REPUBLIC OF KENYA
IN THE APPEALS TRIBUNAL AT NAIROBI
APPEAL NO. 137 OF 2018

W.E.C. LINES KENYA LIMITED.....APPELLANT

VERSUS

COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

JUDGEMENT

BACKGROUND

1. The Appellant is a limited liability company incorporated in Kenya under the Companies Act (Cap.486 of the Laws of Kenya) and is an exclusive agent of W.E.C. Lines BV (WEC BV) in Kenya. WEC BV is incorporated in the Netherlands.

2. The Respondent is principal officer of Kenya Revenue Authority (KRA). KRA is established under the Kenya Revenue Authority Act (Cap.469) and is charged with the mandate of assessment, collection and receipt of revenue as an agent of the Government of Kenya.

3. The Appellant, on various dates, made applications to the Respondent for VAT refunds during the period February 2015 to January 2018. The applications were made on the basis that the Appellant was offering zero rated services to WEC BV, being exported taxable services to an international sea or air carrier on international voyage or flight. The VAT refund claims amounted to Kshs. 6,440,624.00.

4. The Appellant received a letter from the Respondent dated 16th April, 2018 informing it that its claims had been rejected based on a review of the agency agreement between WEC BV and W.E.C. Lines Kenya ltd (WEC Kenya).

5. The Appellant is in the business of a shipping agent where it acts as the authorized and appointed agent for WEC BV. WEC BV is in the business of maritime transportation of containerized goods to, from or through territories. It owns and operates vessels calling at various ports in those territories. Notably, WEC BV enters into contracts with its local clients, the importers, for carriage of cargo.

6. In the letter of 16th April, 2018, the Respondent contended that the services offered by the Appellant to WEC BV did not qualify as exported services and as such were subject to VAT at 16%. The Appellant objected to the decision in its letter dated 17th May, 2018. In the objection letter, the Appellant listed the grounds of objection summarizing its view and position on its VAT status.

7. The Respondent replied to the objection through its letter dated 25th May, 2018. In the letter, the Respondent reaffirmed its position by asserting that the Appellant's claim that it was offering taxable services to an international sea carrier on an international voyage was not applicable. The reason given was that WEC Kenya provided services to owners of the vessels and not the vessels themselves hence the services could not be zero rated under Paragraph 6 of the Second Schedule to the VAT Act, 2013.

8. The Appellant received the Respondent's letter of 25th May, 2018 on 19th June, 2018. The Appellant, having been dissatisfied with the Respondent's objection decision filed its Notice of Appeal on 19th July, 2018. The respective Memorandum of Appeal and Statement of Facts were filed on 2nd August, 2018 and both documents were served on the Respondent.

THE APPEAL

9. The Appellant advanced the following grounds in the Appeal:-

   (a) That the Respondent erred in rejecting the VAT refund claims by the Appellant;

   (b) That the Respondent erred in law and fact by giving prime consideration to the provisions of VAT Regulations 2017, a

subsidiary law, over the provisions of the VAT Act, 2013 which is the main Act;

(c) That the Respondent erred in law and fact by misinterpreting the agency agreement between the Appellant and its principal, W.E.C. Lines BV, a company registered in the Netherlands;

(d) That the Respondent erred in law and fact by concluding that the services offered by the Appellant to the Principal do not qualify as services exported out of Kenya as provided by Paragraph 1 of Part A of the Second Schedule to the VAT Act, 2013;

(e) That the Respondent erred in law and fact by failing to consider that services offered by the Appellant to the Principal qualify as taxable services to an international sea carrier on an international voyage as provided for under Paragraph 6 of Part A of the Second Schedule to the VAT, Act 2013; and

(f) That the Respondent erred in law and fact by attempting to distinguish between a vessel and a vessel owner and thereby making a flawed conclusion on the identity of W.E.C. Lines BV.

10. WEC Kenya, as an agent of WEC BV, carries on activities in Kenya purely and exclusively as an agent of its principal.

