



**Commissioner of Domestic Taxes v Thika Road Baptist Church Ministries (Tax Appeal E024 of 2021) [2022] KEHC 644 (KLR) (Commercial and Tax) (31 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 644 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**COMMERCIAL AND TAX**  
**TAX APPEAL E024 OF 2021**  
**DAS MAJANJA, J**  
**MAY 31, 2022**

**BETWEEN**

**COMMISSIONER OF DOMESTIC TAXES ..... APPELLANT**

**AND**

**THIKA ROAD BAPTIST CHURCH MINISTRIES ..... RESPONDENT**

*(Being an appeal against the judgment of the Tax Appeals Tribunal at Nairobi dated 21st August 2020 in Tax Appeal No.190 of 2018)*

**Tithes, freewill donations and offerings to churches and other religious organisations do not fall within the scope of income chargeable to income tax.**

*The appellant (the Commissioner of Domestic Taxes) issued a letter to the respondent (a Church) demanding tax arrears of Kshs 5, 516,070.00. Following non-payment, the Commissioner issued an assessment for the income tax period 2015, 2016 and 2017 to which the Church applied for an objection. The Commissioner, later on, wrote to the Church informing it that since it did not have a valid tax exemption certificate, the objection would be rejected and subsequently issued the objection decision to that effect. The Church contested the objection decision before the Tax Appeals Tribunal (the Tribunal). The Tribunal held that even though the objection decision was valid, the Church was not liable to pay tax on tithes and offerings hence it was not required to apply for a tax exemption certificate since its income was based on freewill donations, tithes and offerings which was not taxable income. Aggrieved the filed the instant appeal before the High Court. The High Court held that it was only the income that was chargeable that was exempt from tax under section 13 as read with first schedule of the ITA. Since tithes, offering and freewill donations were not income chargeable with income tax, it was not necessary for the Church to seek an exemption.*

Reported by Kakai Toili

**Tax Law** – income tax – income chargeable to income tax - whether tithes, freewill donations and offering to churches and other religious organizations fell within the scope of income which was chargeable to income tax – Income Tax Act (cap 470) sections 3(2), 13 and the First Schedule.



**Tax Law – tax exemption – tax exemption certificates – issuance of tax exemption certificates to churches - whether a tax exemption certificate was to be issued as a matter of right to a church - Income Tax Act, Cap 470, sections 3(2), 13 and the First Schedule.**

### **Brief facts**

The appellant (the Commissioner) issued a letter to the respondent (the Church) demanding tax arrears of Kshs 5, 516,070.00. Following nonpayment, the Commissioner issued an assessment for the income tax period 2015, 2016 and 2017 to which the Church applied for an objection. The main reason for objection was that the Church, being a religious organization registered under section 10 of the Societies Act, was not a business activity and it derived its income from tithes and offerings for its operations. Therefore, its income was exempted from payment of income tax.

The Commissioner, later on, wrote to the Church informing it that since it did not have a valid tax exemption certificate, the objection would be rejected and subsequently issued the objection decision to that effect. The Church contested the objection decision before the Tax Appeals Tribunal (the Tribunal). The Tribunal held that even though the objection decision was valid, the Church was not liable to pay tax on tithes and offerings hence it was not required to apply for a tax exemption certificate since its income was based on freewill donations, tithes and offerings which was not taxable income. Aggrieved by the Tribunal's decision, the Commissioner filed the instant appeal.

### **Issues**

- i. Whether tithes, freewill donations and offering to churches and other religious organizations fell within the scope of income which was chargeable to income tax.
- ii. Whether a tax exemption certificate was to be issued as a matter of right to a church.

