**Epix Investments Limited v Commissioner of Investigation & Enforcement (Income Tax Appeal E019 of 2020) [2021] KEHC 184 (KLR) (Commercial and Tax) (29 October 2021) (Judgment)**

Neutral citation: [2021] KEHC 184 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**COMMERCIAL AND TAX**

**INCOME TAX APPEAL E019 OF 2020**

**MW MUIGAI, J**

**OCTOBER 29, 2021**

**BETWEEN**

**EPIX INVESTMENTS LIMITED ..... APPELLANT**

**AND**

**COMMISSIONER OF INVESTIGATION & ENFORCEMENT ..... RESPONDENT**

## JUDGMENT

1. The Honourable Tax Appeals Tribunal ("the Honourable Tribunal') erred in holding that there was Withholding Tax ("WHT") due on deemed interest on the loan advanced to the Appellant by Mr. Jonathan Jackson ("Mr. Jackson") as assessed and demanded by the Respondent.

2. The Honourable Tribunal erred in failing to find and hold that Mr. Jackson was a resident within the meaning of Section 2 of the *Income Tax Act* for purposes. The said Section 2 of the *Income Tax Act* provides that:

> '....."resident", when applied in relation to an individual means –
>
> i. that he has a permanent home in Kenya and was present in Kenya for any period in a particular year of income under consideration; or
>
> ii. that he has no permanent home in Kenya but-
>
> a. was present in Kenya for a period or periods amounting in the aggregate to 183 days or more in that year of income; or

b. was present in Kenya in that year of income and in each of the two preceding years of income for periods averaging more than 122 days in each year of income....'

3. The Honourable Tribunal's finding that Jonathan Jackson was non-resident for tax purposes is contrary to the evidence placed before it.

4. The Honourable Tribunal erred in failing to find and hold that Mr. Jackson was resident in Kenya for tax purposes as there was more than sufficient evidence before them to show that he has a permanent home in Kenya by way of an Apartment available for his exclusive use:

a. The unchallenged affidavit evidence of his housekeeper not considered by the Tribunal

b. The executed lease between Mr. Jackson and his landlord which discounted in error as

i. Failure to renew the unchallenged duly–executed 2010 one year lease did not terminate a tenancy but just made Mr. Jackson a periodic tenant.

ii. It is not necessary to register a lease for a period of one year.

iii. In any event failure to register a lease did not prevent operating as a contract as between landlord and tenant. Failure to register merely prevents the lease operating against the title and its enforcement against third parties.

iv. The Honourable Tribunal erred in its assessment and evaluation of the evidence placed before it in the form of Jonathan Jackson's passport copies for the period in dispute and a summary thereof in finding that Jonathan Jackson was not present in Kenya for an average period of 122 days in three years and therefore was not resident for purposes of Section 2 of the *Income Tax Act*. At best, the evidence provided by the Respondent did not support the finding.

v. The Honourable Tribunal erred in relying on the provisions of Section 35 (1) (e) of the Income Tax which provides that'

"..... a person shall, upon payment of an amount to a non-resident person but having a permanent establishment in Kenya in respect of

–e) interest and deemed interest, including interest and deemed interest arising from a discount upon final redemption of a bond, loan, claim, obligation or other evidence of indebtedness measured as the original issue discount..."

This is notwithstanding the fact that Jonathan Jackson was a resident for tax purposes.

vi. The Tribunal fundamentally erred in law in relying on the definition of 'deemed interest' under Section 16(3) of the *Income Tax Act* which defines deemed interest as

'....an amount on interest equal to the average ninety-one-day Treasury Bill rate, deemed to be payable by a resident person in respect of any outstanding loan provided or secured by the non-resident, where such loans have been provided free of interest....'

as read together with the definition of paid under Section 2 of the Income Tax to include

'... distributed, credited, dealt with or deemed to have been paid in the interest or on behalf of a person....' to erroneously conclude that the same applies in cases where interest is deemed to have arisen and paid and therefore the withholding tax on the deemed interest is due.

5. The Honourable Tribunal erred in its assessment and evaluation of the evidence placed before it in the form of Jonathan Jackson's passport copies for the period in dispute and a summary thereof in finding that Jonathan Jackson was not present in Kenya for an average period of 122 days in three years and therefore was not resident for purposes of Section 2 of the *Income Tax Act*. At best, the evidence provided by the Respondent did not support the finding.

STATEMENTS OF FACTS:

6. The appeal stems from the judgment and decree made by the Tax appeals Tribunal in favor of an assessment made by the Commissioner of Investigations and Enforcement Department against Epix Investments Limited dated 8th August 2016 as amended by the Respondents Objections dated 7th November, 2016 directing the appellant to remit an amount totalling the sum of Kshs. 20,462,328/- being withholding taxes and pay as you earn amounting to kshs.30,819,751/-.

