



**Ruaraka Diversified Investments Limited v The Commissioner of Domestic
Tax (Income Tax Appeal E029 of 2021) [2022] KEHC 14627 (KLR)
(Commercial and Tax) (29 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 14627 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E029 OF 2021
WA OKWANY, J
SEPTEMBER 29, 2022**

BETWEEN

RUARAKA DIVERSIFIED INVESTMENTS LIMITED APPLICANT

AND

COMMISSIONER OF DOMESTIC TAXES RESPONDENT

*(Being an appeal from the judgment of the tax appeals Tribunal
delivered at Nairobi on 1st April 2021 in Tax appeal no 86 of 2019)*

JUDGMENT

Background

1. The appellant herein, Ruaraka Diversified Investments Limited, was registered in Kenya as a branch under a certificate of compliance in April 2012 and is a branch of Ruaraka Diversified Investment Limited, a limited liability Company incorporated in Mauritius.
2. The respondent is the Commissioner of Domestic Taxes established under Section 3 of the [Kenya Revenue Authority Act](#) Cap. 486 and is mandated under Section 5 thereof to act as an agent of the Government of Kenya for the assessment, collection and receipt of revenue.
3. The Appellant's principal business activity is in the real estate sector in Africa. In furtherance of its business activities, the Appellant, in the year 2011 in the year 2011, bought Land Reference No 10119/3 measuring 13.01 hectares (equivalent to 32.14 acres) from East African Breweries Limited (EABL) at Kshs 1,200,000,000. The land was subsequently divided and sold to three entities in three different transactions between the year 2013 and 2015.



4. The appellant did not pay taxes in respect to the gain made from the transaction done in 2013 but however paid Capital Gain Tax in respect to the two 2015 transactions.
5. The Respondent conducted an audit of the Appellant's accounts for the period 2013 to 2015 and observed that the land transactions undertaken by the Appellant were corporation tax events and not a capital gains tax events.
6. On 29th October 2018, the Respondent issued the Appellant with an additional tax assessment citing mistakes that the appellant had allegedly made in the computation and remission of tax. The Respondent demanded, from the Appellant, corporation tax amounting to Kshs.672,150,686 inclusive of penalties and interest.
7. The Appellant objected to the aforesaid assessment of taxes under corporation tax events and filed its Notice of Objection 2018 but the Respondent rejected/disallowed the Notice of Objection in its entirety and confirmed the assessment through its Objection Decision dated 18 January 2019.
8. Aggrieved by the said objection decision, the Appellant filed Tax Appeal No 86 of 2019 (Ruaraka Diversified Investments Limited v The Commissioner of Domestic Taxes) at the Tax Appeals Tribunal citing the following principle grounds: -
 - a. The Respondent erred in law and fact when it held that the proceeds from the sale of the properties by the Appellant were subject to corporation tax and not capital gains tax.
 - b. The Respondent erred in fact in arriving at its decision that the Appellant gave substantive misrepresentation in its application dated 13th February 2015, thereby leading to the withdrawal of the Respondent's letter dated 22 April 2015 and thus infringing the Appellant's right of legitimate expectation.
9. A summary of the respondent's response before the Tribunal was that:
 - a. The land transactions made by the Appellant were done in the ordinary cause of business, and therefore, the Appellant ought to have computed and remitted corporation tax as opposed to capital gains tax.
 - b. The Appellant gave substantive misrepresentation in its application dated 13th February 2015 which therefore should not give rise to a legitimate expectation.
10. The Tax Appeals Tribunal dismissed the Appeal in its judgment delivered on 1st April 2021 wherein it held that the income realized by the Appellant from the land transactions was business income and not capital gains events. The Tribunal further held that the Respondent's letter dated 22 April 2015 did not give rise to legitimate expectation.
11. Dissatisfied with the judgement of the Tribunal, the appellant lodged the present appeal through the Memorandum of Appeal dated 27th April 2021 setting out the following grounds of appeal:-
 1. The Honourable tribunal erred in law by failing to appreciate that the transfers of land by the appellant to the appellants related agencies GC retail and GC Residential Limited were carried out as part of the internal reorganization of the appellant, were subject to the capital gains tax, prescribed under the Eighth schedule of the *Income Tax Act* and not the corporation tax.
 2. The Honourable tribunal erred in law by failing to appreciate that the subsequent transfer of land by the appellant to Safaricom PLC following its internal reorganization and the initial transfer of land to the appellants related entities, which transfer took place four years after the



initial transfer, was an investment activity and therefore the income generated was subject to capital gains tax as prescribed under the Eighth schedule of the *Income Tax Act*.