11. The Appellant has pointed out that it is a well-known legal principle that Acts of Parliament are supreme to subsidiary legislation. Consequently, the VAT Regulations, 2017 being a subsidiary legislation, cannot override the provisions of the VAT Act, 2013. The Respondent therefore, in making any decision pertaining to VAT refunds, should be informed first by the provisions of the main Act and thereafter apply the same before making any reliance on the Regulations.

12. The Appellant takes note that the VAT Act, 2013 is instructive as to what constitutes an exported service. Being the main Act, the provisions of the Act on the determination of an exported service therefore supersede any contrary determination by subsidiary legislation.

13. The Respondent in its letter dated 18th April, 2018 has rightly stated that the Appellant offers services to WEC BV on an agency basis. The disqualification of the services, as not being exported services, has been done by the Respondent based on the place of performance.

14. The Agency agreement referred to by the Respondent executed between WEC Kenya and WEC BV dated 1st January, 2009 states that the role of the Appellant was to perform the duties and functions as authorized and approved by WEC BV. Under the circumstances, WEC Kenya only provided agency services to its sole client WEC BV.

15. From an analysis of the Agency agreement, one is able to show the business arrangement between WEC Kenya and WEC BV. The identity of the customer or recipient of the services offered by WEC Kenya should guide the Respondent in determining the consumer of the impugned services.

16. The Appellant maintains that, from the Agency agreement, it is obvious that the nature of the supply was a supply of zero rated supplies. It also avers that the parties to the supply and the flow of the services was from the Appellant to WEC BV. It is therefore clear that the user and consumer of the services provided by WEC Kenya was WEC BV. The jurisdiction of the consumer should then inform the answer to the question of whether the services were exported or not.

17. The Appellant reiterates that it provides agency services to its sole client, WEC BV, who is the principal. WEC BV is an international sea carrier which owns, operates and charters ships. In fact, the Agency agreement clearly stated that WEC BV entered into the agreement acting in its capacity as a ship owner. WEC BV is the legal person who receives all subject services from WEC Kenya.

18. The Appellant further reiterates that the services provided by it are consumed by WEC BV, the owners and operators of the vessels. It is therefore absurd that the Respondent is making an attempt to separate the ship from the ship owner. It is obvious that a ship, by nature of it being an object, is incapable of receiving any form of benefit or service unless such a benefit or service is offered to the owner of that ship. An artificial separation of "ship" from the "ship-owner" would render the expression "taxable services to ships"

totally meaningless. The Appellant cannot render services to an object but rather to a legal person. It is inconceivable how the Appellant entered into an Agency agreement to supply services to an object and not WEC BV, the owner of the ships.

19. WEC BV is the owner of the ships and the recipient of the services provided by the Appellant. Thus, the provision of Paragraph 6 of Part A of the Second Schedule to the VAT Act, 2013 should apply to WEC BV as the recipient of the services provided by WEC Kenya. This position should then guide the Respondent on the issue of whether the VAT in relation to the agency services are refundable. In addition, international maritime law offers a directive as to how certain considerations are to be made within the shipping industry. For instance, a container is considered part of a shipping unit within the ship, hence it is part of the ship and should be given similar treatment. This is according to the UN Convention on Contracts for the International Carriage of Goods wholly or partly by sea to which Kenya is a signatory. Consequently, the services provided to shipping units and to ships in general should, as per the Kenyan VAT law, be treated as supplies to a ship and are zero-rated for VAT purposes.

20. The Respondent sought reliance on the agreement dated 1st January, 2009 which was superseded by the agreement dated 1st January, 2013. The VAT, the subject of contention relates to the period February 2015 to January 2018 during which period the latter agreement was in force. The agency agreement dated 1st January, 2013 stated that the role of the Appellant was to perform duties and functions as authorized and approved by WEC BV, its principal.

21. The Respondent in determining whether the Appellant's services qualify for an export of service refund should be guided by the Agency Agreement which is the main contractual document. Since Section 2 of the VAT Act, 2013 overrides the provisions of VAT Regulations, 2017; the identity of the customer or consumer of the services offered by the Appellant is evident from the Agency agreement.