7. The Appellant is a limited company duly incorporated in Kenya with Milwater Holdings limited and Jonathan Jackson as its shareholders.

8. By its letter dated 8th August 2016 the Respondent raised assessments with regard to withholding Tax on deemed interest on related party loans amounting to Kshs.20,462,328/- in respect of withholding taxes (inclusive of penalties and interest) and pay as you earn (PAYE) amounting to Kshs to Kshs.30,819,751/-.

9. In its Notice of objection, the Appellant sought to shed some light on the nature of the engagements between itself and independent consultants. The Appellant also provided details of the scope of work for the Consultants, more importantly the Appellant confirmed that the loan was sourced from Jonathan who held beneficial ownership of Milwater Holdings limited as evidence by the Bank documents.

RESPONDENTS' STATEMENTS OF FACTS:

10. The Appellant is a registered tax paper and holds Personal Identification Number (PIN) P0513368238J. The appellants principal activity that of purchase, sale, lease and development of properties.

11. The Appellant filed all his corporation tax returns for year of income 2009 to 2013 late in 2014. That the appellant did not file returns for the years of income 2014.

12. The Appellant was put under investigations in April 2015 for the period 2008 to 2015 and the investigations was concluded in July, 2016 and amended assessment on withholding tax on deemed interest and PAYE on emoluments made to consultants were issued to the appellant on 8th August 2016.

13. The Appellant objected to the additional assessments vide a Notice of Objection dated 9th September, 2016. The objection was acknowledged and a tax stand-over notice issued. After considering the Objection, the Respondent issued an Objection Decision dated 7th November, 2016 confirming the additional assessments.

14. In raising and confirming the assessment on Withholding Tax on deemed interest, the Respondent contends that:-

    a. In its books of accounts, the Appellant showed that in the year 2013, it received an interest free loan of Kshs.240,950,093/- from Jonathan Jackson MHL.

    b. In its assessment, the Respondent states that the loan was advanced by a non-resident person and therefore deemed interest on the loan, assessing withholding tax amounting to Kshs.20,462,328/-

    c. Jonathan Jackson has no permanent home in Kenya, he was not in Kenya for a period of at least 183 days in each year under review and was not present in Kenya in that year of income and in each preceding two years of income for a period of 122 days. For that reason therefore Jonathan Jackson was not a Kenyan resident for tax purposes as defined by section 2 of the *Income Tax Act*.

    d. Interest was therefore deemed on the interest free loan of Kshs.240,950,093/- and withholding tax of Kshs.20,462,328 on the deemed interest assessed and demanded in accordance with section 16(2) (j) and 35(1)(e) of the *Income Tax Act*.

15. The Tribunal identified two (2) issues for determination:-

    a. Whether the Respondent erred in law and fact on the question of residency of Jonathan Jackson. Whether the Respondent erred in law and in fact be deeming interest on interest free loan advanced in 2013 by Jonathan Jackson, the main shareholder and director of the Appellant.

    b. Whether the Respondent in law and fact by considering Geoff Hindle an employee of the appellant and charging PAYE on his fees and

    c. Whether the Respondent erred in law by assessing PAYE and other benefits paid to consultants.

    On the issue of the residency of Jonathan Jackson the tribunal agreed with the respond net that he was not a Kenyan resident for tax purposes.

    On the issue of deeming interest on interest the tribunal held that deemed inters was due on the loan he granted the appellant.

    On the issue of whether Geoff Hindle was an employee of the Appellant and charging PAYE the tribunal held PAYE in respect of payments made to Gary Corringan, Daniela Callaway and Jan Lichtneger is due and payable.

APPELLANT'S WRITTEN SUBMISSIONS:

16. The Appellant received an interest free loan from Mr. Jonathan Jackson, its majority shareholder. In its Objection Decision, the Respondent raised the withholding tax on deemed interest on the loan, contending that

> "…..Jonathan Jackson is not a resident in Kenya for tax purposes, the Commissioner deems interest on the interest free loan in accordance with Section 16(2) (j) of the *Income Tax Act* and charged withholding tax thereon in accordance to Section 35(1) e of the same Act…"

17. Before the Tribunal, the Appellant challenged that assessed withholding tax on the basis that on their proper reading, neither of the provisions relied on the Objection Decision applied and in any event, as Mr. Jackson was a resident, there could not be no deemed interest. We address each in turn. By Section 16(2) (j) of the *Income Tax Act* ('the ITA) when computing income for tax purposes, no deduction is allowed in respect of an amount of deemed interest on an interest free loan provided by the non-resident person. This has nothing to do with deeming interest on loans advanced to a tax payer on which withholding tax is payable. The Tribunal erred in not upholding this aspect of the Appellant's challenge to the Objection decision.