3. The Honourable tribunal erred in law by finding that the income realized by the appellant in the land transaction arose from trading activities therefore subject to corporation Tax under section 3(2)(a)(i) of the *Income Tax Act* and not capital gains subject to capital gains tax under section 3(2)(f) of the *Income Tax Act*
4. The Honourable tribunal erred in law when it upheld the respondent's objection decision to levy corporation tax of Kshs. 672,150,686 (inclusive of penalties and interest) for the years of income 2013 and 2015 on land transactions between the appellant and its related entities that is GC Retail Limited and GC Residential Limited and Safaricom PLC
5. The Honourable tribunal erred in law by applying the provisions of *Tax Procedures Act* which had not come into effect at the time when the Respondents decision which was communicated via its letter dated 22nd April 2015 confirming that the land transaction with Safaricom PLC was subject to capital gains tax was issued.
6. The Honourable tribunal erred in law by failing to apply the doctrine of legitimate expectation and estoppel when making a finding that the respondent could lawfully withdraw its decision communicated via its letter dated 22nd April 2015 confirming that the land transaction with Safaricom PLC was subject to capital gains tax yet the appellant proceeded with the transaction based on this confirmation and made full payment of the capital gains tax on the income generated.
7. The Honourable tribunal erred in law by misapprehending and misapplying the Badge of Trade tests in determining the nature of income of the appellant.
12. The respondent filed its statement of facts in response to the Appeal.
13. Parties canvassed the appeal by way of written submissions which their respective advocates highlighted at the hearing.

The Appellant's Submissions.

14. The Appellant faulted the Tribunal for failing to consider the evidence presented before it, in totality, thereby arriving at an erroneous decision that the income realized from the land transactions should have been subjected to corporation tax under Section 3(2) (f) of the *Income Tax Act* as opposed to Section 3(2) (a) (i) of the *Income Tax Act* that relates to capital gains.
15. The appellant maintained that the land transactions did not fall within the definition of a business as the activities of the appellant did not amount to a profession or involvement in manufacturing. For this argument, the appellant cited the decision in the case of *Mocian Limited v The Commissioner of Domestic Taxes*, Appeal No 12 of 2016 where it was held that:-

“The respondent has made submissions about the nature and disposal of the office suits based on the various badges of trade, i.e. the subject matter of the realization, the length of the period of ownership, the frequency or number of similar transactions by the same person, supplementary works on or in connection with the property realized, the circumstances that were responsible for the realization and motive of the appellant. The tribunal is of the view that the character of the transaction undertaken by the appellant must depend upon the total impression and effect of the relevant facts and circumstances established as well as evidence adduced before it. In *Janaki Ram Bahadur ram v CIT* [1965] 57 ITR



21, the Supreme Court of India observed that a transaction of purchase of land cannot be assumed without more to be a venture in the nature of trade. However, the magnitude of the transaction of purchase, the nature of the commodity, the subsequent dealings and the manner of disposal may be such that the transaction may be stamped with the character of a trading nature.”

16. The appellant further submitted that the tribunal failed to properly analyze all the evidence on record when considering the badges of trade and failed to form the necessary balanced view thus prejudicing the Appellants case. It was submitted that the tribunal erred in holding that the appellant had a profit motive because it earned income from the sale of land.
17. The Appellant argued that the infrastructure development on the land was not done to enhance its salability and that the sale of the land within two years did not automatically indicate that the appellant was engaging in trade.
18. With regard to the doctrine of legitimate expectation, the appellant submitted that the tribunal erred when it held that the Respondent’s decision did not give rise to legitimate expectation. The Appellant maintained that the tribunal erred in holding that the appellant was guilty of material nondisclosure and misrepresentation of facts.

