



Tax Alert

Supreme Court to determine the appeal against the imposition of withholding tax on card-related payments

The Supreme Court of Kenya (“SC”), vide its ruling delivered on 19 May 2022 (“the Ruling”), confirmed its appellate jurisdiction to determine an appeal by Absa Bank Kenya Plc (formerly Barclays Bank of Kenya Limited) (“the Bank”) against the decision of the Court of Appeal (“the CoA decision”) in ***Commissioner of Domestic Taxes (Large TaxPayers Office) v Barclays Bank of Kenya Ltd [2020] eKLR***. In this decision, the CoA held that withholding tax (“WHT”) is applicable on fees paid by banks to global credit and debit card companies, as well as on the interchange fees payable by acquiring banks to issuing banks.

In this alert, we provide a brief background of the tax dispute, the parties’ arguments, and our view on what the SC’s ruling means for the banking sector and taxpayers in general.

Background

The Court of Appeal, (“CoA”) in its decision in *Commissioner of Domestic Taxes (Large TaxPayers Office) v Barclays Bank of Kenya Ltd [2020] eKLR* delivered on 6 November 2020, held that WHT is applicable on interchange fees and card fees paid by banks to global credit and debit card companies, such as Visa International on the basis that they constitute management or professional fees and royalty payments, respectively, pursuant to the provisions of the Income Tax Act (“ITA”).

Details of the tax dispute from the Tax Appeals Tribunal to the CoA can be found in our November 2020 tax alert: [“The Court of Appeal ruling on payments to card companies and interchange fees”](#).

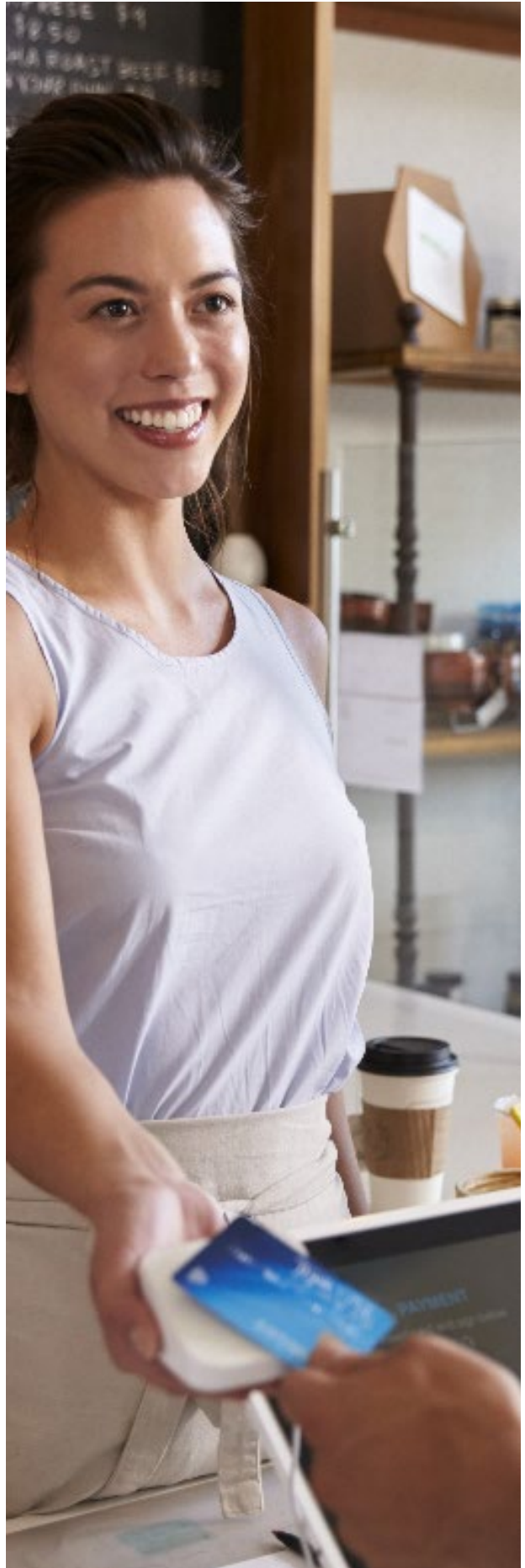
Aggrieved by the above determination, the Bank, applied to the CoA to have the matter certified as within the SC appellate jurisdiction in accordance with Article 163(4) of the Constitution of Kenya, 2010 (“CoK”) as a matter of general public importance. However, in its ruling dated 5 November 2021, the CoA dismissed the application on the basis that the matter did not qualify as a matter of general public importance.