18. Turning on Section 35 (1) (e) of ITA under which withholding tax on deemed interest is only due upon repayment of only the loan to the non-resident. Thus, unless the Respondent could show there was actual repayment of a loan to a non-resident, as a matter of the application of the plain terms of Section 35(1)(e), there is no legal basis for raising an assessment for withholding tax for deemed interest on such loan, Rather than examining the terms of Section 35(1) (e) of the ITA as it was invited to establish whether the assessed withholding tax was within its terms, the Tribunal simply held (and erroneously so) at paragraph 46 of its Judgment that

> "….deemed interest was due on the loan granted by Jonathan Jackson …' and therefore '….withholding tax on the deemed interest is due..'

The Appellant's position had been upheld by this Honourable court in its decision in *Primarosa Flowers Limited –v- Commissioner of Income Tax [2017] eKLR*: '…….[40] in the instant matter, there was no dispute that interest had not been paid during the period under review; and neither was any posting made in that connection in the Appellant's books of account. Clearly therefore, the Cimbria Case is distinguishable. Similarly, in *Stanbic Bank Kenya Ltd –vs- Kenya Revenue Authority: Civil Appeal No. 77 of 2008*, it was found as a fact that the Bank had actually paid fees for the online services to a non-resident person, but was purporting that the services paid for were for provisions of news and information and that the payments made constituted subscription for publication and therefore not taxable. The majority decision of the Court of Appeal was that withholding tax was payable,thus, affirming that withholding tax can only be due upon payment. [….] in the premises, it is my finding that, given the facts of this case, and in particular the agreed fact that no interest was paid during the period of assessment, the Appellant's liability to pay withholding tax had not arisen, granted that the loan was not due for repayment until October, 2017….

PAY AS YOU EARN (P.A.Y.E.)

19. The Appellant had engaged the services of certain Consultants who both the Respondents considered to be employees and therefore PAYE was due. While upholding part of the Respondent's Objection decision the Tribunal submits erred in law and fact in finding that the appellant's independent consultants, Diana Callaway (Ms Callaway), Jan Lichtneger (Mr. Lichtneger) and Gary Corringan) are employees and therefore PAYE is due by so doing the tribunal despite being presented with evidence

in the form of their consultancy contract and actual remunerations, disregarded the same and with no justification, made its finding.

20. Despite being provided with the consultant's contracts of services and bank payments clearly indicating the same to be consulting fees, the Tribunal still found albeit erroneously that the said consultants were employees. This brings the question of how do we determine who is an employee and who amounts to an independent consultant? The case of *Christine Adot Lopeiyo –vs- Wycliffe Mwathi Pere* [2013] was cited.

21. From the above stated decisions Mr. Callaway, Mr. Lichtneger and Mr. Corringan were at no particular time under the control of the Appellant, subject to the Appellant's rules and procedures of the Appellant and dependent upon the appellants for their economic activities. They were independent consultants having fulfilled the criteria set out in the above stated decision.

22. The Appellant further submits that the Honourable Tribunal erred in failing to take cognizance of the evidence placed before it in the form of bank transfers of the consultancy fees paid to Miss Callaway, Mr. Lichtneger and Mr. Corringan yet the same had already been subjected to withholding taxes in accordance with section 35(1) of the ITA.

RESPONDENT'S WRITTEN SUBMISSIONS:

23. The Respondent did demonstrate in its Statement of Fact dated 20th January, 2017 at the Tribunal and through the evidence of its witness Charity Mutarura, which evidence was uncontested by the Appellant as it chose not to cross-examine the witness (Refer to proceedings filed in ITA E020 of 2020), that it disputed the Appellant allegation that Jonathan Jackson is a Kenya tax resident as no documentation had been adduced to prove his tax residence.

24. It is the Respondents submissions that the right to challenge and adduce evidence is espoused in Article 50(2) (k) of the *Constitution of Kenya, 2010* and Section 163(1) of the *Evidence Act* Cap 80 Laws of Kenya. In addition, Section 146(2) of the *Evidence Act* is also clear that cross examination must relate to relevant facts as was stated in *Oriental Five & General Assurance Ltd –vs- Govinder & Others CA 39/1968 [1969] EA 116*, by the Court of Appeal.

25. The Appellant had an opportunity to challenge the evidence presented by the Respondent's witness at the Tribunal but chose not to, a clear indication that it was in full agreement with the said evidence which related to the question of residency of Jonathan Jackson. In determining the question of the residency or otherwise of an individual Section 2 of the *Income Tax Act* (Cap 470) defines a "Resident", when applied in relation to an individual.

26. Going by the definition in section 2, above there are two ways of determining the residency or otherwise of an individual:-

    a. Those with a permanent home in Kenya

    b. Those without a permanent home in Kenya

27. For those with a permanent home in Kenya the only other requirement would be their presence in Kenya for any period in the particular year of income. In this case. therefore the question that needs to be answered is whether Jonathan Jackson has permanent home in Kenya and if the answer is in the affirmative then the next question would be whether Jonathan Jackson was ever present in Kenya during the particular years of income.