Respondents Submissions

19. The respondent submitted that the letter dated 22nd April did not represent a private ruling as it was a response to the letter of enquiry dated 13th February 2015. It was submitted that the said letter and the respondent’s response did not fall within the ambit of Section 113 of the [Tax Procedures Act](#).
20. The Respondent submitted that the appellant did not enjoy the benefit of the transitional provisions under Section 113 of the [Tax Procedures Act](#). It was submitted that the Appellant’s letter of enquiry to the respondent did not provide all the relevant information including the fact that Appellant’s core business was in the area of sale and development of land.
21. It was submitted that the letter dated 22nd April 2015 did not create any legitimate expectation and could not oust the express provisions of the [Income Tax Act](#) CAP 470. It was submitted that the appellant was a property developer as shown in its financial statements which described the Appellant’s principal activities as Land development for sale.

Analysis and Determination

22. I have considered the Memorandum of Appeal, the Statement of Facts, the record of appeal, the parties’ respective submissions and the authorities that they cited. The main issues for determination are as follows:-
 - a. Whether the income realized by the appellant from the land transactions was business income and not capital gains.
 - b. Whether the respondent’s decision contained in its private ruling gave rise to legitimate expectation on the part of the appellant.



23. Since this is a first appeal, the court’s mandate is spelt out in several decisions of this Court including *Selle & another v Associated Motor Boat Company Limited & others* [1968] E.A 123, wherein, it was held:-

“an appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanor of a witness is inconsistent with the evidence generally.

An appeal to this court from a trial by the High Court is by way of a re-trial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif v Ali Mohamed Sholan* (1955)22 EACA 270”.

Whether the income realized by the appellant from the land transactions was business income and not capital gains.

24. The dispute herein concerns the Respondent’s assessment of taxes and the finding that the 3 land transactions undertaken by the appellant were subject to corporation tax and not capital gains tax. According to the appellant the income realized from the land transactions was capital gains in nature and therefore ought to have been subjected to tax under Section 3(2)(f) of the *Income Tax Act* as opposed to section 3(2)(a)(i) of the *Income Tax Act*.
25. Section 3(2) of the *Income Tax Act* classifies taxes for which income tax would be charged as follows: -
- a. Gains or profits from-
 - i. A business, for whatever period of time of time carried on;
 - ii. employment or service rendered;
 - iii. a right granted to another person for use or occupation of property
 - b. Dividends or interest
 - c. Pension, charge or annuity
 - d.
 - e. An amount deemed to be the income of a person under this Act or by rules made under this Act
 - f. Gain accruing in circumstances prescribed in and computed in accordance with Eighth Schedule.
26. The appellant contended that the land transactions did not come within the definition of business as its activities did not amount to a profession and neither was it engaged in manufacturing. The appellant faulted the tribunal for not properly analyzing all the evidence while considering the badges of trade and maintained that the income realized from the transactions was capital profits on an investment.



27. The respondent, on the other hand, was resolute that the appellant had incorrectly declared the income realized from the land transactions as subject to capital gains as opposed to corporation tax. It was the respondents case that the appellant's principal business activity was in the area of land development and sale and further, that the appellant had treated the sale of land transactions as capital gains yet the transactions were not capital in nature. The respondent relied on the concept of badges of trade in determining whether the appellant was carrying out trading activities.
28. In *Janki Ram Bahadur v CIT* [1965]57 ITR 21, the Supreme Court of India observed that the transaction of the purchase of land could not be assumed without more than a venture in the nature of trade. However, the magnitude of the transaction of purchase, the nature of the commodity, the subsequent dealings and the manner of disposal maybe such that the transaction may be stamped by the character of the trading nature.
29. In the Indian case of *Mrs. Sarojini Rajah v CIT* [1969] 71 ITR 504 (Mad), the court in explaining the terms trade, commerce or business observed that:-

“What a trading activity is, it is not easy to define with any comprehensiveness or precision. It is one of those matters which has to be judged having regard to the totality of the impression the circumstances of the case taken together make on the mind of the court. There are, however, certain badges of trade which may generally serve to distinguish it and which are collected in the report of the Royal Commission on the Taxation of Profits and Income, 1955: "We have drawn up and set out below a summary of what we regard as the major relevant considerations that bear upon the identification of these badges of trade.

