

**REPUBLIC OF KENYA**  
**IN THE TAX APPEALS TRIBUNAL AT NAIROBI**  
**APPEAL NO. 30 OF 2016**

**3M KENYA LIMITED.....APPELLANT**

**-VERSUS-**

**KENYA REVENUE AUTHORITY (KRA).....RESPONDENT**

**JUDGMENT**

**BACKGROUND**

1. The Appellant is a limited liability company duly incorporated in Kenya under the Companies Act, Chapter 486 of the laws of Kenya.
2. The Respondent is a principal officer of the Kenya Revenue Authority and which Authority is established under Section 3 of the Kenya Revenue Authority Act, CAP 469 of the Laws of Kenya and is charged with the mandate of assessment, administration and collection of tax revenue as an agent of the Government of Kenya.
3. In furtherance of its mandate, the Respondent conducted a tax audit on the Appellant's tax affairs covering the period January 2010 to August 2015. Following the conclusion of the field audit, the Respondent issued the Appellant with an assessment dated 3<sup>rd</sup> December, 2015 on various issues under the Value Added Tax (VAT) and Withholding Tax (WHT) amounting to Kshs. 100,464,860.00 comprising of the principal tax, penalties and interest.
4. The Appellant, being aggrieved by the Respondent's assessment of additional tax on a number of issues, objected to the assessment through its letter dated 23<sup>rd</sup> December, 2015. In the letter, the Appellant conceded on some issues but objected to the Respondent's assessment of additional tax on the following: -

- (a) Classification of zero rated sales as vatable sales;
  - (b) Prohibited input VAT claimed as input tax (partial objection);
  - (c) Reverse charge VAT claimed as input tax;
  - (d) Unsupported input VAT (partial objection);
  - (e) Turnover variance;
  - (f) Reverse charge VAT not declared as output;
  - (g) Non-filing penalty; and
  - (h) WHT on payments to non-resident entities.
5. On 22<sup>nd</sup> February, 2016, the Respondent wrote to the Appellant dropping all the issues with the exception of classification of zero rated sales as vatable sales. In the letter, the Respondent indicated that it would provide the Appellant with a substantive response. In the same letter, the Respondent concurred with the Appellant on the amount of the principal tax conceded, Kshs 411,558.00; which was subsequently paid.
6. On 2<sup>nd</sup> March, 2016, the Respondent wrote to the Appellant confirming the assessment of VAT on classification of zero rated sales as vatable sales amounting to Kshs. 78,223,172.00.
7. Aggrieved by the Respondent's confirmation of the additional tax assessment in its letter dated 2<sup>nd</sup> March, 2016 and in light of the objection dated 24<sup>th</sup> December, 2015, the Appellant filed a Notice of Intention to Appeal on 30<sup>th</sup> March, 2016. The respective Memorandum of Appeal and Statement of Facts were filed on 13<sup>th</sup> April, 2016 and both documents served on the Respondent.
8. Upon service, the Respondent filed its Statement of Facts on 25<sup>th</sup> April, 2016.

## THE APPEAL

9. The Appellant states as follows: -
- (a) It is a subsidiary of 3M Company which is based in Maplewood, Minnesota, US. It provides marketing support services to 3M Gulf Ltd and previously to 3M South Africa (Pty) Ltd both of

which are related non-resident entities. 3M Gulf Ltd/3M South Africa (Pty) Ltd signed agreements directly with the Appellant.

- (b) 3M Gulf Ltd/3M South Africa (Pty) Ltd invoices the distributors directly and subsequently delivers the consignment to the distributors. In return for the market support services, the Appellant is compensated by 3M Gulf Ltd/3M South Africa (Pty) Ltd for the services at cost plus a mark-up on invoicing.
  - (c) The Appellant has treated marketing support services as exported services since the place of their consumption and economic beneficiaries of their service is outside Kenya hence zero rated for VAT purposes.
  - (d) The Appellant provides the marketing support services to a non-resident related entity under an agreement. The agreement provides that the Appellant will give sales services to 3M (Non-resident) in connection with certain products manufactured and/or sold by 3M (Non-resident).
  - (e) The Respondent has assessed VAT of Kshs. 78,223,172 on the marketing support services provided by the Appellant to 3M Gulf Ltd/3M South Africa (Pty) Ltd on the basis that this is a local supply and as such, subject to VAT at the rate of 16%.
10. The Appellant maintains that it did not wrongly classify marketing support services provided to 3M Gulf Ltd/3M South Africa (Pty) Ltd as zero rated supplies taxable at 0%. The Appellant is dissatisfied with the Respondent's assessment of VAT on marketing support services based on the following reasons: -
- (a) The Respondent in its response explicitly agreed that the Appellant markets and promotes 3M products both locally and in East Africa region which increases the sales of the products to their customers in Kenya and in East Africa region thus, the economic benefit accrues to 3M IPC, a non-resident entity. It is important to note from the onset that the Appellant does not manufacture or procure any products in Kenya.

