



Tax Alert

Court of Appeal declines to provide taxpayer leave to appeal to the Supreme Court on tax matters

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The Court of Appeal of Kenya (“Court of Appeal”) sitting in Nairobi delivered a ruling on 5 November 2021 in *Civil Application (Sup) E005 of 2020 Barclays of Kenya (Now ABSA Kenya PLC) v. The Commissioner of Domestic Taxes* on an application for certification of an intended appeal to the Supreme Court.

The applicant sought orders from the Court of Appeal certifying the intended appeal to the Supreme Court of Kenya (“Supreme Court”) against the judgment of the Court of Appeal in *Civil Appeal No. 195 of 2017 Commissioner of Domestic Taxes (Large Taxpayer Office) v. Barclays Bank of Kenya Limited*. The orders were sought on the basis that the intended appeal involved matters of general public importance.

In *Civil Appeal No. 195 of 2017 Commissioner of Domestic Taxes (Large Taxpayer Office) v. Barclays Bank of Kenya Limited*, the Court of Appeal had held that the transaction fees paid to card companies by Barclays Bank amounted to royalties hence subject to Withholding Tax (“WHT”) under the Income Tax Act (“ITA”).

The Court of Appeal also held that interchange fees allocated by Barclays Bank to an issuing bank fell within the definition of management or professional fees in the ITA hence subject to WHT.

The Court of Appeal’s decision reversed the decision of the High Court which had held that the Kenya Revenue Authority (“KRA”) had not identified the explicit provision it was relying on to levy the WHT. Please refer to our tax alert issued in November 2020



titled ‘*Court of Appeal’s decision subjects transaction fees paid to card companies and interchange fees paid to issuing banks to withholding tax*’, for more details.

The applicant being dissatisfied with the judgment of the Court of Appeal, sought leave to appeal to the Supreme Court.

Litigants can lodge appeals to the Supreme Court in two scenarios. The first scenario is where the case involves interpretation or application of the Constitution, and the



second scenario is where a matter certified by the Supreme Court or the Court of Appeal as one of general public importance. The applicant sought certification from the Court of Appeal that the intended appeal to the Supreme Court involved a matter of general public importance.

The applicant argued that the appeal should be certified on the basis that the judgment of the Court of Appeal would result in significant harm to the banking industry and the card payment industry in Kenya - two crucial industries in Kenya.

The Court of Appeal ruled that the case did not involve a matter of general public importance and the application was thus dismissed. It is noted that the Supreme Court under Article 163(5) of the Constitution of

Kenya is empowered to review a decision of the Court of Appeal on certification and can either affirm, vary or overturn the decision. Accordingly, the applicant could still seek for review by the Supreme Court of the Court of Appeal's ruling on certification of the intended appeal.

It is noted that in tax cases, the 'public importance' of a tax case would ordinarily be judged by the impact and severity of a tax issue on a particular industry.

Where a narrow definition of 'public importance' is adopted, it may unduly restrict taxpayers from having a forum before Kenya's apex court.

We will continue monitoring the developments on this matter and keep you updated.

The Court of Appeal ruled that the case did not involve a matter of general public importance and the application was thus dismissed