REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
APPEAL NO.79 OF 2015

KOBO SAFARIS LIMITED.....APPELLANT

VERSUS

COMMISSIONER OF INCOME TAX.....RESPONDENT

JUDGEMENT

INTRODUCTION

1. The Appellant is a Limited liability company incorporated in Kenya under the Companies Act pursuant to a Certificate of Incorporation Number C.56954 dated 16th of December, 1993.
2. The Respondent is established under the Kenya Revenue Authority Act, (Cap 469) of the Laws of Kenya, Section 13, charged with the mandate of assessment, collection and receipt of revenue as an agent of the Government of Kenya.

BACKGROUND

3. The Appellant carries out the business of destination management services or ground handling of tourists from overseas by providing, arranging and managing services such as transfers, safaris and tours, ground transportation, air travel, booking of accommodation, management of tourists and related services.
4. On 12th of October 1998, the Appellant entered into a Commercial Agreement with a company known as Africae Safaris, hereinafter referred to as "Africae", based in Spain for provision of the aforesaid services.

5. Subsequently, the said parties incorporated further terms and conditions into the said Agreement vide a contract dated 22/8/2006, in which the Appellant agreed to handle Africae's clients destined to Kenya, sourced from Spain, Spanish speaking countries and Portugal (hereinafter referred to as 'territory').

6. Sometimes in the year 2013, the Respondent issued the Appellant with a Notice of Intention to audit it vide a letter dated 24th May, 2013. After carrying out the audit, the Respondent requested for additional documents vide their letter dated 29/7/2013, for the period January to December 2013. The Appellant provided the same vide various correspondence.

7. On 27th of September 2013, the Respondent communicated to the Appellant its findings of the audit in relation to the statements of accounts and additional assessments. The same was in respect of withholding tax and reverse VAT on commissions, being the percentage of the agent's income value refund by Africae that was not subjected to withholding tax (WHT) contrary to Section 35 of the Income Tax Act, Cap 470 Laws of Kenya, (ITA) and VAT on the services imported from Africae pursuant to the VAT Act, Cap 476, repealed.

8. The Appellant objected to the assessments vide a letter dated 7/10/2013 through its tax agent, Manser Taxation Services Limited.

9. Subsequently, further correspondence was exchanged between the parties whereupon the Appellant forwarded to the Respondent additional information vide theirs of 7/11/2013. Upon receipt of the documents, the Respondent issued an Amended Assessment vide their letter of 21/5/2014 for Ksh: 158,535,817.91 for WHT and

further with the sum of Ksh: 7,291,938 being in respect of exchange rate as a result of computations on forex.

10. The issue of exchange rate as a result of computations on forex was admitted by the Appellant through its Statement of Facts dated 1/7/2014, paragraph 22 thereof. The Tribunal will therefore not delve into this issue of forex computations as the same is consequently hereby marked as settled.

11. Upon confirmation of the additional assessments by the Respondent, the same prompted the Appellant to file this Appeal on the 4th day of July, 2014 before the defunct, Local Committee.

12. The Respondent, upon being served with the Memorandum of Appeal together with the Statements of Facts by the Appellant, filed its Statement of Facts on 4th of August, 2014 and served the same upon the Appellant.

13. In its Memorandum of Appeal dated 1/7/2014 and filed on 4th July 2014, the Appellant in paragraph 22 thereof has pleaded that the Appeal herein only relates to the issue of reverse VAT and that the issue of WHT is before the Local Committee. The Tribunal directed that both issues be canvassed herein since the said committee is no longer operational and the Tribunal by virtue of the Tax Appeals Tribunal Act is seized of jurisdiction to determine such disputes. Pursuant to this, the Value Added Tax Appeal and the Income Tax Appeal were consolidated into this Appeal.

ISSUE FOR DETERMINATION.

14. The Tribunal having carefully and respectfully studied the pleadings, together with the submissions of both parties herein is of the view that the issue for its determination is as hereunder: -

Whether the percentage of invoice values retained by Aficae Safaris on payments made for tour packages by tourists from Spain, the Spanish speaking countries and Portugal is subject to Withholding tax and reverse Vat.