- (b) The Respondent has explicitly indicated in its letter of 3<sup>rd</sup> December, 2015 that the economic beneficiary of the marketing support is indeed 3M IPC.
- (c) The Respondent has indicated that the marketing support services offered locally are subject to VAT at 16% whilst the marketing services provided to other countries in the East Africa region qualify as exports hence subject to VAT at 0%. From this, the Respondent has pointed out that it has taken the amounts invoiced to the non-resident entities to represent the value of the services offered locally and charged VAT at 16%.
- (d) Under the repealed VAT Act, a service exported out of Kenya means a service provided for use or consumption outside Kenya regardless of whether the service is performed locally or outside Kenya.
- (e) Section 2 of the Value Added Tax Act 2013(VAT Act 2013) defines a service exported out of Kenya as a service provided for use or consumption outside Kenya.
- (f) Further, Guideline 3.1 of the OECD International Value Added Tax and Gross Sale Tax Guidelines referred to as 'Destination Principle', provides that for consumption tax purposes, internationally traded service should be taxed according to the rules of the jurisdiction of consumption. Under the destination principle, VAT is imposed at the point of consumption. In the Respondent's letter confirming the assessment, it has indicated that the OECD guidelines are not applicable as Kenya has a substantive law in place. It is worthwhile to note however that the transactions in question cut across borders and thus the OECD guideline is applicable to ensure parity and that no transaction is taxed twice in different tax jurisdictions. Thus, the OECD guidelines on 'Destination Principle' render the same treatment on what qualifies as an export of a service in different tax jurisdictions.
- (g) In *F.H. Services Kenya Limited vs Commissioner of Domestic Taxes, Appeal No.6 of 2012*, Flora Holland's principal activity is the provision of marketing and logistics support in Kenya to

Bloemeveiling Flora Holland UA (a company incorporated in Holland) for the export of fresh cut flowers from Kenya to various overseas buyers. Flora Holland Kenya treated the marketing and logistic services it provided to Bloemeveiling Flora Holland UA as an export of service. The Respondent was of the contrary opinion that the services do not qualify as an export of service hence subject to VAT at 16%.

On appeal, the VAT Tribunal concluded that the economic benefit of the services in the F.H Services case did not accrue in Kenya but outside Kenya as it resulted to the non-resident entity increasing its sales and as such the consumption of the marketing and logistic service was in Holland.

In the letter confirming the assessment, the Respondent has erred in distinguishing the above case with 3M business operating model. In both cases, the service provider is resident while the consumer of the service is non-resident.

The economic beneficiary of the services provided by F.H Services is Flora Holland. Specifically, FH Services provides the following services to Flora Holland:

- (i) Coordinates and offers general market information about flowers to the members and the Kenyan growers;
- (ii) Sources for growers to supply flowers for export to Holland;
- (iii) Provides quality information and logistical support for flower shipment out of Kenya to the Netherlands; and
- (iv) Provides tracking and tracing system for flower shipment from Kenya to Holland.

That it is key to note that the Tribunal took cognizance of the fact that the marketing and logistic services were offered by the Appellant in the F.H. Services case as well as the fact that the economic beneficiary of those services was an entity which had entered into agreement for marketing support services.

It is in the same manner that F.H. Services Ltd was offering services to Flora Holland and is in the same exact manner that the Appellant, in the present appeal, offers services to 3M South Africa (Pty) Ltd/3M

Gulf Ltd. The above business model mirrors the Appellant's as both F.H. and the Appellant provide marketing support services to foreign entities who enjoy the economic benefits of such activities.

(h) In *Total Touch Cargo Holland vs Commissioner of Domestic Taxes, Appeal No. 5 of 2013*, Total Touch Cargo Holland is a limited liability company incorporated in the Netherlands. Its nature of business is the arrangement for the provision of transport for the exportation of horticultural produce from Kenya to Europe where the final customers for the purchase of the produce are resident. To effect its business, it purchases airspace from various airlines, prepares for air-shipment of the produce from airports in Kenya and ensures delivery of the horticultural produce up to an agreed center in Holland where other parties in the distribution chain take over and arrange further transportation.