28. A permanent home is not defined in the Kenyan *Income Tax Act* or other related tax laws. According to a New York *State Department of Taxation and Finance Tax Bulletin TB-IT 690*, a permanent place

of abode is a residence, building or structure where a person can live that is maintained, whether you own it or not; and that is suitable for year – round use. According to the said bulletin a corporate apartment will not be considered as your permanent place of abode if the occupant is one of the many people using the same apartment. The Appellant contests that Jonathan Jackson had a flat at Bishops court in Nairobi available to him while in Kenya. It is not in dispute that the said flat is not registered in Jonathan's name but the same is owned by Larkspur, a limited company related to the Appellant herein.

29. The Respondent further submits that as was observed in *Kenya Commercial Bank limited –v- Kenya Revenue Authority [2016] eKLR*; Section 10, 34, (2) and (35) (1) of the *Income Tax Act* stipulates, liabilities to pay tax arises upon making payment. The liability is not dependent on full performance of the contract or on whether the contract was ultimately beneficial to the appellant. Section 4(a) of the *Income Tax Act* provides that where a business is carried on or exercised partly within and partly outside Kenya by a resident person, the whole of the gains or profits from that business shall be deemed to have accrued in or to have been derived from Kenya.

30. The Respondents reiterates that PAYE was rightly charged as the appellant failed to provide adequate details to counter the facts as detailed in the respondent's letter dated 8th August, 2016. The Respondent submits that Geoff Hindle was an employee of the Appellant and not a consultant as alleged by the Appellant. The Respondent cited the case of *George Kamau Ndiritu and another v Intercontinental Hotel [2015] eKLR* and *Collins N. Oneko –vs- G4S security services (Kenya) limited [2016] eKLR*.

31. The Respondent further submits that as was held in the case of *Republic –vs- Kenya Authority Exparte Yaya Towers limited {2008] eKLR* the matter as to whether one Geoff Hindle and the other consultants were consultant or employees of the appellant is primarily a question of fact which can only be proved by calling for evidence thus the Appellant upon refusing to provide the said evidence is precluded from its assertions. Further documents provided cannot be ascertained to reflect true position of the facts which were found upon analysis of the Consultant's ledger.

DETERMINATION

a. Whether, the Hon Tax Appeals Tribunal finding that the Appellant payment of withholding tax on deemed interest is upheld or vacated

b. Whether, the Hon Tax Appeals Tribunal finding that PAYE was/is due and payable from payments made to Gary Corringham, Daniella Callaway & JanLichtneger is upheld or vacated.

c. Whether, as submitted in the cross appeal by the Respondent, the Hon Tax Appeals Tribunal finding that there was insufficient evidence to confirm Geoff Hindle, Aicha Maine, George McCorkell, Martin Stansey & Martin McCoey were employees or Independent Consultants and hence PAYE was not due and payable from payments made to them is a position to be vacated or upheld.

Whether, the Hon Tax Appeals Tribunal finding that the Appellant payment of withholding tax on deemed interest is upheld or vacated

32. The Hon Tax Appeals Tribunal found that Withholding Tax on deemed in interest is due by definitions prescribed to Section 2 & 35 of *Income Tax Act* (ITA)

33. The Appellant submitted that Withholding Tax on deemed interest is due upon payment and since the Appellant had not made any repayments of the Loan the Withholding tax on deemed interest was not due.

34. The Appellant reiterated that the Withholding tax was/is due upon repayment of the loans.

35. The Appellant relied on the case of Primarosa Flowers Limited –v- Commissioner of Income Tax [2017] eKLR: which read;

> '.....[40] in the instant matter, there was no dispute that interest had not been paid during the period under review; and neither was any posting made in that connection in the Appellant's books of account.

36. Secondly, the Appellant submitted that the loans were advanced by Jonathan Jackson from his Companies and he was/is resident in Kenya during the period under review.

37. The Appellant herein, Epix Investment Limited is a limited liability Company incorporated in Kenya with Milwater Holdings Limited & Jonathan Jackson Holding 99% & 1% respectively, of the Appellant's shareholding.

38. This Court considered the following;

39. The letter of 14th April 2015 giving notice to the Appellant of intention by the Respondent to carry out investigations with regard to various Companies among them the Appellant on tax payments due and owing from 2008-2015.

40. The Respondent conducted the audit and the findings are contained in the letter of 8th August 2016 which reads in part

> 'The Company [appellant] received loans from a related Company Milwater Holdings Ltd.....Mr. Jonathan Jackson is not a shareholder or a director but the beneficial owner of Milwater. Jonathan Jackson is a Shareholder and Director of Epix Investments and Chairman of Lordship Companies that operates in Europe & Africa. The loans advanced are interest free
>
> Milwater Holdings advanced money to Epix Investments in 2011.There was no evidence of advanced loans to Epix Investments by Milwater. Withholding Tax of Ksh 20,462 328/- was/is due and computations were/are attached.'

