the manufacturers level or at the point of importation only. The tax had a huge negative impact on the local manufacturing since the manufacturers of the goods that were subject to the sales tax were not allowed to deduct the input tax, hence increasing the cost of goods.

Transition from Sales Tax to Value Added Tax

The sales tax was replaced by the Value Added Tax (VAT) in 1990. The transition from sales tax to VAT was informed by the fact that the former legislation was retrogressive and had negative impact on businesses because it did not provide for deduction of input tax, unlike VAT where the suppliers of taxable goods or services deduct the tax paid on input supplies from the tax paid on output supplies and pay the net to the Kenya Revenue Authority, (KRA). In addition, sales tax was being charged on goods only, whether locally manufactured or imported while VAT widened the scope by including services. At the time of enactment, VAT was considered a progressive tax and major source of revenue for the Government. It was anticipated that the revenue collected from this tax would surpass revenues from other tax heads such as income tax, excise duty and import duty. However, as a proportion of the Gross Domestic Product (GDP), VAT has continued to yield less revenue than income tax. The VAT Act (Cap. 476) underwent a major review in 2013 leading to a new structural design. The rationale for the new VAT Act was to modernize the law, rationalize/reduce zero-rating and exemption of goods which had increased over time. The review was aimed at increasing the revenue raised from the VAT through minimizing tax expenditure as well as aligning it with international best practices. However, following the enactment, some goods and services that were removed from the exemption Schedule and zero-rated Schedules started to be re-introduced progressively thereby creating uncertainty in terms tax policy.

Interpretation

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

business” means –

trade, commerce **or** manufacture, profession, vocation or occupation;

any other activity in the nature of trade, commerce or manufacture, profession, vocation or occupation;

any activity carried on by a person continuously or regularly, whether or not for gain or profit and which involves, in part or in whole, the supply of goods or services for consideration; or

supply of property by way of lease, licence, or similar arrangement, but does not include-

(i) employment..."

"export" means to take or cause to be taken from Kenya to a foreign country, a special economic zone enterprise or to an export processing zone;

By dint of being provided for 'use' and 'consumption' outside Kenya to various non-resident customers based outside Kenya qualify as exported services

In **Commissioner of Domestic Taxes v Total Touch Cargo Holland [2018]** eKLR High Court Judge Maureen Odera held that: -

"I am in full agreement with the above finding by the tribunal. The location where the service is provided does not determine the question of whether the service is exported or not. The test is the location (or place) of use or consumption of that service. Therefore, the relevant factor is the location of the consumer of the service and not the place where the service is performed. In this case the service provided by KAHN was for use and consumption in Europe."

In Commissioner of Domestic Taxes v Coca Cola Central East and West Africa Ltd (ITA E038 of 2020) eKLR the High court pronounced itself clearly as to the interpretation of the above Section. It stated: -

"Section 2 of the repealed VAT Act 2013 defined "export" to mean "take or cause to be taken from Kenya to a foreign country." "Service exported out of Kenya" was defined to mean "a service provided for use or consumption outside Kenya." The operative words in that section were "use" or "consumption." To amount to exported service, the service was to have been provided for use or consumption outside Kenya."

Summary of Cases

- *Commissioner of Domestic Taxes v Coca Cola Central East and West Africa Ltd (ITA E038 of 2020) eKLR,*

- *Google Kenya Limited v Commissioner of Domestic Taxes (ITA No E 004 of 2021) eKLR*
- *Commissioner of Domestic Taxes v 3M Kenya limited, ITA E096 of 2021 [2022] eKLR,*
- *Commissioner of Domestic Services v Total Touch Cargo Holland [2018] eKLR*
- *Panalpina Air Flow Limited v Commissioner of Domestic Taxes [2019] eKLR).*

All the decisions referred to above are consistent in one theme, that the consumer of the service is not necessarily where the marketing is done but **the party who benefits from the marketing and promotion services**. That is, the consumer or user of the service is the party who commissioned the contract and who directly benefited from the service provided.

“service exported out of Kenya” a service provided for use or consumption outside Kenya.