### **Relevant provisions of the Law**

#### **Income Tax Act (cap 470)**

#### **Section 3 – Charge of tax**

*(1) Subject to, and in accordance with, this Act, a tax to be known as income tax shall be charged for each year of income upon all the income of a person, whether resident or non-resident, which accrued in or was derived from Kenya.*

*(2) Subject to this Act, income upon which tax is chargeable under this Act is income in respect of—*

*(a) gains or profits from—*

*(i) any business, for whatever period of time carried on;*

*(ii) any employment or services rendered;*

*(iii) any right granted to any other person for use or occupation of property;*

*(b) dividends or interest;*

*(c) (i) a pension, charge or annuity; and*

*(ii) any withdrawals from, or payments out of, a registered pension fund or a registered provident fund or a registered individual retirement fund; and*

*(iii) any withdrawals from a registered home ownership savings plan;*

*(d) deleted by Act No. 14 of 1982, s. 17;*

*(e) an amount deemed to be the income of any person under this Act or by rules made under this Act;*

*(f) gains accruing in the circumstances prescribed in, and computed in accordance with, the Eighth Schedule;*

*(g) subject to section 15(5A), the net gain derived on the disposal of an interest in a person, if the interest derives twenty per cent or more of its value, directly or indirectly, from immovable property in Kenya; and*

*(h) a natural resource income.*



## Held

1. The jurisdiction of the High Court (the court) exercising appellate jurisdiction from the Tax Appeals Tribunal (TAT) was circumscribed by section 56(2) of the Tax Procedures Act which provided that an appeal to the High Court and Court of Appeal would be on a question of law only. There were no factual issues in contention. The main issues for consideration involved questions of law.
2. The Church was a religious organization that was entitled to exemption from payment of income tax under paragraph 10 of the first schedule of the Income Tax Act (ITA). A tax exemption certificate was not issued as a matter of right and in order to be exempted from paying income tax, the Church ought to have applied for it. Upon meeting the required conditions, the Commissioner would have issued one.
3. The list of sources of income set out in section 3(2) of the ITA was an exclusive and closed list bearing in mind that section 2 of the ITA stated that tax meant the income tax charged under that Act. That was buttressed by use of the word “means” which when used in legislation implied that the indicative list was closed.
4. Tithes, freewill donations and offering to the churches and other religious organizations did not fall within the scope of income which was chargeable as per section 3(2) of the ITA. The Commissioner had not demonstrated that tithes, donations and offering were gains and profits from business, employment or rights granted for use of property or any other form of recognized income caught by the ITA.
5. The purport and import of section 13 of the ITA was that despite the overarching obligation to pay income tax on the sources of income enumerated under Part II and in particular section 3 of the ITA, a person could be exempted from paying income tax under the conditions and in the circumstances provided thereunder. Neither section 13 nor the First Schedule expanded the meaning of income chargeable with tax under the ITA. It was only the income that was chargeable that was exempt from tax under section 13 as read with First Schedule of the ITA. Since tithes, offering and freewill donations were not income chargeable with income tax, it was not necessary for the Church to seek an exemption.

*Appeal dismissed.*

## Orders

*Costs to the respondent.*

## Citations

### Cases

#### Kenya

1. *Mjengo Ltd v Commissioner of Domestic Tax* Civil Appeal 85 of 2014; [2016] eKLR - (Explained)
2. *Republic v Commissioner of Domestic Taxes & another, ex-parte Kenton College Trust* Judicial Review Case 294 of 2010; [2013] eKLR - (Explained)

### Texts

Thornton, GC., (Ed) (1970), *Legislative Drafting* London: Butterworths

### Statutes

#### Kenya

1. Constitution of Kenya articles 208 (b)(i), 210 - (Interpreted)
2. Income Tax Act (cap 470) paragraph 10; Schedule First, Eighth; sections 3(2); 13; 15(5A); 26; part II - (Interpreted)
3. Societies Act (cap 108) section 10 - (Interpreted)
4. Tax Procedures Act, 2015 (Act No 29 of 2015) sections 51(9)(10); 56(2) - (Interpreted)



## Advocates

1. *Ms Mambo, Advocate or the Commissioner of Domestic Taxes instructed by Kenya Revenue Authority for the Appellant*
2. *Mr Otinga instructed by SN Otinga Advocates for the Respondent*