Total Touch Cargo Holland is a subsidiary of Stamina Group of Companies whose holding company is Stamina B.V., a limited liability company also incorporated in the Netherlands. Stamina Group of companies entered into an agreement with Kenya Airways and established a joint venture company, Kenya Airfreight Handling Ltd (KAHL), whereby it was agreed that KAHL would provide scanning, cooling and palletizing service to the produce when it is delivered at the airport and before the produce is transported to Europe, KAHL invoiced Total Touch Cargo Holland for this service. Total Touch Cargo Holland argued that the service is an exported service since, though it is performed in Kenya, it is for use or consumption outside Kenya. However, the Respondent was of the contrary opinion that the services do not qualify as an export of service hence subject to VAT at 16%.

On appeal, the VAT Tribunal considered the service of cooling and palletizing fresh produce in Kenya and held that the final customers/consumers in Holland were the beneficiaries of KAHL's services. Therefore, this cooling and palletizing service, though performed in Kenya, with assets in Kenya, was consumed or used outside Kenya. Accordingly, the cooling and palletizing services attracted VAT at 0%.

In the letter confirming the assessment, the Respondent has not disputed the ruling of the above case as indicated in our objection. Therefore, the Appellant notes that the Respondent would appear to be in agreement with the VAT Tribunal ruling. Since the Tribunal ruled that the palletizing service which is a marketing service done in Kenya was consumed outside Kenya, the benefit of this marketing service was similarly consumed outside Kenya in exactly the same manner that the benefit of the marketing service in the present case was consumed outside Kenya.

In this case, similar to the Appellant's business operating model, the services were provided in and with resources in Kenya while the consumer of the service was outside Kenya.

(i) In the letter confirming the assessment, the Respondent has relied on precedent set in the case of ***Coca Cola Central, East and West Africa vs Commissioner of Domestic Taxes, Appeal No. 11 of 2013.***

As per the Appellant, it is worth noting that the its business operating model is different from Coca Cola's in that it does not have local manufacturers of 3M products who would ordinarily benefit directly from the marketing services. As such, the Appellant stated that, a parallel cannot be drawn between the two cases and give similar tax treatment to the services provided.

In the Appellant's case, the products are imported directly from 3M South Africa Pty) Ltd/3M Gulf Ltd. As such, the economic beneficiary of the marketing services provided by the Appellant can only be the exporting entities (3M South Africa (Pty) Ltd/3M Gulf Ltd). This is primarily achieved through the enhanced brand awareness of the products in Kenya.

The Appellant wishes to note that the Appellant in the Coca Cola case appealed against the VAT Tribunal decision at the High Court and the case is yet to be adjudicated.

11. To buttress its arguments, the Appellant cited the following cases: -

(a) *F.H Services v The Commissioner of Domestic Taxes (VAT Appeal No. 6 of 2012);*

- (b) *Total Touch Cargo Holland v The Commissioner of Domestic Taxes (VAT Appeal No. 5 of 2013);*
- (c) *T.M. Bell v The Commissioner of Income Tax (1960) EALR 224;*
- (d) *M/S Fanuc India PVT V CCE & ST Bangalore;*
- (e) *M/s Microsoft Corporation (I) (P) Ltd v Commissioner of Service, New Delhi;*
- (f) *Paul Merchants Ltd vs CCE Chandigarh;*
- (g) *Unilever Kenya Limited v The Commissioner of Income Tax (Income Tax Appeal No. 753 of 2003);*
- (h) *Ecobank Kenya Limited v The Commissioner of Domestic Taxes (Income Tax Appeal No.8 of 2010);*
- (i) *Commissioner of Domestic Taxes vs Total Touch Cargo Holland (Appeal No. 17 of 2013);*
- (j) *Panalpina Airflo Limited vs Commissioner of Domestic Taxes (Income Tax Appeal No. 5 of 2018);*
- (k) *LG Electronics Africa Logistics FZE Kenya Branch vs The Commissioner of Domestic Taxes (Tax Appeal No. 359 of 2018);*  
and
- (l) *Coca Cola Central East and West Africa Limited vs The Commissioner of Domestic Taxes (Tax Appeal No. 5 of 2018).*

12. In addition, the Appellant made reference to the OECD International VAT Guidelines and Tax Alerts from EY, PWC and KPMG audit firms.