“Supply of services” means anything done that is not a supply of goods or money, including a. The performance of services for another person;

b. The grant, assignment, or surrender of any right;

c. The making available of any facility or advantage; or

d. The toleration”

Section 5- 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. A taxable supply made by a registered person in Kenya;
 - b. The importation of taxable goods; and
 - c. A supply of imported taxable services.
2. The rate of tax shall be –
 - a. in the case of a zero-rated supply, zero per cent; or”
 - b. in any other case, sixteen per cent of the taxable value of the taxable supply, the value of imported taxable goods or the value of a supply of imported taxable services.

3. Tax on a taxable supply shall be a liability of the registered person making the supply and, subject to the provisions of this Act relating to accounting and payment, shall become due at the time of the supply.
4. The amount of tax payable on a taxable supply, if any, shall be recoverable by the registered person from the receiver of the supply, in addition to the consideration.”
5. Tax on the importation of taxable goods shall be charged as if it were duty of customs and shall become due and payable by the importer at the time of importation.
6. Tax on the supply of imported taxable services shall be a liability of any person receiving the supply and, subject to the provisions of this Act relating to accounting and payment, shall become due at the time of the supply.
7. The provisions of subsection (1) shall be applicable to supplies made over the internet or an electronic network or through a digital marketplace.
8. The Cabinet Secretary shall make regulations to provide the mechanisms for implementing the provisions of subsection (7).
9. For the purposes of this section, "digital marketplace" means an online platform which enables users to sell goods or provide services to other users.

Section 7- Zero rating

- (1) Where a registered person supplies goods or services and the supply is zero rated, no tax shall be charged on the supply, but it shall, in all other respects, be treated as a taxable supply.
- (2) A supply or importation of goods or services shall be zero-rated under this section if the goods or services are of the description for the time being specified in the Second Schedule.

Analysis

Kenafri Bakery Limited v Commissioner, Domestic Taxes (Income Tax Appeal E070 of 2020) [2023]

Tax laws are undoubtedly among the most dynamic in most jurisdictions. As we anticipate the introduction of the Finance Bill 2024, which will amend several tax laws, including the Value Added Tax Act (VATA), Income Tax Act Cap 470 Laws of Kenya, and the Tax Procedures Act, it's essential to understand the implications of certain changes. So, what happens when a previously exempt good or service becomes zero-rated through an amendment?

To clarify, Zero-rated VAT means that the supply of goods or services is still subject to VAT, but the rate is 0%. As a result, a supplier does not need to charge VAT on their sales but is still eligible to claim back any VAT incurred on their inputs. On the other hand, VAT-exempt means that the supply of goods or services is not subject to VAT at all. A supplier of exempt goods cannot charge VAT on their sales and is also unable to claim VAT on their inputs.

The difference between VAT-exempt and zero-rated goods and services has a significant impact on businesses. A business selling zero-rated goods can reclaim input VAT, while one dealing with exempt goods cannot.

Section 8. Place of supply of services

1. A supply of services is made in Kenya if the place of business of the supplier from which the services are supplied is in Kenya.
2. If the place of business of the supplier is not in Kenya, the supply of services shall be deemed to be made in Kenya if the recipient of the supply is a registered or unregistered person—
 - a. the services are physically performed in Kenya by a person who is in Kenya at the time of supply;
 - b. the services are directly related to immovable property in Kenya;
 - c. the services are radio or television broadcasting services received at an address in Kenya;
 - d. the services are electronic services delivered to a person in Kenya at the time of supply; or
 - e. the supply is a transfer or assignment of, or grant of a right to use, a copyright, patent, trademark, or similar right in Kenya.

3. In this section—

"electronic services" means any of the following services, when provided or delivered on or through a telecommunications network—

- (a) websites, web-hosting, or remote maintenance of programs and equipment;
- (b) software and the updating of software;
- (c) images, text, and information;
- (d) access to databases;
- (e) self-education packages;
- (f) music, films, and games, including games of chance; or

- (g) political, cultural, artistic, sporting, scientific and other broadcasts and events including broadcast television.