22. The Respondent has not faulted the fact that the Appellant had met the set criteria to qualify as an agent. However, the Respondent disregarded the intentions of the parties to a contract and went ahead to create 'artificial contract' between the Appellant and importers

and use it to deny the Appellant VAT refund rightly and legitimately due to it. The Appellant therefore reasserts that the Respondent ought to respect the contractual obligations of each party as contained in the contract entered into by the parties to the contract and should not amend the parties' intentions in order to impose illegal taxes under the VAT Act, 2013.

23. In light of the foregoing it is the Appellant's case that the decision made by the Respondent to decline VAT refund claims of the Appellant is flawed and legally untenable.

24. In its defense, the Appellant has cited the following tax cases:-

(a) Diamond Trust Kenya Ltd v Daniel Mwema Mulwa, Milimani HCCCC No.70 of 2002(unreported);

(b) Evans Kidero & 4 others v Ferdinand Ndung'u Waititu & 4 others [2014] eKLR;

(c) IRC v Duke of Westminster [1936] AC 1 at 25, 19TC 490;

(d) JGC Corporation v Federal Inland Revenue Service (18 ITLR 421);

(e) The Commissioner for Her Majesty's Revenue and Customs (Respondent) v Secret Hotels 2 Limited (formerly Med Hotels Limited) (Appellant) [2014] UKSC 16;

(f) Coca Cola East Africa and West Africa Limited v Commissioner of Domestic Taxes (VAT Appeal No.11 of 2013);

(g) George Hammond PLC v Commissioners for Her Majesty's Revenue and Customs (2007), VAT London Tribunal Centre, Decision No.20353;

(h) Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR, Presidential Petition No.1 of 2017;

(i) Commissioner of Domestic Taxes v Total Touch Cargo Holland, High Court Income Tax Appeal No.17 of 2013;

(j) F.H. Services Kenya Limited v Commissioner of Domestic Taxes, Appeal No.6 of 2012;

(k) Panalpina Airflo Limited v Commissioner of Domestic Taxes, Income Tax Appeal No.5 of 2018;

(l) Republic v Kenya Revenue Authority & Another, Ex-parte Fontana Limited 2014 eKLR, JR Misc. Civil Application No.442 of 2013;

(m) Philippine Geothermal, Inc. v The Commissioner of Internal Revenue, [G.R. No. 154028 July 29, 2005]; and

(n) Manila Peninsula Hotel, C.T.A. Case No.8519 Inc. v Commissioner of Internal Revenue, 2015.

THE RESPONSE

25. The Appellant entered into an Agency agreement with W.E.C Lines B.V wherein it performed duties and functions, including but not limited to solicitation of business, customer service, booking, documentation, quotation of rates, negotiation of inland rates, collection, administration, forwarding of claims and performance of all functions reasonably requested by W.E.C Lines B.V. As per the contract, the Appellant actively canvassed inbound and outbound cargo to and/or from shippers or receivers. In so doing, the Appellant was required to use W.E.C Lines B.V logo in all its advertising. Further W.E.C. Lines BV (WEC BV) entered into contracts with its local clients (the importers) for carriage of cargo. The completion of performance for those contracts by WEC BV required the doing of certain acts and fulfilling of certain obligations within Kenya. **To this end, WEC Kenya carried these activities purely and exclusively as an agent of WEC BV.**

26. The Appellant offered agency services to WEC BV which from their nature were marketing and customer care to the principal's clients/customers who are in Kenya receiving consideration as provided under clause 6 of the contract.

27. In paragraph 5 of the Appellant's submissions filed on 28th August, 2019, it has admitted that WEC BV had contracted it for purposes of doing certain acts and fulfilling certain obligations within Kenya. This means that the Appellant was contracted to perform services on behalf of WEC BV within Kenya as WEC BV could not perform the services itself. The services were therefore supplied or made in Kenya in line with the definition of a taxable supply. **The Respondent has not refuted that the Appellant and WEC BV are in a principal agent relationship.**

28. The Appellant has claimed that the services it supplied were consumed by WEC BV which is its principal. The Respondent finds that the position as held by the Appellant is illogical as the actions of the principal are those of the agent. It therefore cannot offer itself a service and charge itself for the said service. Further, if WEC BV needed to supply a service in Kenya for which it needed an agent to provide the service; does it not therefore mean that the services were provided for the benefit of persons residing in Kenya and not itself? It follows therefore that the services were made in Kenya and were taxable supplies as they are offered for consumption in Kenya.

