



REPUBLIC OF KENYA



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**Commissioner of Domestic Taxes v Shah & 2 others (Income Tax Appeal E054 of 2023)
[2024] KEHC 7802 (KLR) (Commercial and Tax) (24 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7802 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E054 OF 2023
JWW MONG'ARE, J
JUNE 24, 2024**

BETWEEN

COMMISSIONER OF DOMESTIC TAXES APPELLANT

AND

ELIZABETH RITA SHAH 1ST RESPONDENT

TULA RAVINDARANATH BOWRY 2ND RESPONDENT

DARSHAK SHANTILAL KESHAVJI SHAH 3RD RESPONDENT

JUDGMENT

1. The Respondents herein are siblings and inherited two parcels of land from their father in the year 2015 upon his death. The 2 parcels of land namely LR/1871/11/404 and LR/1871/11/406 (hereinafter known as the suit properties) were acquired through a transfer on 30/9/2015 upon confirmation of a grant of probate wherein the Respondents were the beneficiaries.
2. In the year 2020, the suit properties were sold to Risun Development Company for a total of Kshs.305,584,000/=. The Respondents stated that in order to obtain the value of the property for purposes of determining Capital Gains Tax (CGT), the suit properties were valued by Knight Frank, an independent valuer, who determined the value of the properties to be Kshs.389,619,600.00/=.
3. The Respondents further stated that based on various adjusted costs, they incurred a loss of Kshs.99,485,087.00/= and therefore there was no gain chargeable to CGT.
4. The Appellant on its part issued an assessment notice to the 1st Respondent relating to CGT based on the sale of the property to Risun Development Company, amounting to Kshs.27,728,475.00/=. The Respondents objected to the entire assessment which resulted in the Appellant issuing its objection decision on 13/6/2021.



5. In its objection decision, the Appellant vacated its assessment of a sum of Kshs.13,221,750.00/= and confirmed the assessment of the sum of Kshs.14,406,725.00/=.
6. The Appellant being dissatisfied with the objection decision, Appealed against it, at the Tax Appeals Tribunal (hereinafter the tribunal).
7. Upon considering the Appeal before it, the tribunal found that the Appellant was erroneous in disallowing the Respondents' acquisition costs in the adjustment of costs for determination of Capital Gains Tax(CGT) and fell in error in confirming the additional assessment against the Appellants thereby issuing an erroneous objection decision against the Respondents. The tribunal found the Appeal before it meritorious and allowed it and at the same time set aside the Appellant's objection decision dated 13/8/2021.
8. The Appellant, being dissatisfied by the entire decision of the tribunal filed the present Appeal before this Court on the following grounds:
 - “ 1. 1. THAT the Tribunal erred in law by failing to exhaustively consider the provisions of paragraph 6(2) (c) & (d) of the Eighth Schedule of the *Income Tax Act* which defines what a transfer constitutes for tax purposes;
 2. That the Tribunal erred in the interpretation of the provisions of paragraph 9 of the Eighth Schedule of the *Income Tax Act* by finding that the transaction squarely fell within its ambit;
 3. That the Tribunal erred by misconstruing the interpretation of 'related persons' as used in paragraph 9 of the Eighth Schedule of the *Income Tax Act*;
 4. That the Tribunal erred in law in adopting the market value as determined by the independent valuer for purposes of determining the cost of acquisition; and
 5. That the Tribunal erred in faulting the Commissioner for disallowing the acquisition cost which was a book entry and not an actual expense incurred in the adjustment of costs for determination of Capital Gains Tax.”
9. Based on the foregoing grounds, the Appellant prayed to have the tribunal's judgment set aside in its entirety and to have the Appeal allowed with costs.
10. The Respondents opposed the Appeal by filing a statement of facts dated 8/6/2023.
11. The Respondents contended that the first transaction where the property was transferred to the Respondents herein by assent was exempt from CGT and the second transfer having resulted in a loss was also exempt as no gain was realised and that Paragraph 4(2) of the Eighth Schedule of the ITA is clear that CGT is only chargeable where the transfer value of the property exceeds the adjusted cost of the property and not where a loss is realised. Therefore, in instances such as this one where the adjusted cost exceeds the transfer value, no CGT is due on the transfer.
12. That in the Respondents case, a loss of Kshs.99,485,087/= was realised on the second transfer taking into account the purchase price and the adjusted costs on the two properties in question.
13. Based on the foregoing, the Respondents argued that the tribunal's judgment was proper and founded in law, and urged the Court to dismiss the Appeal with costs to them.