41. The conduct of the Audit by Respondent on 4th May, 2015 is not disputed, except the outcome of the investigations are challenged. The letter of 7th November 2016 by the Respondent was in reply to the Appellant's Notice of Objection to Respondent's audit outcome and/or assessment._____

42. The Response reads in part;

> 'You have not provided documentary evidence that the loans were granted by Milwater Holdings. The documents you provided show the monies came from Jonathan's account ....in Prague of one Christopher Foot.
>
> You have not demonstrated how the moneys were eventually lent out to Epix Investments Ltd
>
> In the objection you have alleged that Jonathan Jackson is a Kenyan resident, yet you have not provided any proof of the same.

If indeed Jonathan Jackson is a Kenyan resident, Section 4 (a) of *income Tax Act* [would apply]'

43. The outline of the above findings, is to consider the Appellants position that Withholding tax was/ is payable upon repayment(s) of the loans are made. Firstly, relying on Primarosa Flowers Limited – v- Commissioner of Income Tax [2017] eKLR:supra; this means that payment of Withholding tax is not contested but its timing is what is in issue; which is at the point of repayment of loan. Either way, therefore, whether now or later, it implies that withholding tax is due and owing until payment is made irrespective of when it is paid.

44. Secondly, unlike the cited case of Primarosa Flowers Limited –v- Commissioner of Income Tax [2017] eKLR supra which reads;

> [22] ' Crest Overseas Holdings Ltd, A holding Company incorporated and based in the British Virgin Islands advanced the Appellant [Primrose Flowers] a loan amounting to USD15,000,000 vide an Agreement dated 25th October 2002.....
>
> (23) On 27th April 2010, the Appellant entered into another loan Agreement with Crest Holdings. The 2nd Agreement shows the Appellant agreed to pay back the sum of USD 21,600,000(which was to include the initial USD 15,000,000) to Crest Holdings by 25th October 2017.'

45. In the instant case, unlike the cited case above, save for the allegation of loans advanced by Milwater Holding Company and as was found during the Respondent's audit, there is no presentation of a Loan Agreement(s) with terms and conditions regarding repayment of the loan(s). Therefore, whereas it is not disputed that the Appellant received Ksh 82,875,711 without presentation of Loan Agreement(s) Repayment Schedules, the Withholding tax on deemed interest cannot wait repayment of the loan indefinitely, as there is no Loan Agreement to spell out terms of repayment as was confirmed in Republic vs Kenya Revenue Authority, payment of tax is timebound.

46. In Primrose case above, the Trial Court ably detailed the issue of payment of Withholding tax under Section 2 & 35 of Income Tax Act and outlined the reasoning by Court of Appeal in the case of *Republic vs Kenya Revenue Authority exparte Fintel; High Court Application no 1768 of 2004* which held;

> First, Section 35 (1) requires a person making payments to deduct tax therefrom at an appropriate rate. Second, section 35 (5) provides how the deduction is to be made and how this is to be done. Deduction implies subtracting from what is due and being paid to another person.....the plain and obvious meaning to paid and upon payment in Section 2 & 35 of *Income Tax Act*.

47. In the cited case, applied to Primrose case, the Court aptly imposed Section 2 & 35 of *Income Tax Act* as the Loan Agreements were presented and timelines for repayment were spelt out. So, withholding tax would be deducted either from funds withheld during payment or entry made in the Profit & Loss Accounts to confirm withheld tax.

48. This position would be applicable if in the instant matter the Loan Agreement(s) were presented to indicate /confirm when the repayment of loan would be made.

49. The scenario herein is complicated further by the fact that the Respondent's finding that the monies advanced are not confirmed as loans from Milwater Holdings and the Agreements were not availed.

The amounts of loans and what the funds were utilized in or for is not documented or confirmed. The Withholding tax is derived from investigations conducted at the appellants offices and through its accounts documents ledgers etc by the Respodent. There is no evidence that any repayments were/are anticipated to be made to Milwater Holdings and no Agreement confirmed such an arrangement.

50. From the remittance of funds from Milwater Holdings to Epix Investments Limited where Mr.Jonathan Jackson is beneficial owner and shareholder and Director respectively in both Companies; it means that the funds were from and to one and the same person, namely Mr Jonathan Jackson, through named/listed Companies and therefore it is not feasible that there would be repayment of a loan advanced to and paid by oneself.

51. From the evidence as presented to the Hon Tax Appeals Tribunal and referred to by this Court, and relying on the case of the Engineers Board of Kenya V. Jesse Waweru Wahome & Others Civil Appeal No. 240 of 2013 supra , withholding tax on deemed interest was due without awaiting repayment of the loan especially where no loan Agreement was presented to outline the repayment timelines.

a. Whether Mr Jackson was resident or non-resident for tax purposes for the period of tax review

52. The Hon Tax Appeals Tribunal found that Mr. Jonathan Jackson was not a resident of Kenya during the period under review.

