Lordship Africa Management Limited v Commissioner of Investigation & Enforcement (Income Tax Appeal E022 & E037 of 2020) [2021] KEHC 286 (KLR) (Commercial and Tax) (29 October 2021) (Judgment)

Neutral citation: [2021] KEHC 286 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INCOME TAX APPEAL E022 & E037 OF 2020

MW MUIGAI, J

OCTOBER 29, 2021

BETWEEN

LORDSHIP AFRICA MANAGEMENT LIMITED ..... APPELLANT

AND

COMMISSIONER OF INVESTIGATION & ENFORCEMENT ..... RESPONDENT

JUDGMENT

MEMORANDUM OF APPEAL

1. The Honourable Tribunal ('Tribunal') fundamentally erred by failing to consider the issues, facts and elaborate evidence placed before it. in particular, the Tribunal failed to appreciate the fact that under section 16(2) (j) of the income tax act under which the Respondent has assessed and demanded the impugned WHT, deemed interest can only arise where a resident company upon repayment of a loan received from a non-resident persons who has control of the company is disallowable deduction. It is and cannot be a basis for charging WHT. In the premises, the Respondent's assessment was null and void.

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 tax purposes. The said section 2 of the income tac 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 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.

4. 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.

5. 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.

STATEMENT OF FACTS

1. As part of its overall financial structures, the Appellant received interest free loans amounting to Kshs. 30,000,000/- from one Jonathan Jackson through his Euro Bank accounts held in Raiffeisen and CSOB Bank in Prague, Czech Republic and were disbursed to Barclays Bank of Kenya No. 7244208 under the name of one Christopher foot, who was a director of the Appellant at the time.

2. By its letter dated 8th August 2016, the Respondent the Respondent raised with regard to Withholding Tax on deemed interest on related party loans amounting to Kshs.2,995,785/- inclusive of penalties and interest. More specifically the Respondent while raising the assessment stated that '.....on reviewing the intercompany transactions and interactions with the related parties we found that the company had received interest free loans from Jonathan Jackson .... We analyzed the documents relating to the loan transaction and found the following (i) The loans are advanced interest free .....(ii) The monies to advance were from earnings by Jonathan in other countries and not from sources in Kenya .....

3. The Appellant objected to the above stated assessment by its Notice of Objection dated 9th September, 2016 file on its behalf by its tax agents RSM (Eastern Africa) consulting limited. The Appellant

categorically stated that 'we object to assessment of tax on withholding tax on the grounds that this company is controlled by a resident person..... During the audit the company's shareholders were Karen Hills Limited and Jonathan Jackson. Karen Hills Limited is a company registered in Kenya..... 'In the Notice of Objection the Appellant was categorical that the it objected the assessment on the basis that deemed interest is only applicable to interest free loans from non- resident controlling persons.

4. After various correspondences and engagements, the Respondent proceeded to confirm the assessment by its Objection decision dated 7th November, 2016 and received by the Appellant on the same day.

5. The Respondent while confirming the assessment now alleged that '.... the documents you provided show that from Jonathan's account in Raiffeisen Bank in Prague to BBK account No.7244208 of one Chris foot...' The Respondent proceeded to state'....you have that Jonathan Jackson resident yet you have not provided any proof of the same....'

RESPONDENT'S STATEMENTS OF FACTS

1. The appellant is a registered taxpayer and holds personal identification number (PIN) P051384259J. The Appellant's principal activity is that of purchase, sale, lease and development of properties.

2. The Appellant's shareholders are Karen Hills Limited (99%) and Jonathan Jackson (1%).

3. The Appellant's directors are Jonathan Jackson (British & Kenyan) and Samuel Simons (British), Jonathan Jackson is the main director and he is in charge of the day to day management of the company, Jonathan also runs other business in the Czech Republic, South Africa and Britain which operate under the name Lordship Group.

4. The Appellant filed nil corporation tax returns for year of income 2012. In the of Income 2013 the Appellant filed Corporation tax return indicating it had incurred losses of Kshs. 285,149,565. The Appellant did not file returns of the years of income 2014 and 2015.

5. The Appellant was put under investigation and amended assessments on withholding taxes on deemed interest for Kshs.1,541,180.10 and corporation tax on trading on income of Kshs.16, 796,172 was raised issued on 8th August, 2016.

6. The Appellant objected to the addition assessment vide a Notice of Objection dated 9th September, 2016. The objection was acknowledge and a tax stand over notice issued. After considering the objections, the respondent issued an objection decision dated 7th November, 2016 confirming the addition assessments.