13. In conclusion, the Appellant prays that: -

- (a) The Tax Appeals Tribunal (TAT) finds that the marketing support services provided to 3M South Africa (Pty) Ltd/3M Gulf Ltd is rightfully treated as a zero rated supply vatable at 0%;
- (b) The TAT vacates the Respondent's confirmed VAT assessment of Kshs 78,223,172 issued to the Appellant for the period January 2010 to August 2015; and
- (c) The Respondent be ordered to pay the Appellant's cost of this Appeal.

## THE RESPONSE

14. The Respondent carried out an audit on the Appellant for the period January 2010 to August 2015. During the exercise, it emerged that its marketing services offered on behalf of the principals, 3M Gulf Ltd/3M South Africa (Pty) Ltd were reported as exports and therefore zero rated for VAT purposes. The Respondent did not agree with the treatment and demanded VAT on the services. The respective VAT liability amounted to Kshs. 78,223,172.

15. The Respondent contends that: -

(a) The Appellant wrongly classified marketing support services provided to 3M South Africa Ltd/3M Gulf Ltd as zero rated as these services do not qualify as exported services within the meaning of Section 2 of the VAT Act (Cap 476) (repealed), which defines exported services as *“services provided for use or consumption outside Kenya, whether the service is performed inside Kenya or outside Kenya or both inside and outside Kenya.”*

Section 2 of the VAT Act 2013 defines exported services as *“services provided for use or consumption outside Kenya.”*

The marketing support services performed by the Appellant are meant for the Kenya population, to create awareness in them of the products being marketed so that they are influenced to buy the same. Advertisements made in the local media (TV, Newspaper and Radio among others) are primarily targeting the local population.

It should be noted that there are several companies in Kenya who import and sell in the local market 3M South Africa (Pty) Ltd/3M Gulf Ltd products. As per the Respondent, these companies are beneficiaries of the marketing services offered by the Appellant being the consumers of these services. The services are therefore local services and are subject to VAT at 16%.

**(b) OECD guideline 3.1 of the OECD International Value Added Tax and Gross Sales Tax guidelines, referred to as destination principle.**

Under this principle, VAT is imposed at the point of consumption. This goes back to the question of who consumes the marketing

services provided by the Appellant. It is worth noting that these services are carried out through local television stations, billboards, daily newspapers and even radio stations. The beneficiaries of these services are the retailers, distributors and the final consumers of the 3M products. As per the Respondent, these are therefore local services and are subject to VAT at 16%.

**(c) In the Flora Holland Vs. KRA case.**

In this case, the products were destined for a market outside Kenya. Therefore, the services relating to those products to be consumed outside Kenya would also be consumed outside Kenya. This is not the position in the Appellant's case; the product and subject matter are consumed in Kenya.

**(d) In the Kenya Airfreight Handling Limited (KAHL) Vs. KRA case.**

In this case, it was rightly observed that the services offered by Total Touch Kenya Ltd do not accrue in Kenya but outside Kenya where the products are consumed unlike in the instant case where the products in respect of which the services are rendered by the Appellant are consumed in Kenya. It is worth noting that whereas KAHL was offering scanning, cooling and palletizing services, the Appellant was offering marketing support services. Therefore, the two companies were offering completely different services and cannot be compared.

**(e) In the *Coca Cola, East and West Africa vs. KRA case.***

The Appellant argues that the case under consideration is different from the case of *Coca Cola Central, East and West Africa case (VAT Appeals Tribunal No. 11 of 2013)*, saying that it does not have local manufacturers while Coca Cola does. The Respondent states that the issue in contention here is not about manufacturing but sales promotion in terms of advertising. In both cases, the alleged beneficiaries of the advertising activities are non-residents, and in both cases, the targeted population for the advertisements are Kenyans themselves. The business models are, therefore, the same.