29. An example of the services contracted for was marketing and sales. The Appellant was tasked to advertise the services of WEC BV and it did so within Kenya. The Appellant was to advertise to Kenyans within Kenya perhaps through adverts on the radio and television, flyers and billboards. The people who saw the adverts, flyers and billboards were the people in Kenya. The service of advertising (termed marketing and sales) was used and consumed in Kenya. The impact of the service lay with the consumer who was convinced to utilize the products of WEC BV. In the current case, the consumers are the importers who walk into the Appellant's premises and are served.

30. Another example of services provided by the Appellant was documentation, such as preparing of the bills of lading. The preparation of the bills of lading is a post landing activity that is done in Kenya to allow the importers to offload and clear their cargo. The benefit therefore cannot be for WEC BV as the same is bound to benefit the importer for not keeping the containers beyond the 21 free days for whatever reason. The use and consumption are therefore in Kenya as the benefit of the documentation process accrues in Kenya to the importer for whom the bill of lading is prepared.

31. The Appellant sub-contracted Fortune Containers to clean and/or repair the containers and charged them a fee. It is evident from this that the benefit on containers accrued to the Appellant as it consumed a service and therefore there was no exportation of services.

32. The Respondent referred to the Coca Cola case where at Paragraph 107, the VAT Appeals Tribunal held that the consumption or use of a

service is not determined by reference to the payer or the location of the payer of the service. The Appellant's claim that WEC BV was the consumer of the services on grounds that it is paying for the services must therefore fail.

33. In the event that this Honorable Tribunal is inclined to find that the services offered were exported, the Respondent submits that no input VAT should be claimed by the Appellant. This is because all expenses were met by WEC BV as it was the one entitled to claim input VAT. The Appellant was simply paid a commission by WEC BV upon provision of the services and therefore it did not incur any input VAT.

34. The Respondent submits that the Appellant is not cognizant of the fact that there existed a tri-partite transaction, which in essence had two elements of taxable supplies. The Appellant in its course of furtherance of its business offered and rendered services in Kenya to consumers who utilized the services locally. On the other hand, to complete the tri-partite transaction, the Appellant, in the course of furtherance of its business, offered management and agency services to WEC BV which is a non-resident company. Thus, the taxable supply consumed by WEC BV was the management and agency services which are not subject to taxation in this particular dispute. The Respondent humbly submits that a demarcation has to be drawn between two taxable services rendered by the Appellant to the consumers locally and taxable services rendered to WEC BV.

35. The services offered by the Appellant were not consumed by WEC BV; if they were, the contract would not be a principal-agent relationship. The services by the Appellant were on behalf of WEC BV to importers and clients of the Appellant within Kenya. The activities carried out in this Appeal involved three parties, being the Appellant, WEC BV and importers/clients. The Appellant has focused solely on the contract between itself and WEC BV, its principal.

36. The Regulations clarify the position of the VAT Act as was stated in the *VAT Appeals Tribunal No.11 of 2013; Coca Cola Central East and West Africa Ltd v Commissioner of Domestic Taxes.* The Appellant has attempted to disqualify the Coca Cola case claiming that they are distinguishable as it does not have subsidiaries. The relationship between the parties is irrelevant.

37. With reliance on Constitutional guidelines, the Respondent finds that the VAT Regulations are Constitutional and do not contradict the laws set in place.

38. The Appellant relies on the OECD Destination principle where VAT is levied on the final consumer. The Respondent humbly submits that the OECD Guidelines are not applicable in this particular matter as they have been ousted by the clear provisions of Regulation 13 which ranks higher as the Regulations form part of the Kenyan statutes. However, and without prejudice, the OECD Guidelines lend credence to the Respondent's submissions on the subject matter.