Section 11. Place of supply of goods

A supply of goods occurs in Kenya if—

- (a) the goods are delivered or made available in Kenya by the supplier;
- (b) the supply of the goods involves their installation or assembly at a place in Kenya;
or
- (c) where the goods are delivered outside Kenya, the goods were in Kenya when their transportation commenced.

Section 12. Time of supply of goods and services

Section 12 (1) of the VAT Act 2013 defines the ‘time of supply’ as below: -

Subject to subsection (3), the time of supply, including a supply of imported services, shall be the earlier of—

the date on which the goods are delivered or services performed;

the date a certificate is issued by an architect, surveyor or any other person acting as a consultant in a supervisory capacity;

the date on which the invoice for the supply is issued; or

Analysis

The Section implies that delivery, performance, the invoice for supply is issued or date payment received whichever occurs earlier VAT becomes payable,

Section 15. Deemed taxable supply

- (1) An application of taxable supplies by a registered person for use outside his business shall be a taxable supply made by the person.
- (2) A taxable supply under subsection (1) shall be deemed to have been made by the person on the date the supply is first used outside the business.

Section 17- Credit for input tax against output tax

Section 17 (1)

Subject to the provisions of this Act and the regulations, input tax on a taxable supply to, or importation made by, a registered person may, at the end of the tax period in which the

supply importation occurred, be deducted by the registered person, in a return for the period subject to the exceptions provided under this section, from the tax payable by the person on supplies by him in that tax period, but only to the extent that the supply or importation was acquired to make taxable supplies.”

If, at the time when a deduction for input tax would otherwise be allowable under subsection (1), the person does not hold the documentation referred to in subsection

The registered supplier has not declared the sales invoice in a return, the deduction for input tax shall not be allowed until the first tax period in which the person holds such documentation: Provided that the input tax shall be allowable for a deduction within six months after the end of the tax period in which the supply or importation occurred.

(3), the deduction for input tax shall not be allowed until the first tax period in which the person holds such documentation. Provided that the input tax shall be allowable for a deduction within six months after the end of the tax period in which the supply or importation occurred.”

Section 17(3)

The documentation for the purposes of subsection (2) shall be

- (a)an original tax invoice issued for the supply or a certified copy;
- (b)a customs entry duly certified by the proper officer and a receipt for the payment of tax;
- (c)a customs receipt and a certificate signed by the proper officer stating the amount of tax paid, in the case of goods purchased from a customs auction;
- (d)a credit note in the case of input tax deducted under section 16(2); or
- (e)a debit note in the case of input tax deducted under section 16(5)”

Section 17 (5)

Where the amount of input tax that may be deducted by a registered person under subsection (1) in respect of a tax period exceeds the amount of output tax due for the period, the amount of the excess shall be carried forward as input tax deductible in the next tax period:

Provided that any such excess shall be paid to the registered person by the Commissioner where-(b)such excess arises from tax withheld by appointed tax withholding agents; and withholding agents may be applied against any tax payable under this Act or any other

written law, or is due for refund pursuant to section 47(4) of the Tax Procedures Act, 2015; (d) the registered person lodges the claim for the refund of the excess tax within twenty-four months from the date the tax becomes due and **payable; and (e) such excess arises from input tax under subsection (8):**

Analysis

A plain reading of Section 17(1) of the VAT Act dictates that input tax is deductible where it is incurred on purchases made in making taxable supplies by a registered person. This means that for a taxpayer to deduct input tax, it must have actually made a purchase and also possessed the documentation enumerated in Section 17(3) of the VAT Act.

Shreeji Enterprises (K) limited vs. Commissioner of Investigations and Enforcement (Tax Appeal No. 58 and 186 of 2019) *the Tribunal observed that it is a common principle that a taxable person who makes transactions in respect of which VAT is deductible may deduct the VAT in respect of the goods and services acquired by him, provided that such goods and services have a direct and immediate link with the output transaction in respect of which VAT is deductible*

Highlands Mineral Water Limited v The Commissioner of Domestic Taxes, Tax Appeal E026 of 2020 where the court held as follows:

“I agree with the Appellant and I hold that the plain and unambiguous language of Section 17 of the VAT Act is clear that the only conditions provided for a Taxpayer to qualify for input VAT are: That the input tax was incurred on a taxable supply made to or on importation made by a taxpayer at the end of the tax period, That the input tax is deducted by a registered person on taxable supplies made by him; and That the input tax is to be allowable for deduction within six months after the end of the tax period in which the supply or importation occurred.”

