REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
APPEAL NO. 28 OF 2020

ACE ENVIRONMENTAL CONSULTANCY LTD .....APPELLANT

-VERSUS-

COMMISSIONER OF DOMESTIC TAXES ..... RESPONDENT

JUDGMENT

BACKGROUND

1. The Appellant is a private limited company based in Naivasha in the Republic of Kenya and offers environmental consultancy services mainly to Non-Governmental Organisations and developers.

2. The Respondent is a principal officer of the Kenya Revenue Authority, a body established under the Kenya Revenue Authority Act, Cap. 469 of the Laws of Kenya and charged with the responsibility of collection and administration of revenue on behalf of the Government of Kenya.

3. The Respondent, after conducting investigations of the Appellant's tax affairs for the period 2015 - 2017, issued additional VAT assessments of Kshs. 1,061,359.84, Kshs. 3,549,590.88 and Kshs. 2,393,593.92 on 16th November 2018 under assessment numbers KRA201815471738, KRA201815471802 and KRA201815471865, respectively. The Appellant filed a late objection on 24th October 2019 which was rejected and the assessments confirmed on 20th December 2019.

THE APPEAL

4. The Appellant, being dissatisfied with the Respondent's Objection Decision, filed this Appeal. The Appeal was canvassed through the Memorandum of Appeal and Statement of Facts both dated 30th January 2020 and filed on even date.

5. The Appellant premised the Appeal on the following grounds, THAT: -

   i. The Respondent erred in law and fact in failing to enforce the VAT Act 2013 Second Schedule-Zero Rating Exportation of goods and services. The taxpayer was retained by the Ethiopia Horticulture Producer Exporters Association (EHPEA) of address P.O. Box 22241-1000 Addis Ababa to undertake an environmental assessment for the wetlands in Ethiopia. The service is exported to Ethiopia and the payment is made from Ethiopia. The contract, invoices for services have been provided for ease of reference and confirmation. The export of services is zero rated for VAT purposes and therefore the assessment contravenes the same.

   ii. The Respondent erred in law and fact in failing to enforce the VAT Act 2013 Second Schedule-Zero Rating Exportation of goods and services- The taxpayer was retained by LIXIL Corporation of address 97-1, Kume, Yariba, Tokoname, City, Aichi,479,0002, Japan to implement a pilot test of LIXIL's Green Toilet System in Kenya on behalf of the Japanese Company. The Appellant implemented the project in Naivasha whereby the LIXIL was undertaking pre-investment market test of the Green Toilet system which was intended. to use Human waste to produce fertilizer. The fact that the staff who were employed on the contract were being paid by LIXIL as a reimbursement of the services offered by LIXIL is confirmation of the contract. The contract between LIXIL Corporation Japan and ACE environmental Consultancy Kenya estopped Ace from Charging VAT on exported services. It is factual that when Ace raised the initial invoice with VAT, the Manager in charge rejected the bill until he

was given a bill without VAT. The export of services is zero rated for VAT purposes and therefore the assessment contravenes the same.

iii. The Respondent erred in law and fact in failing to enforce the VAT Act 2013 First schedule of exempt supplies Part II Subsection 11 social welfare services provided by charitable organizations. The taxpayer provided services youth welfare programmes and other social empowerment programmes related to horticulture services in Naivasha using funds provided by Provenance Partners Ltd (UK Charity) and local horticultural producers, The Karagita Youth Ambassadors programme and the Fresh Producers Export Forum. The Supplies were therefore exempt from VAT. The fact that the taxpayer was undertaking services meant to improve horticulture production in Kenya which improved income for the recipients' using donor funding should be appreciated legally.

iv. The Respondent did not serve the directors of the taxpayer with the assessments directly. They sent the same to an outsourced accountant who did not communicate the same in time. This led to delayed response to the assessments. Our meetings with the Respondent's officers confirmed that they were forced to assess based on bank statements without engaging the directors who are the fiduciary and beneficial owners of the business. The taxpayer is keen to be compliant by settling their rightful tax obligations as the fall due.

v. The Taxpayer has availed the documents to the officers who did not seem to understand the tax implications of the contracts entered between the taxpayer and their customers. The income was legally declared for income tax purposes since it was earned in Kenya and therefore subject to local tax legislation.

vi. We have provided all the contracts entered by the taxpayer with the international customers that he was serving for ease of interpretation. We have also provided the invoices raised. We are ready and willing to provide any further documents requested by the Tribunal and the Respondent to ensure the case is fully resolved.