53. The Appellant relied on the facts cited above to confirm being a resident as defined under Section 2 of *Income tax Act*.

54. The Appellant relied on the case of *Unilever Kenya Ltd vs Commissioner of Income Tax [2005] eKLR* which relied on OECD Model Commentary 13 which prescribes a home;

As regards the concept of home, it should be observed that any form of home maybe taken into account. But permanence of the home is essential, this means; that the individual has arranged to have the dwelling available to him at all times continuously and not occasionally for the purpose of a stay which, owing to the reasons for it, is necessary of short duration (travel for pleasure, business travel, educational travel, attending course at a school etc)

Therefore, the Appellant submitted Mr. Jonathan Jackson was resident in Kenya in the years under investigation. This is demonstrated by the passport that gave numbers of days he was in the country and he had the flat assigned to him by a related Company Larkspur Properties Ltd.

The Respondent on the other hand, submitted that their witness whose statement and testimony of its witness Charity Mutarura, the evidence was uncontested by the Appellant as it chose not to cross-examine the witness (Refer to proceedings filed in ITA E020 of 2020)

The Hon Tax Appeals Tribunal agreed that by virtue of a lease the Appellant had a home but the next issue was if it was a permanent home which is a place of abode, a residence, building or structure where a person can live that is maintained, whether you own it or not; and that is suitable for year – round use.

The Respondent's Investigations revealed that the said Apartment was used as an office from the related companies mainly Lordship Africa, Epix & Karen Hill to operate from as an office. This position was not disputed by the Appellant. The Appellant's Managing Director, Mr.Jonathan Jackson's and personal effects such as clothes, beddings etc of were not found/seen in the said Apartment as derived from visits and interviews disclosed during investigations. The quality of occupation by Director was such that there was neither exclusive room set aside for his personal use nor any belongings in the rooms.

The Hon Tax Tribunal found that the lease was not properly executed by the landlord and tenant and there was no evidence of extension of the lease.

From the submissions above, this Court finds that the Appellant despite holding an ID card which proves citizenship, the Lease Agreement of 1 year of Apartment No 6 Bishops Road Apartment between Larkspur Properties & Mr. Jonathan Jackson of 1st May 2010, this did not depict permanency of the home.

The evidence adduced before the Hon Tax Appeals Tribunal and referred to by this Court confirms that the Appellant did not prove a place of abode where there was continuous occupancy through essential personal belongings depicting continuous use and presence of the premises by Mr. Jonathan Jackson.

Thirdly, the Appellant submitted that they presented Mr. Jonathan Jackson passports and proved that he was in Kenya for a period at least 183 days in each year under review and/or was a resident in Kenya during the period under review, that year under review and preceding 2 years of income for 122 days as required under Section 2 ITA but the Tribunal did not accept the evidence. This evidence of proof of 183 days in each year under review or 122 days in 3years under review was not presented to this Court except faint copies of passport pages that were not referred to in confirming the said days.

The legal and evidential position is that he who alleges must prove, in the absence of such proof of actual stay in Kenya for the period prescribed by law, this Court shall uphold the Tribunal's finding that Mr. Jonathan Jackson was not resident for tax purposes, especially because the Respondent submitted that the passport entries were also referred for confirmation by the Immigration Department.

The Appellant submitted that Withholding tax on deemed interest was not deductible by virtue of Section 16 (2) (j) of *Income Tax Act* and that the Tribunal erred in relying on *Section 2* definition of deemed interest and Section 35 (1) of *Income Tax Act*.

Section 16 (2) (j) of *Income Tax Act* prescribes deductions not allowed for the purpose of ascertaining the total income of a person for a year of income and includes, an amount of deemed interest where the Company is in control of a non-resident person alone or together with 4 of fewer other persons....and

Section 2 defines deemed interest as an amount equal to the average 91 day Treasury Bill deemed to be payable by a resident person in respect of any outstanding loan provided or secured by non-resident where such loan is provided free of interest.

The Appellant posited that by virtue of these 2 provisions then Withholding tax on deemed interest was not payable.

The Respondent vide its letter of 8th August 2016 indicated under Tax Amendment Proposed as follows;

in view of the above, we shall deem interest on the interest free loan granted to the Company and charge Witholding tax. This is in accordance with Section 35 (1) (e) of *Income Tax Act* Withholding Tax of Ksh 9,241,165. Computations attached.

55. It is the Appellants through Tax Consultants vide letter of 9th September 2016 in Response to Notice of Amended Assessment who introduced Section 16 (2) (j) of *Income Tax Act* on the basis that Mr. Jonathan Jackson was resident for the period under review.