Section 18- Tax paid prior to registration

(1) Where—

- a. on the date exempt supplies made by a registered person become taxable, and the person had incurred input tax on such supplies; or
- b. on the date he is registered, a person has incurred tax on taxable supplies which are intended for use in making taxable supplies, the person may, within three months from that date, claim relief from any tax shown to have been incurred on such supplies:

- (2) Provided that this subsection shall apply where such supplies are purchased, within the period of twenty-four months immediately preceding registration or the exempt supplies becoming taxable.
- (3) Where the Commissioner is satisfied that the claim for relief is justified, he shall authorise the registered person to make an appropriate deduction of the relief claimed under subsection (1) from the tax payable on his next return.
- (4) The claim for relief from tax under subsection (1) shall be made in the prescribed form.

Analysis

Kenafri Bakery Limited v Commissioner, Domestic Taxes (Income Tax Appeal E070 of 2020) [2023]

Tax Laws Are Dynamic. What Happens When a Previously Exempt Good or Service Becomes Zero-Rated? Can the Law Apply Retrospectively to Allow Taxpayers to Deduct Input VAT Incurred on Supplies Made Before the Change?

To clarify, **Zero-rated VAT** means that the supply of goods or services is still subject to VAT, but the rate is 0%. As a result, a supplier does not need to charge VAT on their sales but is still eligible to claim back any VAT incurred on their inputs. On the other hand, **VAT-exempt** means that the supply of goods or services is not subject to VAT at all. A supplier of exempt goods cannot charge VAT on their sales and is also unable to claim VAT on their inputs.

The difference between VAT-exempt and zero-rated goods and services has a significant impact on businesses. A business selling zero-rated goods can reclaim input VAT, while one dealing with exempt goods cannot,

Facts of the Case

Kenafri Bakery Limited is primarily engaged in the manufacture and sale of bread to various retail outlets, including schools and colleges. The dispute arose from Kenafri's claim for input VAT of Kshs. 91,381,817, which was incurred between April 2015 and March 2017, prior to the change in VAT status of ordinary bread.

Prior to April 3, 2017, ordinary bread was VAT-exempt, meaning Kenafri was unable to claim VAT on inputs related to its bread production. However, following the amendment

introduced by the Finance Act, 2017, the VAT status of bread was changed from exempt to zero-rated, effective from April 3, 2017. Kenafric sought to claim back the VAT on inputs incurred during the period from April 3, 2015, to April 3, 2017, based on the assumption that Section 18 of the VAT Act would allow them to retroactively claim input VAT.

The Law:

Section 18 of the VAT Act provides the following guidance for businesses that were previously engaged in the sale of exempt supplies, but whose goods or services are subsequently classified as taxable

18. Tax paid prior to registration

(1) *Where,*

a) on the date exempt supplies made by a registered person become taxable, and the person had incurred input tax on such supplies; or

b) on the date he is registered, a person has incurred tax on taxable supplies which are intended for use in making taxable supplies, the person may, within three months from that date, claim relief from any tax shown to have been incurred on such supplies:

Provided that this subsection shall apply where such supplies are purchased, within the period of twenty-four months immediately preceding registration or the exempt supplies becoming taxable.

(2) Where the Commissioner is satisfied that the claim for relief is justified, he shall authorise the registered person to make an appropriate deduction of the relief claimed under subsection (1) from the tax payable on his next return.

Submissions

Kenafric took the view that section 18 (1)(a) and 18 (2) of the VAT Act permits deduction of input tax on all supplies made within a period of twenty-four months preceding the date when exempt supplies become taxable. As such, it was of the view that the law would apply retroactively and that input tax for supplies made between April 3, 2015 and April 3, 2017 ought to be allowed.