6. In its prayers, the Appellant urged the Tribunal to allow the Appeal, set aside the assessments and award it the costs of the Appeal.

APPELLANT'S SUBMISSIONS

7. The Appellant filed written submissions dated 18th March, 2021 and filed on 23rd March, 2021. Its key contention was that the Respondent issued tax assessments based on deposits in the Appellant's bank accounts. However, such deposits related to export of management consultancy services offered in Ethiopia and Japan as well as special economic zone and social welfare services provided by charitable organizations all of which are exempt from VAT.

8. The Appellant argued that it provided the Respondent with invoices supporting the sale of services, the contracts entered into as well as the details of the payees of the funds received in its bank accounts. It mentioned that a meeting held on 4th February 2021, between the Respondent's officer and the Appellant's tax agent, confirmed the Appellant's income as being zero-rated on the basis that 62,700 Euros were paid to Ethiopia Horticultural Producers Exporters Association (EHPEA) for services consumed in Ethiopia. Thus, the VAT of Kshs. 1,103,250.00 charged on this supply was erroneous in light of the provisions of Part A -1 of the Second Schedule to the VAT Act.

9. The Appellant further cited its contract with LIXIL Corporation where services were consumed in Japan. The Appellant noted that the VAT of Kshs. 4,225,272.00 charged on this supply was erroneous as the services involved were zero-rated.

10. The Appellant submitted that its scope of work in the agreement was to seek a location in Kenya with high human traffic for the deployment of the toilet system as a test for efficacy. The Appellant adds that it leased land and deployed the toilet system in Naivasha flower farms because of the labour intensive operations thus a high human traffic on the farm which was ideal for testing. The cost of deployment as well as the requisite licences by the County

Government of Nakuru and National Environment Management Authority (NEMA) was Kshs. 7,207,950/- which were duly reimbursed by LIXIL Corporation.

11. The Appellant submitted that it never sold LIXIL's toilet system to the flower farms and thus never earned any money locally from the project as it was estopped in the contract as part of the intellectual property protection of the principal corporation. The Appellant submitted that its findings would be used by the Japanese Company to market their goods to the 'Un agencies' (sic).

12. Further, the Appellant submitted that it was only contracted by LIXIL Corporation to offer a service to a foreign company which did not have a Kenyan presence at all. As such, the Appellant concluded that the same was a pure export of services since the services were consumed in Japan.

13. The Appellant also submitted that the services provided under the Provenance Partners Limited contract were equally exported services, and thus zero-rated for VAT.

14. The Appellant averred that it properly declared the resultant income for income tax purposes and that the Respondent's assumption that the fact that the income was declared for income tax purposes qualifies the same for VAT, is a clear violation of the VAT Act.

15. The Appellant concluded that the VAT charged on the supply under the LIXIL Contract amounting to Kshs. 4,225,272/- is erroneous since the Second Schedule to the VAT Act 2013 Zero-rates exportation of goods or taxable services.

16. Lastly, the Appellant mentioned its agreement with Provenance Partners Limited, submitting that it was appointed as the Project Manager for the improvement of consistency in large scale and smallholder bean production in Kenya for the UK Agritech Catalyst Fund. The Appellant reiterated that the services supplied under the Agreement were equally zero-rated for being exported services. It

urged the Tribunal to disallow the VAT of Kshs. 53,760/- assessed by the Respondent on this service.