- (1) The subject-matter of the realization. - While almost any form of property can be acquired to be dealt in, those forms of property, such as commodities or manufactured articles, which are normally the subject of trading are only very exceptionally the subject of investment. Again property which does not yield to its owner an income or personal enjoyment merely by virtue to its owner an income or personal enjoyment merely by virtue of its ownership is more likely to have been acquired with the object of a deal than property that does.
- (2) The length of the period of ownership. - Generally speaking, property meant to be dealt in is realized within a short time after acquisition. But there are many exceptions from this as a universal rule.
- (3) The frequency or number of similar transactions by the same person. - If realizations of the same sort of property occur in succession over a period of years or there are several such realizations at about the same date a presumption arises that there has been dealing in respect of each.
- (4) Supplementary work at or in connection with the property realized. - If the property is worked up in any way during the ownership so as to bring it into a more marketable condition; or if any special exertions are made to find or attract purchasers, such as the opening of an office or large-scale advertising, there is some evidence of dealing. For when there is an organised effort to obtain profit there is a source of taxable income. But if nothing at all is done, the suggestion tends the other way.
- (5) The circumstances that were responsible for the realization. - There may be some explanation, such as sudden emergency or opportunity calling for ready



money, that negatives the idea that any plan of dealing prompted the original purchase.

- (6) Motive. - There are cases in which the purpose of the transaction of purchase and sale is clearly discernible. Motive is never irrelevant in any of those cases. What is desirable is that it should be realised clearly that it can be inferred from surrounding circumstances in the absence of direct evidence of the seller's intentions and even, if necessary, in the face of his own evidence."

30. Similarly, in the UK case of *Marson v Morton* [1986] STC 463, the court outlined nine badges of trade where Browne-Wilkinson V-C declined to reverse the commissioners' decision and made the following observations during the course of his judgment:-

"It seems to me that this is essentially a case which falls in the no-man's-land where different minds might reach different conclusions on the facts found. It was a one-off deal and it was a deal for land which was right outside the ordinary trade of the taxpayers as wholesale potato merchants. The taxpayers to an extent used their own money which had recently become available to them as a result of the profit in the company. On the other hand, they had also borrowed nearly half the money required at a fairly high rate of interest.

...

The property was in due course resold in one lot, without anything having been done to the land or any other land bought in to improve its value. These factors, if anything, point towards the transaction being one of investment rather than a trade deal. However, the property was resold very swiftly after the purchase, which in the ordinary case would point to an intention to trade rather than invest. But, notwithstanding that, it must be remembered that the Commissioners accepted the evidence that at the inception of the scheme the [taxpayers] were looking for a safe, long-term investment – long-term in this sense being apparently in the area of one to two years.'

31. Applying the principles stated in the above cited cases to the circumstances of this case, I note that it was not disputed that the appellant acquired Land Reference No 10119/3 from East African Breweries Limited at Kshs 1,200,000,000 in the year 2011. The appellant subdivided the land into 3 portions and subsequently sold the same to 3 different entities as follows: - 15.6 acres sold to GC Retail limited in the year 2013 at Kshs 941,466,191, 8.83 acres sold to GC Residential at Kshs 584,965,120 in the year 2015 and still in the same year, 5.05 acres sold to Safaricom PLC at Kshs 1,150,000,000.
32. I note that even though the appellant stated that it was established to pool funds from various investors for purposes of deployment of capital in emerging opportunities within the real estate sector in Africa, no material was presented in court to show that the money that the appellant paid in acquiring the subject property was pooled from various investors.
33. The appellant further alleged that it registered two wholly owned subsidiaries, GC Rental Limited and GC Residential Limited to undertake the development of the retail and residential components of its development respectively. I however note that no evidence was presented to show that GC Rental and GC Residential Limited were the appellant's subsidiaries.
34. I find that the totality of the evidence presented in this case especially the subject matter of the transactions, the amount of money that changed hands, the length of period of ownership and the similarity of the transactions creates the irresistible impression that trading activities took place in line