## JUDGMENT

### Introduction and Background

1. This appeal stems from the judgment delivered by the Tax Appeals Tribunal (“the Tribunal”) on February 19, 2020 where the Tribunal set aside the objection decision dated November 27, 2018. The appellants (“the Commissioner”) being aggrieved by the said Judgment, has filed the present appeal.
2. The Commissioner issued a letter dated October 5, 2018 to the respondent (“the Church”) for non-filing of tax returns and a letter dated October 23, 2018 demanding tax arrears of KES 5, 516,070.00. Following nonpayment, the Commissioner issued an assessment dated November 2, 2018 for the income tax period 2015, 2016 and 2017 (“the subject period”) to which the Church applied for an objection through letter dated November 5, 2018 which the Commissioner acknowledged on November 8, 2018.
3. The main reason for objection is that the Church, being a religious organization registered under section 10 of the *Societies Act* (chapter 108 of the Laws of Kenya), is not a business activity and it derives its income from tithes and offerings for its operations. Therefore, its income is exempted from payment of income tax under paragraph 10 of the first schedule of the *Income Tax Act* (chapter 470 of the Laws of Kenya) (“the ITA”). After exchanging correspondence on this issue, the Commissioner wrote to the Church on November 27, 2018, informing it that since it did not have a valid tax exemption certificate, the objection would be rejected and there would be no need to hold the intended meeting suggested in the correspondence. The Commissioner then issued the objection decision (“the objection decision”).
4. The Church contested the objection decision before the Tribunal. It raised five grounds in its memorandum of appeal. It argued that the objection decision was invalid, that the Commissioner erred in disallowing legitimate non-taxable church income which is tithes and offerings, that it failed to give the Church an opportunity to be heard prior to making the decision and demanding an amount that was unreasonable and unfair.
5. The Commissioner, in response to the appeal, held that it was justified to tax the income of the church since it failed to produce a tax exemption certificate and as such the appeal should be dismissed with costs.
6. In its judgment delivered on February 19, 2020, the Tribunal analyzed two main issues; whether the objection decision was valid and whether the Commissioner erred in taxing tithes. On the first issue, the Church argued that the Commissioner issued an invalid decision contrary to section 51(9) and (10) of the *Tax Procedures Act, 2015* (“the TPA”). The Church was of the view that the decision was unfair, incorrect and failed to meet the legitimate expectations of a taxpayer under articles 208 (b)(i) and 210 of the *Constitution*. The Tribunal however held that since the Church had not demonstrated how the legitimate expectation of a taxpayer on how the decision contravened the *Constitution* it could not proceed to deal with the issue.
7. As to whether the objection decision was valid, the Tribunal analyzed section 51(9) and (10) of the TPA and concluded that the objection decision was valid by holding that, “...the Commissioner was



notified in writing, an amended assessment was issued, material facts and reasons for the decision was disclosed...”

8. Regarding the tax exemption certificate, the Tribunal was of the view that in accordance to paragraph 10 of the ITA, a party must apply for it and it is issued subject to certain conditions being met. That the burden of proof lies on the party claiming the exemption to prove that he is actually covered by the exemption. However, the Tribunal held that the commissioner erred in bringing to charge tithes and offerings as income. It stated that, “..... the income consisting of tithes and offerings was outside of the scope of the *income tax act*. Therefore, it was not necessary for the Church to apply for a tax exemption certificate for that income to be exempt.” This was based on the reason that tithes and offerings are not taxable income since the sources of income are not defined under section 3(2) of the *ITA* and therefore the provisions of paragraph 10 of the first schedule is not applicable. It therefore took the position that the tax exemption certificate only covers income that qualifies to be taxed under section 3(2) of the ITA.
9. The Tribunal concluded that even though the objection decision was valid, the Church was not liable to pay tax on tithes and offerings hence it was not required to apply for a tax exemption certificate since its income was based on freewill donations, tithes and offerings which is not taxable income. The Tribunal further went on to state that the income of the church could only be subjected to tax if it is used to pay for salaries of church staff and the tax would fall due to such persons. In the end, the Tribunal partially allowed the appeal by setting aside the objection decision.
10. It is this judgment of the Tribunal that culminated to this present appeal which was disposed of by way of written submissions. In their submissions, the parties have reiterated their positions before the Tribunal.