RESPONDENT'S SUBMISSIONS

17. According to the Respondent, for the years 2017, 2016 and 2015, the Appellant filed income tax returns with a turnover of Kshs. 15,209,446/- Kshs. 23,525,794/- and Kshs 6,633,499/- respectively. However, for the same period, the Appellant filed VAT with total income turnovers amounting to Kshs. 310,344/-, Kshs. 1,340,851/-, and Kshs. 0 respectively. These disparities prompted the Respondent to invite the Appellant to its offices for clarification. The Appellant did not honour the invitation leading to the Respondent raising VAT additional assessments.

18. It was the Respondent's further contention that the contract between the Appellant and EHPEA had not specified where the project was to be undertaken and that the Appellant had not provided any evidence to show that the project was carried out outside Kenya. That the fact that the origin of the company issuing the contract is not in Kenya does not make the service exported. What matters is where the service was consumed and since the consultation was consumed in Kenya, then the service is vatable.

19. Contrary to the Appellant's allegations, the Respondent emphasized that the exemptions provided under subsection 11 of Part II of the First Schedule to the VAT Act could not apply in this case as the Appellant is not a welfare or charitable organization or any of the other types of organizations listed under that section.

20. The Respondent refuted claims that it did not serve the Appellant's directors with the assessments directly. It stated that the Respondent tried to contact the Appellant to issue initial findings but the Appellant sent an outsourced accountant whom it later revealed was incompetent. Further, when the assessments were raised they were sent via the Appellant's email address as provided in its iTax profile.

21. The Respondent summed up its submissions by stating that consultancy services consumed in Kenya are vatable regardless of the country where the client comes from. Thus, the additional VAT assessments of Kshs. 7,004,544.64 issued in this case were in order and should be upheld by the Tribunal.

ISSUES FOR DETERMINATION

22. After analysing both the Appellant's and Respondent's cases, the Tribunal frames the following issues for determination:-

    i. Whether the Appellant's services to foreign contractual partners can be considered as exported services thus zero-rated for VAT.

    ii. Whether the Appellant's services to youth welfare programmes and other social empowerment programmes under the Provenance Partners Limited contract were exempt from VAT.

ANALYSIS AND FINDINGS

23. The Tribunal has analysed and identified issues as herein-below;-

i. **Whether the Appellant's services to foreign contractual partners can be considered as exported services thus zero-rated for VAT.**

24. Paragraph 1 of part A of the Second Schedule to the VAT Act on zero-rated supplies provides that; -

> *"Where the following supplies, excluding hotel accommodation, restaurant or entertainment services where applicable, take place in the course of a registered person's*

business, they shall be zero rated in accordance with the provisions of section 7—

*1. **The exportation of goods or taxable services"**(emphasis ours).*

25. The Appellant argued that the services rendered under the LIXIL and EHPEA contracts were exported services, which were zero-rated for VAT and thus the VAT tax liability imposed on them was erroneous.

26. Section 2 of the VAT Act describes the terms 'export' and 'service exported out of Kenya' as follows; -

*"**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; "*

27. The determination of whether services are exported is that the same must be used or consumed outside Kenya. "Use" or "Consumption" is not determined by reference to the payer, location of the service payer or of the person who is requisitioning for the service, but the place where the services are used or consumed.

28. The determination as to whether services are used or consumed outside Kenya for purposes of classifying them as exported services is a controversial one. The courts have pronounced themselves on what constitutes exported services with much clarity. In the cases of **Commissioner of Domestic Taxes v Total Touch Cargo Holland [2018] eKLR** and **Republic v Kenya Revenue Authority & Another Ex-Parte Fontana Limited 2014 eKLR**, it was pronounced that for a service to be deemed as exported, it matters not whether the service is performed in Kenya or outside Kenya. Instead, the determining factor is the location where the service is to be finally consumed or used, which should be outside Kenya.