with the badges of trade. My finding is bolstered by the contents of the appellant's Annual Reports and Financial Statements where its principal activity is listed as "land development and sale".

35. My finding is that the appellant acquired the said property with the sole intention of selling it. The said intention is evident from the subdivision of the title and its subsequent sale to 3 entities within a short span of 3 years. Based on the above foregoing, I am inclined to agree with the 'Tribunal' finding that the appellant had no intention of holding the property as an investment. I further find that the appellant's transactions were in the nature of trade as shown in the huge profits that the appellant realized in each transaction which profits ought to be subjected to corporation tax.

Whether the decision of the respondent in its private ruling gave rise to legitimate expectation on the part of the appellant.

36. It was the appellant's case that the tribunal erred when it made a finding that that the decision of the respondent did not give rise to legitimate expectation on the part of the appellant. The appellant further submitted that the tribunal erred in holding that the appellant was guilty of material nondisclosure and misrepresentation of facts.
37. In a rejoinder, the respondent argued that the letter dated 22nd April 2015 did not create any legitimate expectation as the appellant had only enquired about capital gains tax and further presented facts concerning the capital gains tax discussion.
38. In *Keroche Industries Limited v Kenya Revenue Authority & 5 others Nairobi* [2007] eKLR the Court held that:-

"...legitimate expectation is based not only on ensuring that legitimate expectations by the parties are not thwarted, but on a higher public interest beneficial to all including the respondents, which is, the value or the need of holding authorities to promises and practices they have made and acted on and by so doing upholding responsible public administration. This in turn enables people affected to plan their lives with a sense of certainty, trust, reasonableness and reasonable expectation. An abrupt change as was intended in this case, targeted at a particular company or industry is certainly abuse of power. Stated simply legitimate expectation arises for example where a member of the public as a result of a promise or other conduct expects that he will be treated in one way and the public body wishes to treat him or her in a different way... Public authorities must be held to their practices and promises by the courts and the only exception is where a public authority has a sufficient overriding interest to justify a departure from what has been previously promised."

39. Similarly, in *Republic v Attorney General & another Ex Parte Waswa & 2 others* [2005] 1 KLR 280 it was held that:-

"The principle of a legitimate expectation to a hearing should not be confined only to past advantage or benefit but should be extended to a future promise or benefit yet to be enjoyed. It is a principle, which should not be restricted because it has its roots in what is gradually becoming a universal but fundamental principle of law namely the rule of law with its offshoot principle of legal certainty. If the reason for the principle is for the challenged bodies or decision makers to demonstrate regularity, predictability and certainty in their dealings, this is, in turn enables the affected parties to plan their affairs, lives and businesses with some measure of regularity, predictability, certainty and confidence. The principle has been very ably defined in public law in the last century but it is clear that it has its cousins in private



law of honouring trusts and confidences. It is a principle, which has its origins in nearly every continent. Trusts and confidences must be honoured in public law and therefore the situations where the expectations shall be recognized and protected must of necessity defy restrictions in the years ahead. The strengths and weaknesses of the expectations must remain a central role for the public law courts to weigh and determine.”

40. The above cited cases indicate that legitimate expectation is founded on representation made by an authority, which has the power to make such representation, that certain actions will be done in a particular way without any qualification. The appellant faulted the Tribunal for not applying the doctrine of legitimate expectation in respect to the respondent’s letter dated 22nd April 2015 and for finding that the respondent could lawfully withdraw the decision communicated in the said letter.
41. A perusal of the record reveals that the appellant’s letter dated 23rd February 2015, in which it sought the respondent’s clarification on the applicable tax regime applicable to its land transactions was worded as follows: -

“ 13 February 2015

Mr. James Ojee

Ag. Deputy Commissioner

Kenya Revenue Authority

Policy Unity Technical

30th Floor

Times Towers

Haile Selassie Avenue

Nairobi

Dear Sir,

Application of Capital Gains Tax

We refer to the above matter.

