REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
APPEAL NO.135 of 2016

CHESTER INSURANCE BROKERS LIMITED....................................APPELLANT

VERSUS

COMMISSIONER OF DOMESTIC TAXES ....RESPONDENT

JUDGEMENT

BACKGROUND

1. The Appellant is a limited company and an insurance brokerage company licensed by the Insurance Regulatory Authority pursuant to the provisions of the Insurance Act. It is in the business of providing insurance brokerage services and acts as an intermediary between clients and insurance companies.

2. The Respondent is established under the Kenya Revenue Authority Act, Chapter 469 of the Laws of Kenya, charged with the mandate of assessing, collecting and accounting for all revenue on behalf of the Government of Kenya.

3. The Respondent undertook an audit of the Appellant's tax affairs from 5th of April 2016 for the period July 2013 to November 2015 based on their Financial Statement and other records that were furnished. The audit was finalized and the same showed that the Appellant had not subjected the premiums it earned related to commissions income to excise tax as stipulated in Section 137(4) and Paragraph 8 of Part 111 of the Fifth Schedule to the Customs and Excise Act, Chapter 472, Laws of Kenya as amended in the Finance Act 2013.

4. Consequently, the Respondent issued a Notice of Additional Assessment for Kshs.49,556,922/= being Excise Duty on commissions earned of KShs.44,356,997/= and Kshs.5,199,925/= being Withholding Tax.

5. The Appellant objected to the Respondent's Assessment vide their letter dated 18th July 2016. The Respondent reviewed the same and proceeded to issue its Objection Decision. It reviewed its additional assessment demand from Kshs.49,556,922 to Kshs.45,098,687/= being excise duty Kshs.44,356,996/= and withholding tax of Kshs.741,690/=

6. The Appellant being aggrieved by the Respondent's Objection Decision filed a Notice of Appeal and subsequently filed its Memorandum of Appeal and Statement of Facts on 14th Oct 2016.

ISSUES FOR DETERMINATION

7. The Tribunal, having considered both parties' pleadings, submissions and all documentation is of the respectful view that the issues for its determination are as hereunder;

    a) Whether insurance commissions and in particular brokerage commissions are subject to excise Duty pursuant to the Customs and Excise Duty Act, Cap 472.
    b) Whether fees paid for professional services rendered in respect of the Appellant's software are subject to Withholding Tax.
    c)

a) **Whether Insurance Commissions and in particular Brokerage Commissions are subject to excise Duty pursuant to the Customs and Excise Duty Act, Cap 472.**

8. According to the Appellant the purported 10% levy is to be charged on commission that brokers charge to insured parties. Insurance brokerage firms do not charge any commissions on insured parties rather, the commission is charged on premiums which are paid by insurance companies not consumers hence levying a further 10% on earnings is unconstitutional and will result in a violation of consumer rights.

9. The Appellant contends that whereas in the landmark ruling in respect to Petition Number 383 of 2015, **ASSOCIATION OF KENYA INSURERS AND 5 OTHERS VS THE COMMISSIONER OF DOMESTIC TAXES AND 2 OTHERS,** explored and settled various issues, the court did not articulate itself on the use of the word "charged" as introduced by the Finance Act 2013.

10. It was the Appellant's argument that the Respondent seemingly charged excise duty on the Appellant's gross income and a further tax on its net profit. This it submitted is not only punitive but also burdensome to it.

11. To buttress its contention, the Appellant relied on several decided authorities relating to interpretation of tax statutes, namely;

    a) **REPUBLIC VS. COMMISSIONER OF DOMESTIC TAXES LARGE TAXPAYERS OFFICE EX PARTE BARCLAYS BANK K LIMITED [2012] WHERE MAJANJA J** relied on **T.M BELL VS COMMISSIONER OF THE INCOME TAX** [1960] where it was held that *"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 is to be implied. One can only look fairly at the language used."*

b) **KEROCHE INDUSTRIES LIMITED VS KRA**, where the above position was upheld as follows; *"In interpreting a taxing Act one has to look merely at what is clear. There is no room for intendment. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used...."*

12. The Appellant therefore averred that it is perceived that insurance brokerage firms do not *"charge"* commission to insured parties and in the premises the Respondents assessment of Excise Duty on the Appellant is erroneous and a misapplication of the law.