39. Reliance is placed on the *High Court decision of Commissioner of Domestic Taxes v Total Touch Holland Cargo.* In its decision, the High Court affirmed the internationally accepted VAT destination principle on international trade and services. The impact of this is that taxpayers have to consider whether their transaction is a business to business (B2B) or business to consumer (B2C). In a B2B transaction, the consumer of a service is the business and if it is located outside Kenya, the service is clearly consumed outside Kenya. Such services are therefore exported and zero rated for VAT purposes. However, in a B2C transaction, the customer is the final consumer of the service provided. If the customer is in Kenya, like in this case, then the service is not exported but consumed or used in Kenya. Consequently, such services should be subject to VAT at 16%.

40. The Appellant attempts to argue that Paragraph 6 of the Second Schedule to the VAT Act, 2013 deals with the owners of the vessel as well as the vessel placing reliance on the *Salomon v Salomon* case and stating that the two cannot be separated. The definition the Appellant relies on for a carrier does not relate in any way to the instant Appeal and if relied upon would create an absurdity. The owner of the vessel in this case is WEC BV. Would it be prudent to say that the supply of a taxable service was to WEC BV when it was on international voyage or flight? What services would it provide?

41. If the terms "carriers" as applied in Paragraph 6 related to the company, then the words "international sea or aircraft" and "an international voyage or flight" contained in the paragraph would be

superfluous or redundant. But having been used, it clearly means "international sea or aircraft carrier on international voyage or flight."

42. The Respondent noted that the difference between Paragraph 3 and 6 of the VAT Act, 2013 is that the former is in reference to goods while the latter is in reference to services. The Respondent asks: "Is the Appellant suggesting that VAT-able goods supplied to WEC Lines BV are zero rated?" The Respondent maintains that the same would not be true and would speak to absurdity such a definition of carrier would raise. The services offered are to the vessel and not the owner. The argument raised by the Appellant must fail as it is simply a pure misunderstanding of the law as it is.

43. In its support, the Respondent relied on the following tax cases:-

(a) Coca Cola East Africa and West Africa Limited v Commissioner of Domestic Taxes (VAT Appeal No.11 of 2013);

(b) Microsoft Corporation (India) Private Limited v Commissioner of Service Tax & Anr - In the High Court of Delhi at New Delhi, WP(C) No. 11460/2009 &CM No.11182/2009;

(c) Kenya Union of Domestic, Hotels, Education Institutions and Hospital Workers (Kudheiha Workers Union) v Kenya Revenue Authority & 3 others [2014] eKLR; and

(d) Commissioner of Domestic Taxes v Total Touch Cargo Holland [2018] eKLR.

ISSUES FOR DETERMINATION

44. The Tribunal, having carefully and respectively studied the pleadings together with the submissions from both parties, is of the view that the issues for determination are as hereunder:-

(a) Whether the provisions of the VAT Regulations, 2017 supersede the provisions of the VAT Act, 2013?

(b) Whether the Appellant's services are zero rated for VAT and, if so, whether it is entitled to VAT refund?

ANALYSIS AND FINDINGS

(a) Whether the provisions of the VAT Regulation, 2017 supersede the provisions of the VAT Act, 2013?

45. The VAT Act, 2013 received assent on 14th August, 2013 and commenced on 2nd September, 2013. The VAT Regulations 2017 received assent on 4th April, 2017 and commenced on 1st July, 2017.

46. The Cabinet Secretary made the VAT Regulations 2017 in pursuant to Section 67 of the VAT Act, 2013. However, the Regulations are subject to a proviso under Section 67(2) of the Act which states: **"Regulations made under this section shall be tabled before the National Assembly for approval before they take effect."** There is no evidence that the VAT Regulations 2017 were tabled before the National Assembly for approval and therefore the validity thereof is in doubt.

47. Even if the VAT Regulations 2017 were approved by the National Assembly, it is trite law that a subsidiary legislation, the Regulations in the instant case, cannot override the respective primary legislation, the VAT Act, 2013. In the *Commissioner of Domestic Taxes v Total Touch Cargo Holland, High Court Income Tax Appeal No. 17 of 2013*, it was held that **"A subsidiary legislation cannot repeal or contradict express provisions of an Act from which they derive their authority."**

(b) Whether the Appellant's services are zero rated for VAT and, if so, whether it is entitled to VAT refund?