We write to seek clarification on behalf of our client, Actis, the developers of Garden City along Thika Road in a bid to ensure that correct compliance from a Capital Gains Tax (CGT) perspective is applied in a presently looming transaction with a third party.

Background

Our client is currently involved in a sale of land to a third party. The land on which Garden City is being developed is owned by Ruaraka Diversified Investments Limited (RDIL). RDIL is registered as lessee from the Government of The Republic of Kenya over the land known as Land Reference Number 29271 for a period of 99 years from 1st June 2012.

The company’s objective was to develop a commercial building, mores specifically a retail mall, for hold, and generate rental income therefrom. It also intended to develop residential houses for sale. In order to achieve these objectives, the company, in an Internal re-organization, decided that the two developments should be undertaken in special purposes vehicles, as there would be different laws, rules and regulations applicable to the type of development undertaken. The company therefore created two subsidiaries, GC Retail



Limited and GC Residential Limited to undertake the development of the commercial building and the residential houses respectively.

Through the internal re-organization described above, RDIL sub-leased part of its land in 2013 to GC Retail Limited, a special purpose vehicle for purposes of undertaking the development of a retail mall for Actis in the Garden City project. The mall shall be used for the purposes of obtaining rental income. GC Retail will account for the income arising from the rental.

RDIL subsequently sub-leased another portion of its land in 2014 to GC Residential Limited, a special purpose vehicle for the purpose of undertaking residential real estate development for Actis in the Garden City project. The residential houses will be sold to willing buyers by the special purpose.

It is anticipated that this model will be adopted for any further developments to be undertaken by Actis directly on the land owned by RDIL as part of the Group's strategy to effectively manage its developments within the project.

The transaction.

Actis has received an offer to sell part of the land held by RDIL to third party for the development of a commercial office block. Prior to proceedings with the transaction, we wish to obtain your concurrence on the treatment of the proceeds of the transaction.

Key issues

As mentioned above, Actis has been approached by a third party with an offer to acquire part of the land that RDIL holds. The transaction with the third party is an unanticipated opportunistic transaction. If the offer is accepted, RDIL shall outrightly and completely transfer that part of the land and that the third party intends to acquire and shall also effectively transfer all the rights and obligations with respect to that part of the land. The reversionary interest in this part of the land shall be passed to the third party, to the exclusion of our client RDIL. RDIL, though informally informed the intentions of the third party to develop officers would lose the control of the nature of the development that the third party intends to undertake.

In our view, the transaction with the third party would be a capital gain which is subject to Capital Gain Tax. Further, the costs incurred by the company on the (i) purchase of that part of its land (ii) infrastructural development undertaken on that part of the land and (iii) all other incidental costs including but not limited to legal fees, land rent, valuation etc shall be considered as the adjusted cost to be used in determining the net capital gain subject to tax at the prescribed rate of 5%.

Conclusion

We believe that the details provided above are sufficient for you to provide us with an expeditious response. However, should you seek further information or clarifications, please do get in touch with us. We further believe that we have captured the tax consequences of the transactions correctly and await your usual quick concurrence on the matter.

Kindly note that this transaction is imminent and as such we would appreciate your response at the earliest to enable our client complete the transaction.

Yours sincerely

Alex Muriuki



Partner”

42. The respondent’s response to the said letter dated 22nd April 2015 was as follows: -

“Viva Africa Consulting

Box 75079-00200

NAIROBI

Att: Alex Muriuki

Dear Sir,

RE: Application of Capital Gains Tax – Actis Properties East Africa Limited

We refer to your letter dated 13th February 2015 and our various email and telephone correspondences on the above subject matter.