29. The Tribunal is further guided by the case of **Panalpina Airflo Limited v Commissioner of Domestic Taxes [2019] eKLR** where the court opined that although the VAT Act does not describe the meaning of the words 'use' or 'consumption' as used in the definition of exported services, the dictionary meaning of use and perform differ from the meaning or definition of 'performed'. Accordingly, it can be correctly put that services performed in Kenya may not necessarily be used or consumed in Kenya. Besides, services performed in Kenya may be deemed exported services. In the same vein, the court deemed services provided or performed by Panalpina Airflo Limited in Kenya to be exported services as per the provisions of the VAT Act.

30. In the Indian case of **Paul Merchants Ltd –Vs- Cce Chandigarh [2012 (12) TMI 424 – CESTAT, DELHI LB],** the tribunal was of the view that even though the services in question were rendered in India the word "used" could not be equated with the word "performed" especially where the benefit of the service provided accrued outside India. Further in the case of **Ms Microsoft Corporation (1) (P) –Vs- Commissioner of Service New Delhi. WP (c) NO.1460/2009** (Also an Indian Authority), the Tribunal concluded that the words "used outside India" referred to the place where the benefit of the service accrued.

31. In the case of **Panalpina Airflo Limited v Commissioner of Domestic Taxes (supra)**, the High Court stated that; -

> *"As can be seen from the judicial experience in the above cited authorities, this is not the first time that the court is grappling with the issue of whether services, such as those rendered by the appellant herein, should be considered as exported services within the meaning of section 2 VAT Act. In the present case, it was not disputed that the services offered by the appellant's agents was to facilitate the export of flowers for consumption and use by persons outside Kenya. These eventual buyers were the appellant's customers in Europe and specifically Netherlands. It was also not in dispute that the purpose of the services provided by Airflow BV was to ensure that the flowers*

are delivered to the appellant's customers in Europe a fresh state. The appellant, on whose behalf the services were being performed, was also based outside Kenya. It is therefore crystal clear that the services in question were ultimately used by the buyers/consumers of flowers who were also outside of Kenya and were performed on behalf of the appellant, a company based outside Kenya."

32. The High court went ahead and overturned the Tribunals decision in **Tax Appeal No. 149 of 2016, Panalpina Airflo Limited v Commissioner of Domestic Taxes** where the Tribunal had held that; -

> *"...as related to the first issue the tribunal is of the view that the location of a person making a requisition or effecting payment for a service does not in itself amount to a place of consumption. Essentially, consumption is not determined by reference to the payer, location of the payer of the service or location of the person who is requisitioning for the service. What is important is the place of the consumption of the service. The mere fact that an overseas company requisitioned for the services from the appellant does not necessarily mean that it was the consumer of the services rendered by the appellant."*

33. Despite the High Court agreeing with the Tribunal that what is important is the place of the consumption of the service, it faulted the Tribunal's application of the principle. In overturning the Tribunal's decision, it noted that consumption or use of services should be construed from the viewpoint of the place where the benefit of the service provided accrues to. In the Court's view, the benefit of the services provided accrued to the consumers in the Netherlands.

34. As a deduction, the place of use or consumption in determining as to whether a service is exported is the place within which the benefit of the service accrues.

35. However, the issue of where the place of consumption of the services rendered by the Appellant is contested. As such, the Tribunal now delves into determining the place of consumption based on the applicable approaches and guiding principles.

36. The **Organisation for Economic Co-operation and Development International VAT/GST Guidelines** provide at paragraph 3.53 that; -

"The supplier may also be required under the terms of the business agreement to provide services or intangibles directly to a third party (see Annex I to this Chapter – Example 3). As long as there is no evasion or avoidance, the customer remains the customer identified in the business agreement and it is this customer's location that determines the place of taxation. The mere direct provision of the supply to a third party business does not, in itself, affect that outcome. Accordingly, the general rule should be applied in such a way that the supplier makes a supply free of VAT to a foreign customer even if the third party business is located in the same jurisdiction as the supplier."

37. Therefore, the determination of the location of the consumer should be discerned from the contractual agreement since a direct provision of the supply to a third party business does not, in itself, affect the identity and location of the consumer as identified in the contractual agreement.