56. The Hon Tax Appeals Tribunal found that Mr. Jonathan Jackson provided a loan to the Appellant. It also found that Mr. Jonathan Jackson was not a resident for the period under review. The Respondent relied Section 35(1) (e) of ITA during audit and amended assessment which provides that upon payment of deemed interest to a non- resident person, withholding tax shall apply. This Court also found from the record that Mr. Jonathan Jackson was not resident within the period under review and for tax purposes.

57. If the Appellant was found to be resident he would have paid tax under Section 4 of Income Tax which prescribes income from businesses that are carried out partly within and partly outside Kenya by a resident person.

Whether, the Hon Tax Appeals Tribunal finding that PAYE was/is due and payable from payments made to Gary Corringham, Daniella Callaway & Jan Lichtneger is upheld or vacated.

Whether, as submitted in the cross appeal by the Respondent, the Hon Tax Appeals Tribunal finding that there was insufficient evidence to confirm Geoff Hindle, Aicha Maine, George McCorkell, Martin Stansey & Martin McCoey were employees or Independent Consultants and hence PAYE was not due and payable from payments made to them is a position to be vacated or upheld.**

58. The Appellant contested the payment of PAYE from the Independent Consultants and placed reliance on Section 3 (2) (a) (ii) & 5(1) *Income Tax Act* to buttress the position that PAYE was not payable as regards the Independent Consultants. Further, The Appellant submitted that the *Income Tax Act* does not define 'employee' but only defines 'employer' in Section 2 of the Act as follows;

includes any resident person responsible for the payment of, or on account of, any emoluments to any employee, and any agent, manager or other representative so responsible in Kenya on behalf of any non-resident employer;

The Appellant further submitted that the case of Christine Adot vs Lopeiyo vsWycliffe Mwathi Pere [2013]eKLR where the Court considered the distinction between employment and service. The Court considered, the control test, whereby a servant is subject to command of the master, the integration test, where the worker is subjected to rules and procedures of the employer, the test of economic and business reality and considers if the worker is in business on his own or works for another person, and mutuality of obligation in which parties make commitments to maintain the employment relationship over a period of time.

59. The Appellant took the position, that the Independent Consultants were at no particular time under the control of the Appellant or subject to Appellant's rules and procedures and dependent upon the Appellants for their economic activities. They were independent Consultants having fulfilled the above criteria. The Hon.Tribunal failed to take cognizance of the evidence placed before it in the form of bank transfers of the consultancy fees paid to Miss Callaway, Mr. Lichtneger and Mr. Corringan yet the same had already been subjected to withholding taxes in accordance with Section 35(1) of the ITA.

60. The Respondent on the other hand submitted that PAYE was rightly charged as the appellant failed to provide adequate details to counter the facts as detailed in the respondent's letter dated 8th August, 2016. The Respondent submitted that Geoff Hindle was an employee of the Appellant and not a consultant as alleged by the Appellant. The Respondent cited the case of George Kamau Ndiritu and another v Intercontinental Hotel [2015] eKLR and Collins N. Oneko –vs- G4S security services (Kenya) limited [2016] eKLR which held that the total relationship between parties and the intentions as expressed in the documents of engagement and the mode of payment must be interrogated.

61. The Respondent further submits that as was held in the case of Republic –vs- Kenya Authority Exparte Yaya Towers limited [2008] eKLR the matter as to whether one Geoff Hindle and the other consultants were consultants or employees of the appellant is primarily a question of fact.

62. The Hon Tax Tribunal relied on Section 2 of Income Tax on the definition of Contract of service thus;

> " means an agreement, whether oral or in writing, whether expressed or implied, to employ or to serve as an employee for any period of time, and includes a contract of apprenticeship or indentured learnership, under which the employer has the power of selection and dismissal

of the employee, pays his wages or salary and exercises general or specific control over the work done by him; and for the purpose of this definition an officer in the public service shall be deemed to be employed under a contract of service;'

63. The Hon Tax Tribunal held that;

> Where one is an employee, the rules of taxation of employment of employment income as expounded in the *Income Tax Act* find effect. Where one is an Independent Consultant, the person making payments is required to apply withholding tax on their income.

64. The ***Income Tax Act*** provides at 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.
>
> 3(2) (a) (ii) 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;.....
>
> Section 5 (2) stipulates;
>
> For the purposes of section 3(2)(a)(ii) "gains or profits" includes— (a) any wages, salary, leave pay, sick pay, payment in lieu of leave, fees, commission, bonus, gratuity, or subsistence, travelling, entertainment or other allowance received in respect of employment or services rendered,and any amount so received in respect of employment or services rendered in a year of income other than the year of income in which it is received shall be deemed to be income in respect of that other year of income:

65. The letters of engagement to the employees and/or Independent Consultants were by Lordship Group of Companies whose Chairman was/is Mr. Jonathan Jackson. The Companies included were/are Space Investments Ltd, Lordship Square Ltd, Karen Hills Ltd. Larkspur Properties Ltd, Lordship Africa Fund management Ltd and Epix Investments Ltd.