The Kenya Revenue Authority (KRA), however, took the position that the tax relief provisions of Section 18 should only apply to inputs incurred after the VAT status change came into effect. The KRA argued that input VAT could only be claimed if the materials were purchased after the law was amended to zero-rate ordinary bread.

To support this, the KRA referenced **Section 23(3) of the Interpretation and General Provisions Act (Chapter 2, Laws of Kenya)**, which stipulates that an amending law generally does not have retroactive effects unless explicitly stated by the legislature.

Court's Analysis and Decision

The High Court, agreed with the KRA's argument that, as a general rule, amendments to tax laws do not apply retroactively. The Tribunal cited the principle that legislative amendments generally take effect from the date of enactment, and any exceptions to this rule must be clearly expressed by the legislature.

However, the Tribunal also acknowledged that retroactive application is permissible under certain conditions. It emphasized that **the intention of the legislature must be the determining factor in deciding whether a law should apply retroactively.**

The Tribunal referenced the case ***Samuel Kamau Macharia and Another v Kenya Commercial Bank Ltd and 2 Others***, where the Supreme Court held that retroactive laws are not inherently unconstitutional unless they violate specific constitutional principles, such as impairing vested rights or obligations under contracts.

It also looked at **Municipality of Mombasa vs Nyali Limited [1963] EA 374**

*“Whether or not legislation operates retrospectively depends on the intention of the enacting body as manifested by the legislation. In seeking to ascertain the intention behind the legislation the courts are guided by certain rules of construction. One of these rules is that if the legislation affects substantive rights, it will **not be construed to have retrospective operation unless a clear intention to that effect is manifested;** whereas if it affects procedure only, prima facie it operates retrospectively unless there is a good reason to the contrary. But in the last resort it is the intention behind the legislation which has to be ascertained and a rule of construction is only one of the factors to which regard must be had in order to ascertain that intention.”*

Against this background and in the complete appreciation of these interdicts, The Tribunal proceeded to determine the import of section 18 (1)(a) of the VAT Act.

The Tribunal ruled that **since the change in VAT status was meant to provide relief to businesses like Kenafric, it should be interpreted in a manner that preserves the right to claim input tax incurred during the period prior to the VAT status change.** The Tribunal thus upheld Kenafric's claim for input tax relief for purchases made between April 3, 2015, and April 3, 2017, as this was within the 24-month window specified by Section 18(2) of the VAT Act.

Section 19. When tax is due

(1) Tax shall be due and payable at the time of supply.

(2) Notwithstanding the provision of subsection (1), a person may defer payment of tax due to a date not later than the twentieth day of the month succeeding that in which the tax became due.

Analysis

Section 12 (1) of the VAT Act 2013 defines the time of supply' as the earlier of—

- the date on which the goods are delivered or services performed;
- the date a certificate is issued by an architect, surveyor or any other person acting as a consultant in a supervisory capacity;
- the date on which the invoice for the supply is issued; or

Section 20-

Section 31. Refund of tax on bad debts

(1) Where a registered person has made a supply and has accounted for and paid tax on that supply but has not received any payment from the person liable to pay the tax on that supply and that person—

(a) has not received any payment from the person liable to pay the tax, he may, after a period of three years from the date of the supply; or

- (b) the person to whom the supply was made has been placed under statutory management through the appointment of an administrator, receiver, or liquidator,

he may apply to the Commissioner for refund of the tax involved: Provided that-

- (a) no application for a refund shall be made under this section after the expiry of ten years from the date of supply;
- (b) the refund shall be made in compliance with section 47(5) of the Tax Procedures Act;
- (c) the amounts may be credited to the taxpayer's record for use against future value added tax liabilities;
- (d) where the tax refunded under sub-section (1) and (2) is subsequently recovered from the recipient of the supply, the registered person shall refund the tax to the Commissioner with sixty days of the date of recovery;
- (e) if the payment is made within the time specified under subsection (1) and (2), an interest of two per cent per month or part thereof of the tax refunded shall forthwith be due and payable and the interest shall not exceed one hundred per cent of the refunded amount.