38. This Honourable Tribunal in **Appeal No. 5 of 2018, Coca- Cola Central East and West Africa Limited** (Coca-Cola Case) when faced with an issue of determining the place of consumption held that; -

> *"At this juncture, we therefore agree with the Appellant that the Kenyan consumers of the beverage are the target audience of the advertising services; however, the benefit is accrued by Coca- Cola Export, who enhances the business and sales of selling and manufacture of concentrate. Accordingly, and in applicability of the destination principle, the United States of America has the taxing rights."*

39. In the above Coca-Cola case, Coca-Cola Central East and West Africa Limited contested a VAT liability imposed by the Respondent, citing that the services provided to Coca- Cola Export were exported services and thus VAT zero-rated. The Coca-Cola Central East and West Africa Limited had been contracted by the Coca- Cola Export to provide advertising services in Kenya. The Respondent argued that the Kenyan consumers of the beverage are the target audience of the advertising services, and thus the services were not exported. The Tribunal, in rejecting the argument, held that the benefits accrued to Coca- Cola Export by enhancing the business and sales in selling and manufacture of concentrate.

40. The Tribunal finds no reason to reinvent the wheel by deviating from the position that has been developed and adopted in similar matters, and thus wishes to apply the same in the Appellant's case as herein below; -

Services under the LIXIL Contracts

41. The Appellant produced its two contracts with LIXIL Corporation, a company incorporated in Japan. The first contract was a Consultancy Agreement executed on 1st September, 2015 to run up to 31st December, 2015; whereas the second contract was a Service Agreement executed on 1st January, 2016 to run up to 31st December 2016.

42. The consultancy agreement provided in clause I as follows; -

> ***"1. OBJECTIVE***
>
> *LIXIL wishes to engage with ACE and ACE wishes to engage with LIXIL in relationship whereby LIXIL will appoint ACE to assist with all consultancy services in preparation for pilot test of Green Toilet System in Naivasha for LIXIL's business expansion to Kenya market."*

43. The Service Contract was executed in furtherance of the Consultancy Agreement. The objective of the said Service Agreement was captured in Clause I of the agreement as follows; -

> *"ACE has been providing LIXIL with services in relation to preparation and the first phase of a pilot test of LIXIL's Green Toilet System ("the Pilot Test") in accordance with the Consultancy Agreement dated 1st September, 2015 and the Service Agreement dated 1st January, 2016 ("the First Phase Service Agreement"). In furtherance of LIXIL's business expansion into Kenyan Market, LIXIL wishes to engage ACE and ACE wishes to provide LIXIL with services for the second phase of the implementation of the Pilot Test."*

44. Based on the Consultancy Agreement, the Appellant was appointed to provide consultancy services in preparation for pilot test of Green Toilet System in Naivasha for LIXIL's business expansion to the Kenyan market.

45. Guided by the case of **Osteria Ice Cream Limited versus Junction Limited (2011) Eklr,** the duty of the court is to interpret and enforce contracts but not rewrite them. Such a factor is mirrored in the previously cited Paragraph 3.5.3 of the OECD VAT/GST Guidelines which requires that determination of the location of the consumer should be construed from the contractual agreement, irrespective of whether the services are directed to third parties as per the agreement.

46. The Service Agreement entailed the Appellant providing a broad range of services to LIXIL for the second phase of the implementation of the Pilot Test.

47. The Appellant leased land and deployed the toilet system in Naivasha flower farms because of the labour intensive operations thus a high human traffic on the farms which was ideal for testing. The cost of deployment as well as the requisite licences by the County Government of Nakuru and NEMA was Kshs. 7,207,950/- were duly reimbursed by LIXIL.

48. The Tribunal finds that the flower farms are third parties in so far as the Appellant's arrangement with LIXIL is concerned and therefore the consumer of the services remains LIXIL. To buttress this position, the duties of the Appellant under the contracts was to aid in the implementation of the Pilot Test programme.