66. The letter of 8th August 2016 by the Respondent to the Appellant

67. Disclosed that other than letters of consultancy at fees/emoluments paid /remitted monthly, the Independent Consultants were engaged spent more than the requisite resident period of 183 days for purposes of payment of tax, the Consultants /employees enjoyed allocation and use of motor vehicles, payment of airtime Phone bills, Housing /accommodation was provided with no rent paid, medical insurance cover, they had office space and staff assigned to the Consultants.

68. Therefore, the totality of evidence derived from the inspection conducted by Respondent and letters of engagement by Lordship Holding Company to the Consultants confirm they obtained income from either employment or rendering services to the Lordship Group/Holding Company as shown

by letters of engagement stipulating services to be rendered and monthly Fees to be paid and were paid as proved by Payment documents. These are letters dated 1st August 2014 -addressed to

a. Letter of 1st August 2014-Aicha Mane-to provide services in Project Financing Legal Review for Ksh 550,000/- monthly and though based at her home will frequently travel to Lordship Offices in Nairobi, Kenya.

b. Letter of 2nd January 2013- Garry Corringham- work shall be to provide professional services for Project Financing for commercial projects in Kenya for Euros 8,333 per month and transport and accommodation shall be paid while in Kenya.

c. Letter of 24th January 2013-Danielle Callaway to develop new business contacts and potential financial investors and will be based in Kenya and attend the office in Nairobi Kenya. Transport and accommodation would be paid and would be paid $5,833.33 monthly.

d. Letter of 27th February 2014-George McCorkell to provide professional services in development management and leasing of international tenants for Ksh 575,000/- monthly. He would be based at home but frequently travel to Kenya and Prague, Czech Republic,

e. Letter of 2nd January 2015 – Geoff Hindle whose work was to provide professional services for Planning & Project Development & Marketing for Euros 10,000 a month and frequently travel to and from Prague- Czech Republic & Nairobi Kenya.

f. Letter of 4th March 2014 – Martin Stastny to provide professional services for Project Management at Euro 5000 a month transport and accommodation would be catered for and would work at Lordship office in Nairobi Kenya.

g. Letter of 1st September 2014- Jan Lichtneger was/is to provide professional services in Project development and strategy for retail development in Kenya Czech & Slovak Republics at monthly fee of Euro 4,165.

69. The Appellants submitted that the above listed were Independent Consultants vide the contracts, invoices and bank payments. The Consultants were on different professional services terms; some of them worked from their home and visited Head Office in Nairobi Kenya on specific assignments while others frequently visited Head Office in Nairobi Kenya and accommodation and transport were catered for apart from the Fees payable.

70. Danielle Callaway was based at Head Office Nairobi, Kenya, accommodation and transport was catered for including the the Fees/Emoluments paid. Jan Lichtneger who spent 158 days more than 122 days, was also found to be more of an employee than a Consultant as they were allocated vehicles as confirmed by carlogs and were part of the Appellant's medical scheme and their roles were integral to the operations of the Appellant. The finding by the Tax Tribunal was not controverted as the evidence was provided by the Appellant. With regard to Gary Corringham who alleged he was seconded by AMSCO and therefore exempted under Privileges & Immunities Act. The Letter of 2nd January 2015 made no reference of secondment of Gary Corrigan to the appellant from AMSCO nor proof of any exemption under the *Income Tax Act* and therefore, he is held as an employee of the Appellant including other grounds arising from the investigation.

71. The Employees obtained gains in form of wages, salary, fees, commission, bonus, or subsistence, travelling, entertainment or other allowance received in respect of employment or services rendered and compliance with Section 3, 5 & 35 of Income Tax ought to pay PAYE as employees or Withholding tax as Consultants.

72. The Respondent/Appellant failed to tender evidence to prove that the rest of the Consultants were more of employees than Consultants; save for Geoff Hindle was Development Director and did not fit the bill as employee of the Appellant. Aicha Mane, George McCorkell, Martin Stastny were not found to be employees in terms of job description, number of days spent in Kenya and use of accommodation and transport and /or medical care cover extended to them as employees.

73. The Notice of appeal was filed on 6th April 2020 following the Tax Appeals Tribunal Judgment delivered on 9th March 2020 and within 30days as required under Section 32 of *Tax Appeals Tribunal Act*. The Cross Appeal was filed on 27th April 2020 after the 30 days required to file an appeal and therefore is time barred.

DISPOSITION

74. The Court upholds the Decision of the Hon Tax Tribunal and dismisses both appeals each party to bear its own costs.

**DELIVERED SIGNED & DELIVERED IN OPEN COURT ON 29TH OCTOBER 2021(VIRTUAL CONFERENCE)**

**M.W. MUIGAI**

**JUDGE**