THE APPEAL

15. The Appellant in its Memorandum of Appeal and Statement of Facts stated that under the Agreement entered into between it and Africae, the latter is responsible for sourcing clients in its own right as a tour operator in Spain and Portugal and does not market the Appellant.
16. The Appellant further submitted that the clients belong to Africae and are billed by Africae directly without involving the Appellant.
17. It was the Appellant's contention that the Appellant has no control of the relationship between Africae and its clients and therefore the actions by Africae in Spain and Portugal do not bind the Appellant as there is no Agency relationship between them.
18. The Appellant argued that the margin granted to Africae is not a commission but a discount since Africae is selling to the clients in the said territory directly.
19. Moreover, the Appellant stated that the clients from Africae territory coming into Kenya are not coming to see the Appellant, but to tour the destinations marketed to them by Africae, including other destinations not handled by the Appellant, for example, Zanzibar, Rwanda and Mauritius, in which case for these other destinations, the clients are handled by other destination management companies not related to the Appellant.

20. For the Appellant, it was argued that if there was a supply of a service, then it would have been the Appellant supplying Africae with destination management services and not vice versa.

21. The Appellant contended further that pursuant to the agreement entered into, its role was to give Africae a consolidated quote for destination management for various services, namely:-

    (i) Airport transfers
    (ii) Tour guide services
    (iii) Park entry fees
    (iv) Game drives
    (v) Accommodation
    (vi) Ground transport
    (vii) Meals
    (viii) Entertainment
    (ix) Local taxes
    (x) Appellant's margin

    Which services result in charges and expenses which are included in the invoices to Africae Safaris alongside the Appellant's mark-up for the services offered.

22. The Appellant argued that Africae would only enjoy the volume discount at a margin of 11% on the sales confirmed and paid for as long as Africae brought into Kenya a minimum of 3,000 tourists per annum.

23. It was contended that due to the large number of tourists that Africae Safaris was bringing into Kenya, Africae negotiated with the Appellant for a volume discount on the tourist packages and or services rendered by the Appellant as provided for in the

Agreements entered into by the relevant parties and dated 12/10/1998 and 22/8/2006.

THE RESPONSE

24. The Respondent on its part, argued that the Agreement entered into between the Appellant and Africae clearly stipulates that Africae would earn a margin of eleven percent (11%) on sales confirmed and paid for by the tour operators from the territory even if directly paid to the Appellant.

25. Further the Respondent stated that Africae acquired exclusivity on all sales made in the territory and was restricted from entering into any other business relationship with any other party relating to the services it provided to the Appellant in Kenya and Tanzania.

26. The Respondent contended that outside the margin stipulated in the Agreement, Africae was not entitled to any other amounts and in fact was only able to bill the Appellant for specific expenses related to trips by the staff of the Appellant to support promotional activities of Africae, inter alia visits to prospective tour operators and travel agencies, participation in trade and travel shows, which expenses had to be pre-approved by the Appellant.

27. The Respondent submitted that the margin earned by Africae was as a result of a negotiation process with the Appellant pegged on increasing the Appellant's sales to a given target over a specified period through aggressive marketing and promotional activities which is a clear indication that the Appellant was in control of what Africae charged to clients and what it earned.

28. It was the Respondent's contention that Africae invoiced clients as per the packages provided by the Appellant, collected all the monies on behalf of the Appellant and the Appellant would then invoice Africae for its monies less Africae earnings, that viz. the agreed margin.

29. The Respondent concluded that the foregoing was a clear indication that the Appellant was the principal and Africae was the agent undertaking the role of marketing and promotion resulting into Africae earning a percentage of the sales confirmed by the Appellant.

ANALYSIS AND FINDINGS

30. It is worth noting that the Appellant entered into contracts dated 22/10/1998 and 22/8/2006 with Africae. One of the clauses therein has a non-competition clause that provides as hereunder: -

"AFRICAE Safaris shall not, accept without the written authorisation of KOBO safaris, directly or indirectly exercise by itself or through an intermediate company or individual on its own account or an account of third parties, any professional or business activity relating to the services of an identical nature for travel companies competing with KOBO safaris in the same destination (Kenya & Tanzania) throughout the terms of this contract....."

31. A further scrutiny of the Agreement shows that Africae would provide the following services, inter alia,

a. Procure and supply a set target number of tourists to the appellant;

b. Source new customers;

c. Increase the volume and business line;

d. Use the Appellant's collateral materials in marketing and promotion activities;

e. Sell the Appellant's products in the trade fair/shows;

32. Having carefully scrutinized the said agreement of the parties, it is noted that the Appellant was to provide the following services, inter alia;

a) To provide destination management services;

b) Provide Africae Safaris with sufficient brochures, information and documentation necessary for the marketing activities;

c) Provide tour package proposals and quotations, itineraries and corresponding costs

These were the products of the Appellant.