#### **Analysis and Determination.**

11. The jurisdiction of this court exercising appellate jurisdiction from the Tribunal is circumscribed by section 56(2) of the TPA states which provides that an appeal to the High Court and Court of Appeal shall be on a question of law only. Indeed, there are no factual issues in contention. The main issues for consideration involve questions of law. That is, whether tithes and offerings are taxable income under the ITA and whether the Church was required to apply for tax exemption certificate.
12. Both parties agree that the Church is a religious organization which is entitled to exemption from payment of income tax under paragraph 10 of the first schedule of the ITA. On the one hand, the Commissioner argues that the Church must have a certificate of exemption if the income in the form of tithes and donations is to be exempted. It urges that the certificate is not automatically issued but it is subjected to various conditions This position was affirmed in *Republic v Commissioner of Domestic Taxes & another ex-parte Kenton College Trust* NRB HC JR No 294 of 2010 [2013] eKLR held, in relation to section 13 and paragraph 10 of the First Schedule to the ITA, as follows:

From the above cited provisions, it is clear that income of an institution, body of persons or irrevocable trust, of a public character established solely for the purposes of the relief of the poverty or distress of the public, or for the advancement of religion or education can be exempted from tax. Before the Commissioner grants an exempt, he must satisfy himself that an applicant meets the conditions for grant of such an exemption.
13. The Commissioner is therefore right that a tax exemption certificate is not issued as a matter of right and in order to be exempted from paying income tax, the Church ought to have applied for it. Upon meeting the required conditions, the Commissioner would have issued one.



14. On its part, the respondent argues that the first question to be determined is whether the tithes and donation in issue are taxable income. It points out that under section 3(2) of the ITA, which sets out the items and or transactions upon which income tax is chargeable, tithes, offering and freewill donations are not a specified source of income hence the issue of exemption does not arise in this case.
15. In resolving this appeal, this court must consider the ITA as a whole and the starting point for this inquiry is to establish whether the tithes, offering and freewill donations are income chargeable with tax and then proceed to determine whether the income so charged is subject to the statutory exemptions. Under the scheme of ITA, the exemption will only apply if the income is chargeable with tax.
16. Income tax is chargeable under section 3 of the ITA which reads as follows: -

### 3. Charge of tax

- (1) Subject to, and in accordance with, this Act, a tax to be known as income tax shall be charged for each year of income upon all the income of a person, whether resident or non-resident, which accrued in or was derived from Kenya.
- (2) Subject to this Act, income upon which tax is chargeable under this Act is income in respect of—
  - (a) gains or profits from—
    - (i) any business, for whatever period of time carried on;
    - (ii) any employment or services rendered;
    - (iii) any right granted to any other person for use or occupation of property;
  - (b) dividends or interest;
  - (c)
    - (i) a pension, charge or annuity; and
    - (ii) any withdrawals from, or payments out of, a registered pension fund or a registered provident fund or a registered individual retirement fund; and
    - (iii) any withdrawals from a registered home ownership savings plan;
  - (d) deleted by Act No 14 of 1982, s 17;
  - (e) an amount deemed to be the income of any person under this Act or by rules made under this Act;
  - (f) gains accruing in the circumstances prescribed in, and computed in accordance with, the eighth schedule;
  - (g) subject to section 15(5A), the net gain derived on the disposal of an interest in a person, if the interest derives twenty per cent or more of its value, directly or indirectly, from immovable property in Kenya; and



(h) a natural resource income.