Analysis And Determination:-

14. The Court has carefully considered the Record of Appeal, the Respondent's Statement of Facts and the written rival submissions filed in support of and against the Appeal.
15. The grounds of Appeal may be condensed into one issue for determination, to wit: whether the adjustment costs applied by the Respondents to determine the CGT payable are allowable.
16. It is not in dispute that the Respondents inherited the suit properties from the estate of their deceased father. The only contentious issue is on the computation of CGT in respect of the second transfer whereby the Respondents sold and transferred the suit properties to a company known as Risun Development Company Limited.
17. As the name suggests, Capital Gains Tax(CGT) is a tax chargeable on gains following the transfer of property. The computation of a gain is described under paragraph 4(1) and (2) of the 8th schedule of the *Income Tax Act* which states:-
 - “(1)The gain which accrues to a person on the transfer of any property is the amount by which the transfer value of the property exceeds the adjusted cost of the property.
 - (2) Where, in computing the gain accruing to a person on the transfer of any property, it is found that the adjusted cost of the property exceeds the transfer value of the property, the amount of the excess is the loss realized by the person on the transfer of the property.”
18. Paragraph 7 of the 8th schedule provides:-
 - “the transfer value of property shall be computed by reference to such of the following amounts (if any) as are appropriate having regard to the manner of the transfer, namely—
 - (a) the amount of or the value of the consideration for the transfer of the property;”
19. Paragraph 8 describes the adjusted cost as:-
 - “(a) (a) the amount of or value of the consideration for the acquisition or construction of the property;..”
20. Paragraph 9 states:-
 - “Where property is acquired or transferred—
 - (a) otherwise than by way of a bargain made at arms length;
 - (b) by way of a gift in whole or in part;
 - (c) for a consideration that cannot be valued; or
 - (d) as the result of a transaction between persons who are related then, for the purposes of—
 - (i) paragraph 7 of this Schedule, the amount of the consideration for the transfer of the property shall be deemed to be equal to the market value of the property at the time of the transfer; and



(ii) paragraph 8 of this Schedule, the amount of the consideration for the acquisition of the property shall be deemed to be equal to the market value of the property at the time of the acquisition or to the amount of the consideration used in computing stamp duty payable on the transfer by which the property was acquired, whichever is the lesser.”

21. The above provisions elaborate that a gain is arrived at when the transfer value of property is greater than the adjusted cost of the property and conversely if the adjusted cost of property is greater than the transfer value of property then there will be a loss. Further, the adjusted cost is the price of acquiring the property while the transfer value is the consideration for the transfer of the property.
22. In this case, the suit properties were inherited by the Respondents through succession, therefore there was no payment for the acquisition of the properties. Under paragraph 9, the amount of the consideration for the acquisition of the property shall be deemed to be equal to the market value of the property at the time of the acquisition or to the amount of the consideration used in computing stamp duty payable on the transfer by which the property was acquired, whichever is the lesser.
23. The market value for both properties as per the valuation of Knight Frank in 2015 when the properties were acquired by the Respondents was Kshs.389,619,600/=. This figure is not disputed by the Appellant who did not produce a contrary valuation.
24. As for the transfer costs, the suit properties were sold for the sum of Kshs.305,584,000/= and incurred incidental costs of Kshs.15,449,487/=: amounts which are not in dispute.
25. Owing to the fact that the transfer cost was less than the adjusted cost of the property, the Respondents incurred a loss. In the circumstances there was no gain to warrant the levying of CGT by the Appellant.
26. I agree with the findings of the tribunal that the Appellant was erroneous in disallowing the Respondents’ acquisition costs in the adjustment of costs for determination of CGT and fell in error in confirming the additional assessment against the Appellants thereby issuing an erroneous objection against the Respondents.
27. It is my finding that the adjustment costs applied by the Respondents to determine the CGT payable are allowable.
28. The upshot of the foregoing is that the Appeal before the Court lacks merit and is dismissed. The tribunal’s judgment of 17/3/2023 is upheld. Each party shall bear its own costs to the Appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF JUNE, 2024.

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J.W.W. MONG’ARE

JUDGE

In the Presence of:-

Ms. Kinyua for the Appellant.

Ms. Maina holding brief for Dr. Arwa for the Respondent.

Amos - Court Assistant