(2) Where the tax refunded under subsection (1) is subsequently recovered from the recipient of the supply, the registered person shall refund the tax to the Commissioner within thirty days of the date of the recovery.

(3) If payment is not made within the time specified under subsection (2), an interest of two per cent per month or part thereof of the tax refunded shall forthwith be due and payable:

Provided that the interest payable shall not exceed one hundred per cent of the refunded amount.

Section 34 -registration for VAT

(1) A person who in the course of a business—

- (a) has made taxable supplies or expects to make taxable supplies, the value of which is five million shillings or more in any period of twelve months; or
- (b) is about to commence making taxable supplies the value of which is reasonably expected to exceed five million shillings in any period of twelve months,

shall be liable for registration under this Act and shall, within thirty days of becoming so liable, apply to the Commissioner for registration in the prescribed form:

Provided that a person supplying imported digital services over the internet, an electronic network or through a digital marketplace shall register whether or not the taxable supplies meet the turnover threshold of five million shillings.

(2) In determining whether a person exceeds the registration threshold for a period, the value of the following taxable supplies shall be excluded—

- (a) a taxable supply of a capital asset of the person; and
- (b) a taxable supply made solely as a consequence of the person selling the whole or a part of the person's business or permanently ceasing to carry on the person's business.

(3) Notwithstanding subsection (1), a person who makes or intends to make taxable supplies may apply, in the prescribed form, to the Commissioner for voluntary registration.

(4) The Commissioner shall register a person who has applied for voluntary registration under subsection (3) if satisfied that—

- (a) the person is making, or shall make taxable supplies;
- (b) the person has a fixed place from which the person's business is conducted;
- (c) if the person has commenced carrying on a business, the person—

(i) has kept proper records of its business; and

(ii) has complied with its obligations under other revenue laws; and

- (d) there are reasonable grounds to believe that the person shall keep proper records and file regular and reliable tax returns.

(5) The Commissioner shall issue a registered person with a tax registration certificate in the prescribed form.

(6) If the Commissioner is satisfied that a person eligible to apply for registration has not done so within the time limit specified in subsection (1), the Commissioner shall register the person.

(7) The registration of a person under subsection [\(1\)](#) or [\(6\)](#) shall take effect from the beginning of the first tax period after the person is required to apply for registration, or such later period as may be specified in the person's tax registration certificate.

(8) The registration of a person under subsection [\(4\)](#) shall take effect from the date specified in the person's tax registration certificate.

(9) The Cabinet Secretary may, in regulations, provide for the registration of a group of companies as one registered person for the purposes of the Act.

Analysis

Abby Holdings Limited V Commissioner of Investigations and Enforcement- TAT 95 of 2020 A person who has made or expects to make taxable supplies, with a value that is anticipated to exceed five million shillings in any period of twelve months is liable for registration of VAT and shall, within thirty days of becoming so liable, apply to the Commissioner for registration. Accordingly, Section of the VAT Act provides that any person who has met or is likely to meet the specified threshold and fails to apply for registration within the stipulated time limit will be automatically registered by the Commissioner Section .

Missing Trader

Basco Products (K) Limited vs Commissioner Domestic Taxes Appeal Number 1 of 2021

Exported Services

Mwaura Kabata, Viva Africa Consulting & Others vs. The National Assembly & 3 Others.

The export of services was moved from the zero-rated category to the exempt category by the Finance Act of 2020. The Finance Act of 2022 reclassified the export of services as taxable at the standard rate, except for BPO services, which were reinstated into the zero-rated category. This was challenged in Petition Number 338 of 2022. The High Court has dismissed this petition, and, consequently, the classification by KRA of exported services as taxable stands.

Commissioner of Domestic Taxes vs Total Touch Cargo Holland HC ML ITA No. 17 of 2013 [2018] eKLR held, for a service to be deemed an "exported service", it matters not whether that service was performed in Kenya or outside Kenya. That the determining factor is the location where that service is to be finally used or consumed.

That this was in line with the TAT definition of consumption as quoted in the same case as follows: "To our mind then, it is immaterial where the place of the performance of the

service takes place, it can be in China, in Latin America, in Ireland, in Mesopotamia, in Asia or Europe or even here in Kenya; what is material is where the use or consumption of the service takes place, not the place of services.”