RESPONDENT'S CASE

13. The Respondent states that the Finance Act 2013 amended the Customs and Excise Act Chapter 472 Laws of Kenya part III of the 5th schedule and introduced Excise Duty at the rate of 10% on commissions earned by insurance brokers.

14. The Respondent contends that though the law was repealed removing Excise Duty on Insurance Commissions effective 1st December 2015, there is no provision in law suspending the application of the law for the period that the tax is being demanded

15. The Respondent in its submission relied on the authority of **Association of Kenya Insurers, Association of Kenya Re-Insurers, Motor Vehicle Assessors Association of Kenya, The Institute of Loss Adjusters and Risk Surveyors. The National Association of Kenya Investigators and the Association of Kenya Insurance Brokers against Commissioner of Domestic Taxes, Kenya Revenue Authority and the Attorney General (Petition No.383 of 2013)**,a case with similar issues as the instant case, where Justice Lenaola held that;

    "the provisions of the Finance Act, 2013 amending the provisions of the Fifth Schedule of the Customs and Excise Act in so for as it applies to persons registered under the Insurance Act does not violate the petitioners right to fair and administrative action under Article 47(1).The public Notice demanding the payment of Excise duty from the petitioners for the entire month of June 2013 does not have any legal effect as the obligation to pay Excise Duty was imposed by the Finance Act 2013 which commenced on 18th June 2013".

16. The Respondent submits that the use of the term "charged" was adequately dispensed by the landmark **RULING ON PETITION NUMBER 383 OF 2015, ASSOCIATION OF KENYA INSURERS AND FIVE OTHERS VERSUS THE COMMISSIONER OF DOMESTIC TAXES AND TWO OTHERS, THE AKI CASE, aforesaid.**

17. Furthermore, the Respondent submitted that the issue of ambiguity or otherwise of the definition of *"other fees"* contained under Paragraph 8 of Part 111 of the Fifth Schedule to the Customs and Excise Act has already been determined by the Tribunal in **Tax Appeal No. 203 of 2015; BTB Insurance Brokers vs. Commissioner of Domestic Taxes**, where it held as follows;

    "The Tribunal finds that the Finance Act 2013 defines "OTHER FEES" as ....other fees, charges, commissions charged by financial institutions, except "interest" and observes that this is a clear definition in the writ of law and is neither confusing nor indeterminate and that only one needed to read the relevant statute carefully to discern the true intention of the legislation".

18. Consequently, the Respondent contends that it did not err in assessing Excise Duty on commissions and urged us to uphold the same.

    b) Whether fees paid for professional services rendered in respect of the Appellant's software are subject to Withholding Tax.

19. The Appellant's argument is that it replaced its entire software by purchasing new software and made a one-off payment. It therefore argued that its reason for not charging WHT on the software was correct since the said software was a one-off purchase.

20. In support of its argument the Appellant referred to Section **31B of the Second Schedule, Part VI of the Income Tax Act, Cap 470. The same provides as follows;**

    "Subject to this Schedule, where a person incurs capital expenditure on the purchase or acquisition of the right to the use of a computer software, there shall be deducted, in computing his gains or profits for the year of income in which the software is first used and for subsequent years of income, an amount equal to one-fifth of that expenditure."

21. The Appellant states that the fees paid to M/S Spyce It Limited, a locally registered company was a one off payment and not a recurrent expenditure. Moreover, it averred that the software developed for the Appellant was intended for enhancement of its core business operations and thereby qualified as an asset.

22. On its part, the Respondent submitted that the law does not exempt a one-off payment of professional fees from the ambit of withholding tax. To buttress its assertion, it relied on Section 35 (3)(f) of ITA which provides as hereunder;

"A person shall, upon payment of an amount to a person resident or having a permanent establishment in Kenya in respect of management or professional fee or training fees the aggregate value of which is twenty four thousand shillings or more in a month, which is chargeable to tax, deduct therefrom tax at the appropriate resident withholding tax".