7. Being aggrieved by Respondent's Objection decision the appellant filed an appeal before the Appeals Tribunal. All the documents relating to assessment, objection and objection decision are contained in the Respondent's statement of facts filed in the Tribunal which is annexed herein.

8. 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.30,000,000/- from Jonathan Jackson.

   (b) 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.

(c) Interest was therefore deemed on the interest free loan Kshs 30,000,000/- and withholding tax of Kshs.1,541,180.10 on the deemed interest assessed and demanded in accordance with Sections 16(2) (j) (e) of the Income Tax Act.

9. The respondent's position on income Tax on sub- leases was as follows:-

(a) On 11th October 2012, the Appellant acquired 60 one acre registered from Karen Hills limited on L. /R No.195/228. The sub- leases acquired with the objective of reselling them for gain. The Appellant thus put the sub-out in the market for sale, several sub-leases were sold.

(b) The Appellant filed their first corporation tax returns on the 30th June, 2014 for the year of income ending December 2013. In this return the company did not declare any taxable income from sale of sub-leases but only recognized the cost of infrastructure development done on the Hills land. The Appellant considered the plot sale proceeds as deposit for subleases and argued that they could not recognize the sale proceeds as income.

(c) Upon investigation, the Respondent held that the monies received from the sale sub-leases should have been treated as trading income ought to have been used in recognizing income from the sales.

(d) The respondent holds that audited accounts are prepared in accordance with prescribed accounting standards and then aligned to tax laws to come up with tax computations. The Kenyan tax law is premised on accrual basis, not receipts basis.

(e) While the Appellant argues that the Income Tax Act does not elaborate how to treat income from the sale of property, it is important to note that as per the memorandum of association and annual financial statements, the principal activity of the company is that of purchase, sale, lease and development of properties. Sales of property being the taxpayers business, it is, just like any other business, governed for tax purposes of section 3, 4, 15 and 16 of the Income Tax Act.

APPELLANT'S WRITTEN SUBMISSIONS:

1. 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.

2. 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 positon 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....

3. It is not contested both would have been applicant only if Mr. Jackson was a non –resident for tax purposes. On the evidence before it, the Tribunal erred holding that he was a non-resident.

RESPONDENT'S SUBMISSIONS

WITHOLDING TAX

1. 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.

2. The Respondent conducted investigations on the above said apartment and established that the said apartment is not exclusively available for Jonathan Jackson as alleged by the Appellant, the apartment is also available to the other directors and consultants of the nine companies operating under the banner of Lordship Group of Companies which the Appellant is a member whenever they are in Kenya. This fact is not disputed by the Appellant.

3. My Lord, on 22nd February 2019, the Full Federal Court of Australia ("the Full Court" allowed the taxpayer's appeal in *Harding –v- Commissioner of Taxation [2019] FCAFC 29* and held that the taxpayer was not an Australian tax resident. In allowing the taxpayer's appeal, the Australian full court has determined that when assessing residency of an individual, the phrase "permanent place or dwelling but rather should be interpreted more widely to consider whether a person is living permanently in a particular "country or state."

4. Without prejudice to above the Respondent took the trouble to scrutinize the copies of passport of the said Jonathan Jackson supplied by the Appellant and found that in some instances there were inconsistencies between entry and exit information and hence it was difficult to establish with precision the total number of days the said Jonathan Jackson was in the country.

5. That the inconsistencies notwithstanding the Respondent compute the number of days Jonathan Jackson was in the country and found as shown in the table below.

Year	No. of days in the country	Tax residency status	
183 days test		122 days test	
2010	30	Not resident	Not resident
2011	6	Not resident	Not resident
2012	53	Not resident	Not resident
2013	20	Not resident	Not resident
2014	Could not be determined		

6. In response we humbly submit that the issue of withholding tax and when the same is payable was effectively determined in the most recent case of *Kenya Revenue Authority –vs- Republic (Exparte Fintel Ltd) (2019) eKLR* in this case the court of Appeal held as follows:-

> "While the words "upon payment" in their colloquial and ordinary parlance suggest "payment" or "paid" that is, to be given money for something in exchange. It is our considered view the relevant statute, the income Tax must be the source of the meaning to be attached to it. The interpretation must be contextual. A statue ought to be looked at, in the context of its enactment and as whole as opposed to picked and choosing words in isolation. "No part of a statute and no word of a statute can be construed in isolation. "No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place." So said the learned judges of the supreme court of India in Reserve Bank of India –vs- peerless general finance and investment Co. ltd, 1987 SCR (2) 1.