That again, this was in line with the destination principle under the Organization for Economic Co-Operation and Development (OECD) Guidelines which provide that the jurisdiction where a customer is located has the taxing rights over internationally traded services (coffee being an export supply). That this principle was reinforced in the 3M Kenya Limited (Appellant) vs. Kenya Revenue Authority. TAT No. 30 of 2016.

by dint of being provided for ‘use’ and ‘consumption’ outside Kenya to the various non-resident customers based outside Kenya qualify as exported services under Section 2 of the VAT Act, 2013 which defines an exported service to mean:

“Services provided for use or consumption outside Kenya.

In the case of Commissioner of Domestic Taxes v Coca Cola Central East and West Africa Ltd (ITA E038 of 2020) eKLR, Mwita J while referring to the case of Google Kenya Limited v Commissioner of Domestic Taxes (ITA No E 004 of 2021) eKLR among other cases stated the following which the Tribunal finds to be instructive: -“See also Commissioner of Domestic Taxes v 3M Kenya limited, ITA E096 of 2021 [2022] eKLR, Commissioner of Domestic Services v Total Touch Cargo Holland [2018] eKLR and Panalpina Air Flow Limited v Commissioner of Domestic Taxes [2019] eKLR).

All the decisions referred to above are consistent in one theme, that the consumer of the service is not necessarily where the marketing is done but the party who benefits from the marketing and promotion services. That is, the consumer or user of the service is the party who commissioned the contract and who directly benefited from the service provided.”

In the case of Commissioner of Domestic Taxes v Coca Cola Central East and West Africa Ltd (ITA E038 of 2020) eKLR the High court pronounced itself clearly as to the interpretation of the above Section. It stated:-“Section 2 of the repealed VAT Act 2013 defined “export” to mean “take or cause to be taken from Kenya to a foreign country.” “service exported out of Kenya” was defined to mean “a service provided for use or consumption outside Kenya.” The operative words in that section were “use” or “consumption.” To amount to exported service, the service was to have been provided for use or consumption outside Kenya.”

Section 36- Cancellation of Registration

1. A registered person who ceases to make taxable supplies shall apply in writing to the Commissioner, for the cancellation of the person's registration, within thirty days of the date on which the person ceases to make taxable supplies.
2. A registered person who continues to make taxable supplies whose annual value does not exceed the registration threshold may apply in writing to the Commissioner, for cancellation of the person's registration.
3. The Commissioner shall, by notice in writing, cancel the registration of a person if—
 - a. the person has applied for cancellation under subsection [\(1\)](#) and the Commissioner is satisfied that the person has ceased to make taxable supplies; or
 - b. the person has not applied for cancellation but the Commissioner is satisfied that the person has ceased to make taxable supplies and is not otherwise required to be registered.
4. Where a person applies for cancellation of registration under subsection [\(2\)](#) and the Commissioner is satisfied that the person is not required to be registered—
 - a. the Commissioner shall, if the person has been registered for a period of more than twelve months, by notice in writing, cancel the registration; or
 - b. the Commissioner may, if the person has been registered for a period of twelve months or less, by notice in writing, cancel the registration.
5. The Commissioner may, by notice in writing, cancel the registration of a person who is no longer required to be registered, if the Commissioner is satisfied that the person has not—
 - a. kept proper tax records;
 - b. furnished regular and reliable returns; or
 - c. complied with obligations under other revenue laws, and there are reasonable grounds to believe that the person will not keep proper records or furnish regular and reliable returns.
6. The cancellation of a person's registration shall take effect from the date specified in the notice of cancellation.
7. Where a person's registration is cancelled under this section, the person shall
 - a. immediately cease to hold out that the person is a registered person, including on any documentation used by the person;

- b. submit a final return and pay all tax due, including the tax due under subsection (9), within fifteen days after the date of cancellation of the person's registration.
- 8. Notwithstanding the cancellation of registration of a person under this section, the person shall be liable for any act done or omitted to be done while registered.
- 9. (A person whose registration is cancelled shall be deemed to have made a taxable supply of any trading stock on hand at the time the registration is cancelled if the person was allowed an input tax credit for the acquisition or import of the stock, or in respect of the acquisition or import of goods that have been subsumed into that stock.
- 10. The taxable supply under subsection (9) shall be deemed to have been made by the person immediately before the person's registration is cancelled and the person shall be liable for an amount of output tax in respect of the supply equal to the amount of the input tax credit allowed to the person on acquisition or import of the stock.

