Tax Alert

Tax Appeals Tribunal Judgment: Forex Margins not subject to Excise Duty

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In a judgment issued on 14 March 2025, the Tax Appeals Tribunal ("Tribunal") held that forex margins do not constitute a charge or a fee for service and thus are not excisable and proceeded to set aside KRA's (or the "Respondent") assessment.

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Background

The KRA conducted a review of the taxpayer's ("or the "Appellant") excise duty records, identifying alleged discrepancies in the declared excise duty. Consequently, the KRA reworked the excise duty payable, including an assessment on forex margins earned from currency conversion transactions.

The taxpayer, a licensed money remittance operator under the Money Remittance Regulations, 2013 of the Central Bank of Kenya (CBK) Act, Cap. 491, objected to the assessment, arguing that forex margins earned from spot foreign currency transactions should not be subject to excise duty.

The KRA confirmed the assessment, alleging that the forex margins earned by the taxpayer constitute part of the fees charged for its international money transfer services and therefore fall within the definition of "other fees" chargeable to excise duty under Paragraph 4 of Part II of the First Schedule of the Excise Duty Act, Cap 472, which subjects "other fees" charged by financial institutions to excise duty at a rate of 20%.

Dissatisfied with the KRA's decision, the taxpayer filed an appeal at the Tribunal.

The Appellant's Contention

The Appellant presented two primary arguments before the Tribunal challenging the assessment of excise duty. First, they argued that the forex margin, which arises from currency purchase and sale, is not a fee or premium for money transfer services.

As a licensed money remittance operator, the Appellant offers two distinct services: money transfer and spot foreign currency transactions. The forex margin results from the difference between the local currency and the base currency at the time of the transaction and serves as a risk mitigation measure against currency fluctuations. It is neither a fee nor a premium for money

transfer services and therefore could not fall within the definition of “other fees,” which itself is not defined within the Excise Duty Act, Cap 472 as the act does not provide a specific definition for the terms “fee,” “commission,” or “charge.”

Second, the Appellant contended that the purchase and sale of currencies should be classified as a “supply of money,” explicitly excluded from the definition of a “supply of services” under both the Excise Duty Act, Cap 472 and the Value Added Tax Act, Cap 476. They emphasized that their spot foreign currency conversion activities involved swapping one currency for another, which should be considered a supply of money and thus exempt from excise duty.

Respondent’s Contention

The Respondent argued that the forex margins earned by the Appellant should be subject to excise duty as they allegedly constituted part of the fees charged for money transfer services. They maintained that the Appellant’s operations, including currency conversion, are interconnected with the money transfer services and should be treated as a single transaction.

The Respondent cited the Money Remittance Regulations, which require the disclosure of charges and exchange rates, to support their claim that the forex margins are part of the excisable value.

The Tax Appeals Tribunal’s Findings

The Tribunal held that the forex margins are not subject to excise duty. The Tribunal reasoned that forex margins are gains made from currency conversion at a rate higher than the prevailing market rate and are not fees or charges for services rendered.

The Tribunal noted that Paragraph 22(4)(b) of the Money Remittance Regulations when expressly providing that “the money remittance provider must disclose all charges as well as the exchange rate to be used for converting the payment transaction” , that by this provision, the law separates an exchange rate from “all charges”, demonstrating that the gain made from forex is not a charge.

The Tribunal emphasized that the literal definition of fees, which is a payment for a service or for the use of something, does not include exchange rates. Therefore, forex margins are not fees and cannot be treated as charges or “other fees.”

The Tribunal further noted that in interpreting tax laws, there is no room for intendment, and taxing statutes must be unambiguous. The Tribunal cited legal precedents that support the principle that a subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax. Based on this principle, the Tribunal found that the forex margins are not explicitly provided for in the Excise Duty Act Cap 476 as subject to excise duty. The Tribunal pointed out that the Excise Duty Act does not specifically mention forex margins as excisable, and therefore, the KRA’s assessment of excise duty on forex margins was unjustified.

What this ruling means for taxpayers

This decision significantly enhances certainty and clarity for financial institutions by confirming that forex margins from currency conversion transactions are not classified as “other fees” and are therefore not subject to excise duty.

It also underscores the importance of accurately capturing the fundamental nature of the transactions sought to be subjected to tax. Additionally, the Tribunal has reiterated the principles of tax law interpretation, emphasizing that taxpayers should not be subjected to taxation unless the wording of the taxing statute explicitly imposes the tax.

Please feel free to reach out to your usual PwC contact or any of our indirect tax experts listed herein should you wish to discuss this.