CORPORATION TAX

7. The appellant filed their first corporation tax returns of the 30th June, 2014 for the year income ending December, 2013. In this return the Appellant did not declare any taxes from sale of sub-leases but only recognized the cost of infrastructure development done on the Karen Hill land. The Appellant considered the plot sale proceeds as deposits for subleases and argued that they could not recognize the sale proceeds as income.

8. Upon investigation the respondent held that the monies received the sale of the sub-leases should have been treated as trading income, and the accrual method of accounting for income ought to have been used in recognizing income from the sales.

9. While the Appellant argues that the Income Act does not elaborate how to treat income from the sale of property, it is important to note that as per the memorandum of association and annual financial statements, the principal activity of the company is that of purchase, sale, lease and development of properties. Sale of property being the Appellant's business, it is, just like any other business, governed for tax purposes by sections 3,4, 15 and 16 of the Income Tax act.

10. The Appellant refers to paragraph 32(3) of the second schedule in the Income Tax Act, Cap 470 which provides that a sale in reference to this schedule shall be construed as a reference to the time of completion or the time when possession is given whichever is earlier. The Respondent contends that the interpretation of the sale in the 2nd schedule is on capital Deductions and does not relate to a trading transaction. The Appellant has therefore misconstrued and misapplied the said section.2

CROSS APPEAL

11. On the second issue of not filing a memorandum of Appeal within 30 days from the date of filing the Notice of Appeal, the Respondent admits the delay which was only for 12 days and attributes the same to the current Covid 19 pandemic that led to the closure of court registries. The Respondent avers that it had challenges filing the appeal online through email address then provided and urge the court not to penalize it on an issue that was out of its control.

12. On this issue we urge that the court to be guided by the case of *Nicholas Kiptoo Arap Korir Salat – vs- Independent Electoral and Boundaries commission and 6 others [2013] eKLR*: in which the court held as follows:-

> Deviations from and lapses in form and procedures which do not go to the jurisdiction of the Court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the Court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness.

APPELLANT'S SUBMISSIONS IN RESPONSE

1. The court's attention was drawn to the OECD model which kenya is not only a signatory to but which was recognized by the court in the case of *Unilever Kenya Limited –vs- Commissioner of Income Taxes (2005) eKLR* where Justice Visram stated that:

2. Commentary 13 of Article 4 of the OECD Model provides as follows:

> '.....As regards the concept of home, it should be observed that any form of home may be taken into account. But the 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 concessionary.....'

The above stated definition does not distinguish between a 'corporate' apartment as contended by the respondent at paragraph 16 to 18 of its submission neither does it require exclusivity as averred by the Respondent at paragraph 19 of its submissions.

3. Furthermore, the appellant submits that Jonathan Jackson met the test out under Section 2 of the Income Tax Act to the effect the Appellant showed an element of existence of a permanent home and without prejudice equally showed that Jonathan Jackson was present in Kenya for a period averaging 122 days as of the time and in the two preceding years. However the Tax Appeals tribunal failed to take into consideration the evidence of the copies of passports that were placed before it.

4. 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 papers on which WHT is payable. The Tribunal erred in not upholding this aspect of the appellant's challenge to the Objection decision.

Whether the Commissioner's Cross – appeal is valid

5. As stated in the appellant's principal submissions, the commissioner in its Cross- Appeal No. E037 of 2020, failed to serve its Notice of Appeal or at all contrary to Section 32 of the Tax Appeal Tribunal Act which provides that:

> '.....(1) A party to proceedings before the tribunal may within thirty days after being notified of the decisions or within such further period as the High Court may allow, appeal to the High Court and the party so appealing shall serve a copy of the Notice of Appeal on the other party.....

6. The above stated provisions of Section 32 of the *Tax Appeals Tribunal Act* are mandatory nature. The Commissioner's failure to serve the Notice of Appeal on the Appellant within time invalidates it and the same should be struck out.

7. The court in the case of *Zacharia Okoth Obado –vs- Edward Akong'o & 2 others [2014] eKLR* found that thus

> '...."[37] serve of a notice of appeal is crucial Kiage, J. A in Nicholas Kiptoo Arap Korir Salat –v- IEBC & 6 others [2013] eKLR states:-
>
> > I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned.

8. The said Rule 3 of the Tax appeal tribunal (Appeal to the High court rules, 2015) provides that:

> '..... The appellant shall, within thirty days, after the date of service of a notice of appeal under section 32(1), file a memorandum of appeal with the registrar and serve a copy on the Respondent....."

9. The Appellant's submissions to this extent are encapsulated in the decision of the Court of Appeal in the case of *Daniel Nkirimpa Monirei v Sayialel Ole Koilel & 4 others [2016] eKLR* where it stated that:

There was no application for enlargement of time to serve the Notice of Appeal outside the seven (7) days provided for by the Rules.