37. Offences relating to registration

A person who—

- (a) fails to apply for registration as required under this Act;
- (b) applies for cancellation of registration when still required to be registered;
- (c) fails to apply for cancellation of registration as required under this Act; or
- (d) fails to comply with section 35 or 36(7)(a),

commits an offence and shall be liable on conviction to a fine not exceeding two hundred thousand shillings or to imprisonment for a term not exceeding two years, or to both.

Section 42- Tax invoice

- (1) Subject to subsection (2), a registered person who makes a taxable supply shall, at the time of the supply furnish the purchaser with the tax invoice containing the prescribed details for the supply.
- (2) No invoice showing an amount which purports to be tax shall be issued on any supply—

which is not a taxable supply; or

by a person who is not registered.

- (3) Any person who issues an invoice in contravention of this subsection commits an offence and any tax shown thereon shall become due and payable to the Commissioner within seven days of the date of the invoice.
- (4) A registered person shall issue only one original tax invoice for a taxable supply, or one original credit note or debit note, but a copy clearly marked as such may be provided to a registered person who claims to have lost the original.

Section 43-

Analysis

TAT No. 469 of 2022 Five Forty Aviation Limited vs Commissioner of Domestic Taxes It is settled law on record keeping and provision of the same when requested by the Respondent where Section 43 of the VAT Act 2013 requires a taxpayer to keep transactional records for a period of five years...”

Section 44- Submission of returns

- (1) Every registered person shall submit a return, in the prescribed form and manner, in respect of each tax period not later than the twentieth day after the end of that period.

Section 62- Burden of Proof

In any civil proceedings under this Act, the burden of proving that any tax has been paid or that any goods or services are exempt from payment of tax shall lie on the person liable to pay the tax or claiming that the tax has been paid or that the goods or services are exempt from payment of tax.

Analysis

Section 30 of the Tax Appeals Tribunal Act provides as follows with regard to the burden of proof:-

“Burden of proof In a proceeding before the Tribunal, the appellant has the burden of proving—

- a. where an appeal relates to an assessment, that the assessment is excessive; or
- b. in any other case, that the tax decision should not have been made or should have been made differently”

Further, Section 38 of the Tax Appeals Tribunal Act states as follows;

“In any proceedings, whether criminal or civil, under this Act—

- (a) other than upon an appeal, a certificate from the Commissioner stating that any amount is due from any person by way of tax, or other liability under this Act, shall be conclusive evidence that the amount is due and payable from that person;
- (b) the burden of proving that any tax has been paid or that any goods or services are exempt from payment of tax shall lie on the person liable to pay the tax or claiming that the tax has been paid or that the goods or services are exempt from payment of tax; and
- (c) a statement by the Commissioner that a person is registered or is not registered under this Act, shall be conclusive evidence of the fact unless that person proves the contrary.

Additionally, Section 56 of the Tax Procedures Act states as follows:

- (1) In any proceedings under this Part, the burden shall be on the taxpayer to prove that a tax decision is incorrect.”

First Schedule

Exempt Supplies

1	Bovine semen of tariff No. 0511.10.00.
2	Fish eggs and roes of tariff No. 0511.91.10.
3	Animal semen other than bovine of tariff No. 0511.99.10.
4	Soya beans, whether or not broken of tariff Nos. 1201.10.00 and 1201.90.00
5	Groundnuts, not roasted or otherwise cooked, in shell of tariff No. 1202.41.00
6	Groundnuts, not roasted or otherwise cooked, shelled, whether or not broken of tariff No. 1202.42.00.

7	Copra of tariff No. 1203.00.00.
8	