Subsequently, the Bank applied to the SC for a review of the CoA’s ruling in accordance with Article 163(5) of the CoK, under which the SC can review a decision of the CoA pertaining to the certification of an appeal.

The Applicant’s Case

The Bank advanced the following arguments in support of its position that the matter is of public importance:

- **Impact of the CoA decision on the banking industry:** the CoA decision negatively affected the entire banking industry, by exposing banks to demands from the Commissioner for the payment of WHT on the card fees and interchange fees; and ultimately increasing the cost of card transactions.
- **Impact of the CoA decision on the general public:** the CoA decision would adversely affect the public, by disincentivising banks and card companies from issuing cards to millions of Kenyan individuals, institutions and businesses who rely on them for payments.
- **Impact of the CoA decision on other sectors:** sectors reliant on card transactions, such as the tourism sector, would suffer harm from the CoA decision.
- **Impact of the CoA decision on freedom of contract:** the CoA decision carried the indirect impact of granting the courts authority to rewrite agreements between parties so as to impose tax, thus contravening the established principle of freedom of contract. This argument stems from the CoA’s decision to disregard the fact that the agreements between the Bank and the card companies expressly provided that no royalties were payable thereunder.
- **Impact of the CoA decision on tax administration:** the CoA decision would increase uncertainty and unpredictability in taxation by granting the Commissioner the right to raise ambiguous tax demands by merely claiming that a payment is ‘management or professional fees’ without identifying the specific subset of management or professional fees.





The Supreme Court's Determination

In its ruling, the SC held that:

- In determining whether a case involves a matter of general public importance, several principles must be considered, including whether the matter presents a legal question whose ultimate impact is substantial, broad-based, transcends the interests of the parties, and impedes public interest.
- Further, controversial issues emerging from political-socio-economic-cum legal factors, with impacts on the parties' rights or on public access to services, also qualify as "matters of general public importance." This finding is momentous as going forward, cases raising weighty political and socio-economic issues, rather than just legal questions, will qualify for hearing by the SC.
- The SC further held that the question of whether card fees and interchange fees constitute management or professional fees and royalties, and therefore subject to tax, is significant to the entire banking industry.
- Accordingly, the SC determined that the case involved a matter of general public importance and therefore accepted appellate jurisdiction over the Bank's intended appeal.

Our View and Conclusion

The SC's ruling is auspicious for the banking sector, whose players have received demands and assessments for payment of WHT on fees paid to card companies and interchange fees since the CoA decision was delivered.

The SC's ruling provides the banking sector hope for certainty in taxation of this category of payments, as the SC, being the apex court in Kenya, will have the opportunity to conclusively determine the applicability of WHT on payments to card companies and interchange fees.

Crucially, the ruling underscores the importance of taxation matters to the public, and consequently provides some relieve to taxpayers to the extent that tax matters with industry-wide effects or significant impacts on the general public may be heard by the SC.

Should the SC overturn the CoA decision, taxpayers who have remitted WHT on interchange fees and card fees would, subject to the provisions of the Tax Procedures Act ("TPA"), be entitled to seek refunds of tax paid in error. However, if the SC upholds the CoA decision, the Commissioner will have the right to issue tax demands and raise assessments for WHT on interchange fees and card fees, subject to the statutory limitation of five (5) years.

We shall monitor the progress of the dispute and provide timely updates on the same. Should you wish to discuss this further, kindly feel free to contact any of the contacts below or your usual Deloitte contact who will be more than glad to offer you guidance and assistance.

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