17. I agree with the respondent's submission that the list of sources of income set out in section 3(2) aforesaid is an exclusive and closed list bearing in mind that section 2 of the ITA states that, "tax" means the income tax charged under this Act." This is buttressed by use of the word "means" which when used in legislation implies that the indicative list is closed as the Court of Appeal *Mjengo Limited v Commissioner of Domestic Taxes* NRB CA Civil Appeal No 85 of 2014 [2016] eKLR held by citing with approval the following passage in Professor GC Thornton, *Legislative Drafting*:

"Means' is appropriate where the stipulated meaning is expressed in a complete form and no part of the intended meaning is omitted. The significance to be attached by the reader to the word defined is limited to the stipulated meaning. 'Means' may be appropriate for delimiting, extending or narrowing definitions. The vital element is that the definition must give a complete meaning." [Emphasis]

18. The Tribunal accepted the respondent argument that tithes, offerings and freewill donations did not fall within the definition of chargeable income. It held that, "[T]ithes, freewill donations and offering to the churches and other religious organisations do not fall within the scope of income which is chargeable with as per section 3(2) of the *Income Tax Act*." I also agree that this type income of does not fall within section 3(2) of the ITA. The Commissioner has not demonstrated that tithes, donations and offering are gains and profits from business, employment or rights granted for use of property or any other form of recognized income caught by the ITA. I would on this ground alone dismiss the Commissioner's appeal.

19. Turning to the issue of exemptions, the first port of call is section 13 of the ITA which provides:

13.(1) notwithstanding anything in part ii, the income specified in part I of the first schedule, which accrued in or was derived from Kenya shall be exempt from tax to the extent so specified.

(2) The Minister may, by notice in the Gazette, provide -

- (a) that income or a class of income which accrued in or was derived from Kenya shall be exempt from tax to the extent specified in the notice;
- (b) that an exemption under subsection (1) shall cease to have effect either generally or to the extent specified in the notice.

(3) A notice under subsection (2) shall be laid before the National Assembly without unreasonable delay, and if a resolution is not passed by the assembly within twenty days on which it next sits after the notice is so laid that the notice be annulled, it shall thenceforth be void, but without prejudice to the validity of anything previously done thereunder, or to the issuing of a new notice. [Emphasis mine]

While paragraph 10 of the first schedule of the ITA states as follows:

- 10. Subject to section 26, the income of an institution, body of persons, or irrevocable trust, of a public character established solely for the purposes of the relief of the poverty or distress of the public, or for the advancement of religion or education: -
  - (a) established in Kenya; or



- (b) whose regional headquarters is situated in Kenya, in so far as the Commissioner is satisfied that the income is to be expended either in Kenya or in circumstances in which the expenditure of that income is for purposes which result in the benefit of the residents of Kenya:

Provided that any such income which consists of gains or profits from a business shall not be exempt from tax unless those gains or profits are applied solely to those purposes and either -

- (i) the business is carried on in the course of the actual execution of those purposes; or
- (ii) the work in connection with the business is mainly carried on by beneficiaries under those purposes; or
- (iii) the gains or profits consist of rents (including premiums or similar consideration in the nature of rent) received from the leasing or letting of land and chattels leased or let therewith.

20. The purport and import of section 13 aforesaid is that despite the overarching obligation to pay income tax on the sources of income enumerated under part II and in particular section 3 of the ITA, a person may be exempted from paying income tax under the conditions and in the circumstances provided thereunder. What is important to note is that neither section 13 nor the First Schedule expand the meaning of income chargeable with tax under the ITA. It is only the income that is chargeable that is exempt from tax under section 13 as read with first schedule of the ITA. I therefore find and hold that since tithes, offering and freewill donations are not income chargeable with income tax, it was not necessary for the Church to seek an exemption. The Tribunal therefore reached the correct conclusions.

### **Disposition**

21. The appeal is dismissed with costs to the respondent.

**DATED AND DELIVERED AT NAIROBI THIS 31<sup>ST</sup> DAY OF MAY 2022.**

**D. S. MAJANJA**

**JUDGE**

Court Assistant: Mr Michael Onyango

Ms Mambo, Advocate for the Commissioner of Domestic Taxes instructed by Kenya Revenue Authority.

Mr Otinga instructed by S. N. Otinga Advocates for the Respondent.