23. In view of the foregoing the Respondent urged the Tribunal to affirm its tax assessment on the Appellant's software.

ANALYSIS AND FINDINGS

a) **Whether insurance commissions and in particular brokerage commissions are subject to excise Duty pursuant to the Customs and Excise Duty Act, Cap 472.**

24. The Tribunal finds that there is no ambiguity in the definition of the term other fees as contained under Paragraph 8 of Part 111 of the Fifth Schedule to the Customs and Excise Act, Cap 472. It therefore agrees with the Respondent's argument on the definition of the words "Other Fees" as provided by the Finance Act, 2013. The same states:-

"as .....Other fees, charges, commissions charged by financial institutions, except "interest".

25. Furthermore, it is not in dispute that the Appellant being an insurance brokerage company is licensed under the Insurance Act and categorized as a financial institution under Part 111 of the Fifth Schedule to the Customs and Excise Act as amended in the Finance Act 2013. Indeed, the commissions earned are expressly mentioned in the Act as chargeable to tax.

26. The Respondent relied on the case of BTB **BROKERS VS COMMISSIONER OF DOMESTIC TAX** before the Tax Appeals Tribunal where it was held as follows:-

"The Tribunal finds that the provisions of the customs and Excise Duty Act and the Amendments contained in the Finance Act of January 2013, Financial service providers, money transfer service providers, communication providers are all intermediaries connecting persons who need to do business with each other and further establishes that commissions earned by these intermediaries are the tax target of the Finance Act 2013."

27. Insurance Brokers, which include the Appellant, though incorporated under the Companies Act are nevertheless licensed under the Insurance Act Cap 487 of the Laws of Kenya. It is worth noting that the Tribunal, while pronouncing

itself on the issue of the definition of **other fees** in the case referred to herein above stated;

> *"this is a clear definition in the writ of law and is neither confusing nor indeterminate and that one only needed to read the relevant statute carefully to discern the true intention of the legislation".*

28. The Tribunal has no reason to deviate from its aforesaid judgment and finds that the Respondent did not err in its tax assessment against the Appellant in respect to the insurance commissions it earned.

b) Whether fees paid for professional services rendered in respect of the Appellant's software are subject to Withholding Tax.

29. As regards to the issue of WHT on the Appellant's software, the Tribunal notes that the Appellant contracted a company known as M/S Spyce Limited in the year 2014, to computerize its operations and upgrade its systems. It is not in dispute that it paid the said company a fee of Kshs.11,070,000/= for the service rendered. It is from the said professional service that the Respondent demanded WHT of Kshs.741,690/= including interest and penalty.

30. The relevant applicable law is Section 35(3)(f) of ITA. The same provides as follows:-

    "A person shall, upon payment of an amount to a person resident or having a permanent establishment in Kenya in respect of management or professional fee or training fees the aggregate value of which is twenty four thousand shillings or more in a month, which is chargeable to tax, deduct therefrom tax at the appropriate resident withholding tax" Having studied the said relevant provision and indeed the entire Act, the Tribunal does not agree with the Appellant that the law exempts a one-off payment of professional fees from WHT.

31. In view of the foregoing the Tribunal finds that WHT tax is applicable to the said transaction and the Respondent lawfully brought it to charge.

FINAL DECISION

32. The Tribunal finds no merit in the Appeal and makes the following orders;
    a) The Appeal is hereby dismissed.
    b) The Respondent's confirmed Additional Tax Assessment vide its demand dated 19th September 2016 in respect of Excise Duty and WHT on software totaling **Kshs.45,098,687/=** is hereby upheld.
    c) Each party shall bear its costs.

33. It is so ordered.

DATED and DELIVERED at NAIROBI this 18th day December 2019.

In the presence of: Samuel Mwaura ....for the Appellant

Fridah Mwongera ....for the Respondent

....
JOSEPHINE K. MAANGI
CHAIRPERSON

....
RICHARD ROTICH
MEMBER

....
TANVIR ALI
MEMBER

....
GEOFFREY KARUU
MEMBER

....
DELILAH K. NGALA
MEMBER