33. The Tribunal finds that when determining the relevant supply in which a taxable person engages, due regard must be made to all the assessments in which a transaction or transactions take place. In a case like the instant appeal, where a scheme operates through contractual relationships, it is imperative to consider the issues in totality in order to determine the party's economic activities by examining the contractual documents entered into so as to comprehend the wider context of the arrangements of the various parties involved.

34. The Tribunal makes a finding that it is clear from the said business Agreement entered into by the Appellant and Africae, Africae would earn a margin of 11% on sales confirmed and paid for by the tour operators from the territory whether or not paid directly to the Appellant.

35. It is succinctly evident from the Agreement executed by the parties that the 11% margin is built in the tour packages by the Appellant. The Tribunal agrees with the Respondent that indeed the said margin cannot be amended without the consent and approval of the Appellant who is the owner and operator of the tour packages. Furthermore this is supported by correspondence marked as **KS4** which are requests by Africae to the Appellant, for margin adjustments. Therefore the level of control is clearly manifested to the extent that the Appellant exercises control over Africae.

36. The Tribunal further notes that the contractual relationship indicates that Africae is an Agent of the Appellant who clearly restricts the operators in the target destinations to safeguard its interests as the Principal. Consequently, the Tribunal disagrees with the Appellant's argument implying that Africae is an independent contractor.

37. It is worth noting that the Appellant's business model was that Africae invoiced clients as per the sample invoices marked **KS3**, Africae collected all the monies on behalf of the Appellant and the Appellant would then invoice Africae for its monies less the margin of 11%. Notably, Africae would then remit all the monies due to the Appellant less its margin and the Appellant determined the prices to be charged by Africae to the tourists.

38. The Appellant argued that the drafters of the 1998 and 2006 Agreements were Non-English speaking persons and therefore the use of the word ***"margin"*** in the Agreement was inappropriately used therein and that even if the discount word was termed as a margin, the conduct of the parties and the way they related was consistent with 11% margin being a volume discount as opposed to a commission. The Tribunal takes cognizance of its finding herein

above to the effect that it has considered the Agreements in totality and all the circumstances surrounding the business activities of the parties including its so called "business model" and not just the word 'margin' herein on its own.

39. The Tribunal notes that if the margin is treated as a commission it has a tax implication as it would result in an obligation to withhold and account for reverse vat. However if the margin is treated as a discount, there would be no tax obligation on the part of the Appellant. The Appellant argued in its Submissions that the Respondent had failed to discharge the evidential and legal burden placed on it to demonstrate the basis for treating the 11% margin as a commission and not as a discount. The Tribunal disagrees with the Appellant to the extent that it was incumbent upon it to prove its case against the tax assessment and or dispute herein. Moreover the Appellant failed to demonstrate how the discounts were reported in its books of accounts and financial statements for the relevant period under audit. It is the finding of the Tribunal that the Appellant has failed to discharge its burden of proof herein.

40. The Tribunal is convinced by the Respondent's submission that the product being sold by Africae is a package designed by the Appellant, the product belongs to the Appellant and so is the service of marketing and promotion by the Appellant.

41. The Tribunal is in no doubt that the Appellant was indeed the Principal and Africae was the Agent undertaking the roles of promotion and marketing which would result in the agent earning an 11% margin of the sales confirmed and paid for by the Appellant herein. The Tribunal finds that the margin earned by Africae is part of money paid in respect of tour services carried on in Kenya by the

Appellant and the same therefore constitutes income in the form of management or professional fees accrued and derived from Kenya, pursuant to Section 2(1) of the Income Tax Act.

42. Consequently, the Tribunal is satisfied that it is evident that Africae was the Agent for the Appellant, and Africae being a non-resident person earned agency fees, being income accrued from or derived in Kenya and the same ought to be subjected to WHT and be subjected to reverse VAT being services imported to Kenya.

43. The Appeal herein lacks merit and is hereby dismissed with no order as to costs. The Respondent's Assessment is upheld.

DATED and **DELIVERED** at **NAIROBI** this **15th** day of **November, 2017.**

In the presence of:- Mr. Kashindi for the Appellant

Diana Almadi for the Respondent

JOSEPHINE K. MAANGI
CHAIRPERSON

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JOSEPH WACHIURI
MEMBER

.....
BONIFACE DIMMO
MEMBER