We would like to confirm your position that capital gains tax applies to the transaction outlined in your letter.

With regard to the infrastructure development costs however, from their nature and accounting as described in your email communication, it is our position that they are not allowable in the computation of capital gains tax.

Please note and be guided accordingly.

Yours faithfully

J.M.OJeo

For. Commissioner of Domestic Taxes.”

43. A simple reading of the appellant’s letter dated 23rd February 2015 shows that it did not provide/ disclose all the relevant information over the critical aspects of the land transactions so as to enable the respondent to make an informed decision on the applicable taxes. The letter is clear, from the very word go, that the appellant was specifically seeking advice on compliance ‘from a Capital Gains Tax (CGT) perspective’ of the development of Garden City. I find that the tone of the appellant’s letter was intended to preempt a specific response. The scenario would have been different had the appellant laid all its cards on the table by clearly stating the full particulars of its dealings with the third party including its core business, financial statements, the purchase price it paid for the land in question and the amount that it expected to receive from the third party. It is however curious to note that nowhere in the said letter did the appellant disclose the amount of money involved in its transactions with the third party thus lending credence to the respondent’s position that the letter dated 22nd April did not represent a private ruling as it was merely a response to a specific enquiry.

44. I therefore agree with the respondent’s position that its said letter did not fall within the ambit of Section 113 of the *Tax Procedures Act* which stipulates as follows:-

“ 113. Transitional and saving

- (1) Subject to this section, this Act shall apply to any act or omission that occurred or is occurring for which no prosecution has been commenced, or any assessment made against which no appeal has been made, before the commencement date.



- (2) Any appeal or prosecution commenced before the commencement date may be continued and disposed of as if this Act had not come into force.
- (3) If the period for any application, appeal or prosecution had expired before the commencement date, nothing in this Act shall be treated as having enabled the application, appeal, or prosecution to be made under this Act by reason only that a longer period is specified in this Act.
- (4) Any tax liability that arose before the commencement date may be recovered under this Act despite any action already taken for the recovery of the tax.”

45. The appellant contended that the respondent’s letter of 22nd April 2015 gave rise to legitimate expectation that Capital Gains Tax was applicable to its transactions. The doctrine of legitimate expectation was discussed in the case of H. W. R. Wade & C. F. Forsyth[3] at pages 449 to 450, as follows:-

“It is not enough that an expectation should exist; it must in addition be legitimate....First of all, for an expectation to be legitimate it must be founded upon a promise or practice by the public authority that is said to be bound to fulfil the expectation..... Second, clear statutory words, of course, override an expectation howsoever founded..... Third, the notification of a relevant change of policy destroys any expectation founded upon the earlier policy....”

“An expectation whose fulfillment requires that a decision-maker should make an unlawful decision, cannot be a legitimate expectation. It is inherent in many of the decisions, and express in several, that the expectation must be within the powers of the decision-maker before any question of protection arises. There are good reasons why this should be so: an official cannot be allowed in effect to rewrite Acts of Parliament by making promises of unlawful conduct or adopting an unlawful practice.”

46. As I have already stated in this judgment, the respondent’s letter of 22nd April 2015 was a response to the appellant’s enquiry on Capital Gains Tax only and was therefore limited to the said specific enquiry. I have already noted that the appellant did not furnish the respondent with all the relevant information that could have assisted it in making an informed decision and for this reason, I find that the doctrine of legitimate expectation does not arise in this case. I further find that the appellant could only give a final advisory on the taxes due from the subject transactions upon assessing the appellant’s audited accounts of the appellant.

47. In the upshot, having established that the appellant’s transactions were in the form of trade, I find that the same were subject to corporation tax. I find no merit in the instant appeal which I hereby dismiss with orders that each party shall bear its own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 29TH DAY OF SEPTEMBER 2022.

W. A. OKWANY

JUDGE

In the presence of: -

Mrs Gatheru and Ms Guyo for Appellant.

Akhaabi for appellant.



Mr. Osoro for respondent.

Court Assistant- Sylvia

