

Tax Alert: VAT Regulations, 2017 are now valid and enforceable

Summary

This Alert brings to your attention the High Court's updated judgement of 14 July 2022 in the case of **Commissioner of Domestic Taxes (KRA) vs W.E.C Lines Kenya (Taxpayer)** Case No HCCOMMITA/E084/2020.

On 31 January 2022, the High Court invalidated the VAT Regulations 2017. The High Court found that the VAT Regulations 2017 were not valid because they were not tabled before the National Assembly.

Aggrieved by this finding, the KRA filed a Notice of Appeal and later an application seeking a review of the judgment of the Court. The KRA argued that its lawyer inadvertently misled the Court to arrive at an erroneous decision that the Regulations were never tabled before the National Assembly.

The Taxpayer opposed the application and argued that the KRA had not met the grounds required for review. The High Court rendered its decision, setting aside that part of its earlier judgment invalidating the VAT Regulations 2017. Thus, the High Court determined that the Regulations were valid and enforceable.

Background

On 31 January 2022, the High Court delivered judgment affirming the decision of the Tribunal that the Taxpayer, having made zero-rated supplies, is entitled to VAT refunds due to it.



The High Court also held that the VAT Regulations 2017 were not valid because they were not tabled before the National Assembly.

The KRA filed an application for review of the judgment under section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules. Among the orders that KRA sought were:

- a. That the Honourable Court be pleased to review its judgment delivered on 31 January 2022, holding that the VAT Regulations 2017 ceased to have any effect immediately on the 8th day after the said Regulations were not tabled before the National Assembly. The KRA could not apply them to the Taxpayer's case as they were at the time, null and void; and
- b. That the Honourable Court be pleased to further review its orders that the Taxpayer having made zero rated supplies, is entitled to VAT Refunds due to it.

The KRA outlined the procedure that was followed to table the Regulations before the National Assembly including press release, letters issued and their publication in the Kenya Gazette. The KRA confirmed that the VAT Regulations 2017 were tabled before the National Assembly on 10 May 2017 as required under section 11(1) of the Statutory Instruments Act, 2013.

The KRA urged the Court to review its judgment which if allowed to stand, would not only be factually wrong but also occasion loss of revenue in form of tax refunds requested by taxpayers since the judgment has effect on the general public.

The Taxpayer opposed the application and submitted that the information upon which the KRA based the application was known to it throughout the case. The Taxpayer relied on Rule 15 of the Tax Appeals Tribunal Act (Appeals to the High Court) Rules, 2015 which requires an appellant to produce evidence in its possession before or during the hearing of the Appeal.

The Taxpayer further argued that the Tribunal found that even if the VAT Regulations 2017 were valid, they could not take precedence over the VAT Act 2013 and that the Court could only decide based on the evidence on record.

Issues for determination

The Court found only one issue for determination. i.e. Whether the application was merited, and if the orders sought should be granted.

The High Court's findings

The High Court determined the application in favour of the KRA on 14 July 2022 as follows:

Cognisant of the findings of the Court of Appeal in **Multichoice Kenya Ltd vs Wananchi Group (Kenya) Ltd & 2 Others NRB CA Civil Appeal No. 368 of 2014**

[2020] eKLR the High Court affirmed that the since the KRA had only filed a Notice of Appeal and not the Appeal itself, the Court had jurisdiction to hear the application for review.

Further the Court opined that applying the grounds set out in Order 45 of the Civil Procedure Rules, the Court would have dismissed the application since the facts relating to the VAT Regulations, 2017 were known to the KRA. However, the Court allowed the application, on public interest, deeming the legality of the Regulations as a matter that transcends the rights and interests of the parties to the dispute.

Consequently, the Court allowed the application only to the extent that the VAT Regulations, 2017 are valid based on the evidence produced by the KRA.

The Court dismissed the request to review its finding that the Taxpayer having made zero rated supplies, was entitled to VAT refunds due to it.

Our opinion

The judgement has reinstated the VAT Regulations, 2017 and any disputes on the applicability of the regulations to specific circumstances will have to be addressed on their own merit.

The High Court also settled the issue of application for review where there is already filed a notice of appeal. The decision means that an application for review can be considered if the substantive appeal has not been filed, as was the case in this matter.

KPMG is happy to assist on any issues arising from this decision.

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