16. In its support, the Respondent cited the following cases: -

(a) *Coca Cola Central East and West Africa Ltd vs Commissioner of Domestic Taxes, VAT Appeal No. 11 of 2013;*

- (b) *Metcash Trading Ltd vs The Commissioner for the South African Revenue Service & Another, CCT3/2000;*
- (c) *Commissioner of Domestic Taxes and Panalpina Airflo Limited, [2019] eKLR;*
- (d) *Panalpina Airflo Limited vs Commissioner of Domestic Taxes (Appeal No. 115 of 2016);* and
- (e) *Commissioner of Domestic Taxes and Barclays Bank of Kenya Ltd (Civil Appeal No. 195 of 2017)*

17. In addition, the Respondent made reference to the OECD International VAT Guidelines.

18. In conclusion, the Respondent submits as follows: -

- (a) THAT the marketing supporting service provided by the Appellant were consumed in Kenya and are therefore subject to VAT at 16%.
- (b) THAT consumption is not limited to those who pay for the services; it includes anybody who puts a service to use. Consumption is in the knowledge derived from the advertisements by opting to buy the 3M products and not any other product.
- (c) THAT Flora Holland and Total Touch cases referred to by the Appellant are completely different from the case under appeal.
- (d) THAT it is immaterial about the person who earns the revenue from the service that is provided by the Appellant or any other supplier of a service. What is material is the place of consumption of a service and not the location of the person who earns revenue from the service undertaken.

19. In view of the foregoing arguments, the Respondent prays that the appeal be dismissed.

## ISSUES FOR DETERMINATION

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

**Whether the Appellant's marketing support services to 3M Gulf Ltd/3M South Africa (Pty) Ltd are exported services and therefore zero rated for VAT?**

21. The Tribunal, having considered the above issue wishes to analyze the same as hereunder.
22. The Appellant provided marketing support services to 3M Gulf Ltd and prior to that, to 3M South Africa (Pty) Ltd both of which are non-resident companies. In this connection, the Appellant executed agreements with both companies.
23. 3M Gulf Ltd and 3M South Africa (Pty) Ltd manufacture products such as plasters and theatre bandages for hospitals as well as adhesive notes. The marketing support services undertaken by the Appellant are in the form of visits to hospitals, offices, schools and other institutions to give them information about 3M products. The Tribunal notes that the Appellant does not manufacture or sell any of these products. The products are sold through independent distributors in Kenya. These facts were not disputed by the Respondent.
24. It is also not in dispute that, for purposes of providing market support services, the Appellant executed agreement with 3M Gulf Ltd and prior to that to 3M South Africa (Pty) Ltd. The scope of the services are spelt out under Paragraphs 8 and 2 of the respective agreements.
25. In the *Tax Appeals Tribunal No. 5 of 2018, Coca Cola Central East and West Africa Ltd vs 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 regard 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.

26. Before delving into the services that the Appellant provided during the period of interest, the Tribunal will examine the VAT law applicable to export of services.
27. The tax audit period was January 2010 to August 2015 and therefore the VAT Act, Cap 476(Repealed) and the VAT Act, 2013 are the relevant VAT Acts in this regard.
28. Section 2 of the VAT Act, Cap. 476 (Repealed) defines “service exported out of Kenya” as follows: -  
“means a service provided for use or consumption outside Kenya, whether the service is performed in or outside Kenya, or both inside and outside Kenya;”
29. Section 2 of the VAT Act, 2013 defines “service exported out of Kenya” as follows: -  
“means a service provided for use or consumption outside Kenya;”
30. The Tribunal notes that both the VAT Act, Cap 476 (Repealed) and the VAT Act, 2013 do not define the terms “use” or “consumption” in relation to export of services. *In IBM India private Ltd & Others vs 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**”. The Tribunal has borne this in mind in dealing with the appeal before it.
31. Under the OECD guidelines, in respect to business services, the general rule is that the jurisdiction where the customer is located has the taxing rights over services. The rule has some bearing in this case.
32. Zero rating is provided for in the Fifth Schedule to the VAT Act Cap 476 (Repealed) and the Second Schedule of the VAT Act, 2013. Paragraph (1) of both Schedules is relevant to this Appeal. Paragraph (1) zero rates “**The exportation of goods or taxable services.**”

33. The Tribunal has considered two main questions in dealing with this Appeal: -

- (a) **Who was the user or consumer of the marketing support services provided by the Appellant?** and
- (b) **Did the Appellant provide marketing support services to the local distributors and/or customers of the 3M products?**