49. The benefit of the consultancy services did not accrue to the third parties (flower farms) but rather to LIXIL, which perhaps was to be influenced in making its expansion decision into Kenya upon successfully gauging the efficacy of the Green Toilet Systems under the Pilot Test programme.

50. Accordingly, the contract identified LIXIL as the consumer of the services. In as much as there are third parties involved in the scope of the services to be provided, the benefit of the services accrued to LIXIL.

51. In relation to the Appellant's services under the LIXIL contracts, the said services were aimed at the implementation of a pilot test to gauge the efficacy of LIXIL's Green Toilet Systems in Kenya. The test for efficacy was only beneficial to LIXIL as a tool for decision making. In any event, LIXIL as the consumer of the Appellant's services stood to lose in the event that the project never materialized. Additionally, the Appellant averred that it never made any sales of the toilet systems to the flower farms as this was expressly prohibited under the contract.

52. Regarding the place of consumption, the services cannot be considered to have been consumed in Kenya as there is no indication whatsoever as to whether the flower farms paid LIXIL or the Appellant during the Pilot Test period. Be that as it may, the Appellant was obligated as per the contracts to report to LIXIL through monthly review meetings with LIXIL's representative in Nairobi (Kenya).

53. The Tribunal is inclined to find that the services offered by the Appellant to LIXIL were exported services, despite having been performed here in Kenya as the benefit accrued to LIXIL.

Services under the Provenance Partners Limited

54. The contract between the Provenance Partners Limited and the Appellant stated in its Preamble that: -

> *"Wherein the Service Provider (the Appellant herein) shall provide quarterly in-country project management services to the Contractor for the purpose of fulfilling the project's goals and objectives in accordance with terms & conditions as set out below..."*

55. Based on the above contractual provision, the Appellant was tasked with the provision of in-country project management services to Provenance's Contractor for the purpose of fulfilling the project's goals and objectives in Kenya.

56. Additionally, the Appellant submitted that it was appointed by the Provenance Partners Limited as the Project Manager for the improvement of consistency in large scale and smallholder bean production in Kenya for the UK Agritech Catalyst fund.

57. The Appellant's services under the Provenance Partners Limited contract were aimed at the implementation of projects in Kenya, whose intended users and consumers (customers) were Kenyan farmers for the purpose of improving consistency in large scale and smallholder bean production. It would follow that the services were not only performed in Kenya but also the benefit accrued to the farmers in Kenya, disqualifying the same from being characterized as exported services.

Services under the EHPEA Contract

58. The Appellant also adduced a contract executed between Ethiopian Horticulture Producer Exporters Association (EHPEA) and the Voucher Farm Consortium. Upon perusal of the said contract, the Tribunal observed the following; -

a. The Appellant was not a party to the contract, as the parties were EPHEA and the Voucher Farm Consortium, comprising of Joytech Plc. (lead firm) and Vegpro Agriculture plc. (consortium member).

b. The Appellant's role in the contract was not clear, as it did not feature anywhere in the contract.

c. No explanation was given as to how the Appellant became a party to the said contract.

d. The said contract was executed in Ethiopia and that the farm address of the Farm Consortia is in Ethiopia.

59. Specifically, the EHPEA contract outlines its scope to entail providing support for Farm Consortia that wish to make improvements to farm production and productivity by enacting a project that is designed and implemented by the Farm Consortium with, where appropriate, support from a Consultant.

60. The Respondent averred that the contract between the Appellant and EHPEA had not specified where the project was to be undertaken and that the Appellant had not provided any evidence to show that the project was carried out outside Kenya. That the fact that the origin of the company issuing the contract is not in Kenya does not make the service exported. What matters is where the service was consumed and since the consultation was consumed in Kenya then the service was vatable.

61. The Appellant submitted that the contract was for implementation of IDH Project Wetlands- Waste Water Management in Ethiopia and that the work was carried out in the said country. However, no documentation was provided to demonstrate any contractual agreement to that effect nor prove that indeed the Appellant carried out any services in relation thereof.