48. In the Tax Appeals Tribunal, Tax Appeal No.5 of 2018, *Coca Cola Central East and West Africa Limited v The Commissioner of Domestic Taxes,* the Tribunal noted that, "**it is seemingly evident that there is rich jurisprudence, globally as Courts have been approached on different circumstances in regards to the applicability of 'exported services'...**" The Appellant, as well as the Respondent, have made extensive reference to jurisprudence in support of their positions in this matter. The Tribunal has given due regard to the same.

49. Before delving into services which the Appellant provided during the period of interest, the Tribunal invokes the applicable law.

Section 2 of the VAT Act, 2013 defines the following:-
"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.
"service exported out of Kenya" means a service provided for use or consumption outside Kenya.

50. The Tribunal notes that the VAT Act, 2013 does not define the terms **"use"** or **"consumption"** in relation to export of service. In *IBM India Private Ltd & Others v. Commissioner of Central Excise & Others, Customs, Excise & Service Tax Appellant Tribunal South Zonal Bench, Bangalore*, it was observed that **"services being intangible, what constitutes export of service is difficult to conceive and define unlike in the case of goods which are tangible."**

51. Paragraph 13(1) of the VAT Regulations, 2017, in respect of exportation of goods and services states:-
"An exportation shall be a taxable supply-

(a) In the case of goods, when the taxable supply involves the goods being entered for export under the East African Community Customs and Management Act and delivered to a recipient outside Kenya at an address outside Kenya; or

(b) In the case of services, when the taxable supply involves the services being provided to a recipient outside Kenya for use, consumption, or enjoyment outside Kenya.

Provided that the exportation of services shall not include-

(a) taxable services consumed on the exportation of goods unless the services are in relation to transportation of goods which terminate outside Kenya;

(b) taxable services provided in Kenya but paid for by a person who is not a resident of Kenya."

52. The proviso (b) on services in the VAT Regulations, 2017 contradicts the proviso for the export of services as per Section 2 of the VAT Act,

2013 and as pointed out earlier a subsidiary legislation cannot override a primary legislation. Consequently, the Tribunal has relied on the definition of export of services as per the VAT Act, 2013 in dealing with this Appeal.

53. The services provided by the Appellant are in dispute. The Appellant renewed its agency with WEC BV in the agreement dated 1st January, 2013. In Paragraph 2.1 of the agreement, it stated; **"The Principal hereby appoints the Agent as its General Agent to act on the Principal's behalf, to promote and to sell the Principal's services within the Territory, and to carry out and/or co-ordinate any and all activities, including but not limited to port activities, necessary to the efficient, good and proper performance of the Principal's services on the terms of this Agreement, and the Agent hereby accepts the appointment on those terms."** It is therefore clear that the Appellant acted as a General Agent of WEC BV.

54. The Respondent, in its submission filed on 18th September 2019 in Paragraph 4, stated that **"To this end WEC Lines Kenya Limited carries these activities purely and exclusively as an agent."** In Paragraph 18 it stated that **"There is no dispute that the Appellant and WEC Lines BV are in a principal agent- relationship. In this relationship, the Appellant performs duties on behalf of WEC Lines BV within Kenya."**

55. The impugned services are those provided by the Appellant to its principal and what the Respondent deems to have provided by the Appellant to the principal's clients, the importers.

56. The Appellant's case is that the agency services offered to WEC BV are within the ambit of Section 2 of the VAT Act, 2013 as they are used or consumed outside Kenya by the contracting company. In addition, the Appellant avers that the services supplied to WEC BV were to an **"international sea or air carriers on international voyage or flight".** In both circumstances the services, in respect to VAT are zero-rated.

57. While opposing the Appeal, the Respondent stated that the Appellant offered two types of services, the first to WEC BV, and the second to WEC BV's clients, the importers. While the former are zero rated for VAT, the latter are subject to VAT at the standard rate of 16%.