34. In respect of the first question, the Tribunal notes that is not in doubt, and the Respondent has admitted in Paragraph (1) of its Submissions dated 14<sup>th</sup> August 2017, that the marketing activities conducted in Kenya by the Appellant were on behalf of 3M Gulf Ltd/3M South Africa (Pty) Ltd. This created an agent/principal relationship. The marketing support services were provided by the Appellant to the principals in order to enhance the local sales of the 3M products which the principals owned.
35. The Tribunal would like to make a distinction between the “**marketing support services**” and the “**3M products**”. The marketing support services were provided by the Appellant to 3M Gulf Limited/3M South Africa (Pty) Ltd. The 3M products were sold to local customers through local distributors. The 3M products were therefore used or consumed by the local distributors and customers.
36. The Tribunal would like to draw a parallel with a local product; Tusker Malt, a popular beer brand. Should E A Breweries, the manufacturers of Tusker Malt, use the services of a local agent to advertise its product, it is clear to us that the user of the advertising services would be E A Breweries. The users or consumers of Tusker Malt would, in this case, be the distributors and customers of Tusker Malt. The VAT on the advertising services would be at 16% since the consumer, E A Breweries, is resident for tax purposes. Should E A Breweries, however relocate to Rwanda while retaining the services of the local advertising agent as well as its local distributors and customers, the incidence of VAT on the advertising services changes. The user or consumer of the advertising services would be, in the circumstances, be E A Breweries, Rwanda, a non-resident company. The VAT on the advertising services would be at 0% since the consumer E A Breweries, Rwanda would be non-resident.

37. Drawing from the above, the Tribunal makes a finding that the marketing support services provided by the Appellant to 3M Gulf Ltd/3M South Africa (Pty) Ltd were used or consumed by the two companies.
38. In answering the question as to whether the Appellant provided advertising support services to local distributors and customers, it is important to understand the relationship between the parties. In this respect, it should be noted that there were no agreements between the Appellant, the local distributors and/or the customers. However, the Appellant has an agreement with 3M Gulf Ltd (and previously 3M South Africa (Pty) Ltd).
39. In the case of *Total Touch Cargo Holland vs Commissioner of Domestic Taxes [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. In the instant appeal, the local distributors and customers did not have service contracts with the Appellant.
40. Undeniably, in the present case, a benefit could have accrued to the local distributors and/or customers from the effects of the marketing support services provided by the Appellant to its principals. However, what the local distributors and customers used or consumed were the 3M products not the marketing support services. The same could be said of a newspaper advertisement for jobs by an employer. A potential candidate may benefit but the user is the employer who advertises for jobs. Consequently, the Tribunal finds that the Appellant did not provide marketing support services to the local distributors and/or customers of the 3M products.
41. The Appellant and its principals were involved in business-to-business transactions. Under the OECD guidelines, in respect to business services, the general rule is that the jurisdiction where the customer is located has the tax rights over services. 3M Gulf Ltd and 3M South Africa (Pty) Ltd are the customers of the Appellant’s marketing support services. Since the customers are located outside Kenya, the

taxing rights over the Appellant's marketing support services are in the respective customers' tax jurisdictions.

42. The Tribunal notes that both parties referred us to **VAT Appeal No. 11 of 2013, Coca Cola Central, and East and West Africa Limited vs- The Commissioner of Domestic Services**. It is further noted that an appeal was preferred to the High Court in respect to the same by the Appellant, to wit, Income Tax Appeal No. 19 of 2013, Coca Cola Central, East and West Africa Limited vs- The Commissioner of Domestic Services. We are aware that the High Court pronounced itself on the matter on 23<sup>rd</sup> November 2020 and set aside the Judgement of the VAT Tribunal.
43. In view of the foregoing and in answer to the issues as framed, the Tribunal finds that the Appellant's marketing support services to 3M Gulf Ltd/3M South Africa (Pty) Ltd are exported services and therefore zero rated for VAT.

## **FINAL DECISION**

44. The upshot of the foregoing is that the Appeal is merited and succeeds.
45. Consequently, the Tribunal makes the following **ORDERS**: -
  - (a) The Respondent's confirmation of the additional VAT Assessment for Kshs. 78,223,172.00 vide its letter dated 2<sup>nd</sup> March, 2016 is hereby set aside.
  - (b) Each party to bear its own costs.
46. Orders accordingly.

DATED and DELIVERED at NAIROBI this 18<sup>th</sup> day of December, 2020.

  
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**JOSEPHINE K. MAANGI**  
**CHAIRPERSON**

  
.....  
**TANVIR ALI**  
**MEMBER**

  
.....  
**GEOFFREY KARUU**  
**MEMBER**

  
.....  
**DELILAH K. NGALA**  
**MEMBER**