62. Section 30 of the Tax Appeals Tribunal Act places the burden on the Appellant. In the circumstances and in the absence of any tangible evidence that the Appellant provided any services in Ethiopia in

relation to the alleged IDH Project Wetlands- Waste Water Management in Ethiopia, the Tribunal respectfully holds that the Appellant failed to discharge the burden of proof bestowed upon it.

63. Based on the foregoing, it follows that the services rendered by the Appellant to EHPEA foreign contractual partners herein cannot be considered to be exported services as their attendant benefit accrued in Kenya. As such, the services are neither exported services nor zero-rated for VAT.

ii. **Whether the Appellant's services to youth welfare programmes and other social empowerment programmes under the Provenance Partners Limited were exempt from VAT.**

64. The Appellant averred that it provided social welfare services which are exempt from VAT. The Appellant stressed that it provided services to youth welfare programmes and other social empowerment programmes related to horticulture services in Naivasha using funds provided by Provenance Partners Ltd (a UK Charity) and local horticultural producers, The Karagita Youth Ambassadors programme and the Fresh Producers Export Forum.

65. The Appellant averred that the supplies were exempt from VAT since they were meant to improve horticulture production in Kenya. The Appellant contended that the services provided under the programme improved income for the recipients' using donor funding, a fact that should be appreciated legally.

66. The Respondent averred that the exemptions provided under Paragraph 11 of Part II of the First Schedule to the VAT Act could not apply in this case as the Appellant is not a welfare or charitable organization or any of the other types of organizations listed under that section.

67. Paragraph 11 of Part II of the First Schedule to the VAT Act provides some of the exempt supplies as;-

"The supply of the following services shall be exempt supplies—

11. The supply of—

(a) services rendered by educational, political, religious, welfare and other philanthropic associations to their members, or

(b) social welfare services provided by charitable organizations-registered as such, or which are exempted from registration, by the Registrar of Societies under section 10 of the Societies Act (Cap. 108), or by the Non- Governmental Organizations Co-ordination Board under section 10 of the Non-Governmental Organization Coordination Act (Cap. 134) and whose income is exempt from tax under paragraph 10 of the First Schedule to the Income Tax Act (Cap. 470), and approved by the Commissioner of Social Services:

Provided that this paragraph shall not apply where any such services are rendered by way of business."

68. The Tribunal wishes to state that the Appellant is a limited liability company and therefore does not qualify as an educational, political, religious, welfare and other philanthropic associations nor is it a charitable organization.

69. Therefore, the Appellant's alleged welfare services offered to various entities do not qualify for VAT exemption under the provisions of Paragraph 11 of Part II of the First Schedule to the VAT Act, 2013.

FINAL ORDERS

70. In view of the above analysis and findings, the Tribunal makes the following Orders: -

i. The Appeal succeeds in part.

ii. The services rendered by the Appellant under the consultancy and service agreements entered into between the Appellant and LIXIL Corporation qualify for exported services and therefore zero rated for VAT purposes.

iii. The services rendered by the Appellant in respect of the contract entered into between the Appellant and Provenance Partners Limited do not qualify for exported services and the Appellant is liable for payment of VAT thereon.

iv. The services rendered by the Appellant to Ethiopia Horticulture Producer Exporters Association (EHPEA) do not qualify for exported services and the Appellant is liable for payment of VAT thereon.

v. The Respondent's VAT Assessments be and are hereby set aside.

vi. The Respondent do issue fresh and or revised Assessments in accordance with the orders issued herein.

vii. Each Party to bear its costs.

DATED and DELIVERED at NAIROBI this **16th** day of **July**, 2021.

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PATRICK LUTTA
CHAIRPERSON

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HELEN BILA
MEMBER

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MWAI MBUTHIA
MEMBER

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ELISHAH NJERU
MEMBER

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HABON FARAH
MEMBER