58. Zero rating is provided for in the Second Schedule to the VAT Act, 2013. Paragraphs (1) and (6) are relevant to this Appeal. Paragraph (1) zero rates **"The exportation of goods or taxable services"**. Paragraph (6) zero rates **"The supply of taxable services to international sea or air carriers on international voyage or flight."**

59. It is not in dispute that a Service Agreement existed between the Appellant and WEC BV, a company resident in the Netherlands which had no office in Kenya. WEC Kenya charged a fee for its agency services. The Appellant however had no service agreements with the WEC BV's clients, the importers. The Respondent in its submission made no reference to the existence of any service agreements between the Appellant and the importers.

60. The Tribunal has considered two main questions in dealing with this appeal: -

    (a) **Who is the consumer of the agency services provided by the Appellant? ;** and

    (b) **Did the Appellant provide services to WEC BV's clients, the importers?**

61. It is not in doubt and the Respondent has admitted that agency services were rendered by the Appellant to WEC BV. WEC Kenya, the Appellant, carried out agency services as an agent of WEC BV in Kenya. WEC BV is resident in Netherlands and was the recipient and consumer of the agency services. Consequently, the agency services were exported out of Kenya and are therefore zero rated for VAT in accordance with Paragraph (1) of the Second Schedule to the VAT Act, 2013, being in respect of exportation of taxable services.

62. WEC BV is in the maritime business and an owner of ships which docked in Kenya during the respective period. The Appellant attended to the ships and as a consequence supplied services to an international sea carrier on international voyage. These services are zero rated under Paragraph (6) of the Second Schedule to the VAT Act, 2013.

63. In answering the question as to whether the Appellant provided services to WEC BV clients, the importers, it is important to

understand the relationship between the Appellant and the importers. In the case of *Total Touch Cargo Holland versus Commissioner of Domestic Tax [2013] eKLR,* it was observed that **"there was no evidence or even suggestion that any of the Kenyan farmers had a contract or agreement with Kenya Airfreight Handling Ltd (KAHL)".** In this case, the service contract existed between KAHL and Total Touch Cargo Holland. It was held that KAHL did not provide services to the local farmers. By way of an illustration, where a Kenyan consultant is hired by a nonresident to carry out a due diligence of a local target company with the purpose of acquisition, the consultancy service provided is used or consumed outside Kenya. Should the deal be concluded, a benefit could accrue locally. The resultant benefit would not mean that there was a service provided by the local consultant. In the instant case, WEC Kenya, the Appellant had no agreements with the importers and only interacted with them in its capacity as an agent of its principal, WEC BV. Undoubtedly, the importers could have benefited from the activities of the Appellant. Notwithstanding, the Tribunal finds that the Appellant did not provide services to the importers.

64. Section 17(5) of the VAT Act, 2013 states: -

"Where the amount of the input tax that may be deducted by a registered person under subsection (1) in respect of the 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 period:

Provided that any such excess shall be paid to the registered person by the Commissioner where-

(a) the Commissioner is satisfied that such excess arises from making zero rated supplies; and

(b) the registered person lodges the claim for the refund of the excess tax within twelve months from the date the tax became due and payable."

65. In view of the foregoing, the Tribunal finds that the Appellant is registered for VAT and made zero rated supplies and it is therefore entitled to VAT refunds.

FINAL DECISION

66. The upshot of the foregoing is that the Appeal is merited and succeeds. Consequently, the Tribunal makes the following **ORDERS:** -

(a) The Respondent's letter of 25th May, 2018 through which it reaffirmed its rejection of the Appellant's VAT refund applications is hereby set aside subject to the Respondent's right to verify the respective VAT refund claims before settlement of the same.

(b) Each party to bear its own costs.

DATED and **DELIVERED** at **NAIROBI** this **24th** day of **July, 2020**

.....
JOSEPHINE K. MAANGI
CHAIRPERSON

.....
GEOFFREY KARUU
MEMBER

.....
DELILAH K. NGALA
MEMBER

.....
TANVIR ALI
MEMBER