Whichever way, one looks at it, there was no service of the Notice of Appeal on the applicant. The purpose of service of a Notice of Appeal is to alert the parties being served that the case in question has not been concluded yet as the same has been escalated to another level. This enables the party to prepare and get ready for another fight, be it by way of gathering resources or just getting mentally prepared for defending the intended appeal. Failure to serve a party with a Notice of Appeal within the time prescribed by law gives a party false belief that the matter has been concluded, only to be ambushed later with the record of appeal in which the said notice is tucked away somewhere in the record. That occasions prejudice to the ambushed party, and it is in our view a habit that should not be countenanced in any fair and just process. That would explain why Rule 77(1) of the *Court of Appeal Rules* is couched in mandatory terms.

DETERMINATION

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

Whether the cross appeal should be admitted heard and determined if it is timebound or time barred.

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).

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.

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

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.

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.

The Appellant herein, Lordship Africa Fund Management Limited is a limited liability Company incorporated in Kenya with Karen Hills Limited 99% & Mr.Jonathan Jackson 1% respectively, of the Appellant's shareholding.

The Appellant filed Corporation Tax return in 2013 and indicated losses of Ksh 285,149,565 and failed to file returns in 2012, 2014 & 2015.

This Court considered the following;

The Respondent in raising and confirming the assessment of withholding tax on deemed interest relied on the following findings;

a) The Appellant's books of account, the Appellant showed that in 2013, it received an interest free loan of Ksh 300,000,000/- from Mr. Jonathan Jackson.

b) That Mr. Jonathan Jackson has no permanent home in Kenya, he was not in Kenya for 183 days in each year under review and was not present in Kenya in that year of income and in each preceding 2years of income for a period of 122 days as required under Section 2 of Income Tax Act.

c) Interest was therefore deemed on interest free loan of Ksh 30,000,000/- and Withholding tax of Ksh 1,541,180 on deemed interest assessed and demanded under Section 35 (1) € of Income Tax Act.

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.

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.'

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 loan(s) as it disclosed during investigations by the Respondent. Yet the loan(s) were 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 time bound.

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.

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.

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.

The scenario herein is complicated further by the fact that the Respondent's finding that the monies advanced to Lordship Africa Fund Management Limited was used to purchase land. There is no evidence that any repayments were/are anticipated to be made to Milwater Holdings and no Agreement confirmed such an arrangement.

From the remittance of funds from Milwater Holdings to Lordship Africa Fund Management 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.

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

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

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

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.

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.

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.

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.

In the case of *Kenya Revenue Authority & Another –v- Republic (Ex-parte) Kenya Nut Company limited [2020] eKLR* – NBI CA. 58 of 2015 (3 judge bench) – Ouko JA, Musinga JA and Kantai JA held that:

> " Under the Income Tax Act and the *Kenya Revenue Authority Act*, the Commissioner wields immense power and is generally "responsible for the control and the collection of, and accounting for, tax" See Sections 122 and 123 of the Act.....With regard to withholding tax due from a non-resident person not having a permanent establishment in Kenya, but trading with a Kenyan entity, it becomes the business of the latter to ensure that the tax is deducted from such payment and remitted. This obligation, needless to say, is mandatory. It is deemed to have full knowledge of the provisions of section 10, 35 and 96 of the Act."
>
> CROSS-APPEAL-ITA E037 OF 2020
>
> The Hon Tax Tribunal delivered judgment on 9th March 2020. The Appellant in ITA E022/2020 filed on 6th April 2020. The Appellant in ITA E 037 of 2020 filed Appeal on 13th May 2020 clearly out of the mandatory statutory period of 30 days after judgment contrary to Section 32 of the Tax Appeal Tribunal Act. The court relies on
>
> The cases of; Zacharia Okoth Obado –vs- Edward Akong'o & 2 others [2014] eKLR
>
> Nicholas Kiptoo Arap Korir Salat –v- IEBC & 6 others [2013] eKLR Daniel Nkirimpa Monirei v Sayialel Ole Koilel & 4 others [2016] eKLR
>
> That whereas enlargement of time to file an appeal may be applicable
>
> With reasonable grounds, such leave must be sought from Court first. In the circumstances, the cross appeal is dismissed as it was filed out of time without leave of Court.

DISPOSITION

1. The Appeal filed on 6th April 2020 is hereby dismissed for the following reasons;
2. Withholding tax on deemed interest due and owing to the Respondent by the Appellant
3. Mr Jonathan Jackson was non-resident for tax purposes for the period of tax review.
4. The issue of Corporation Tax was /is dismissed for lack of proof of the sales and completion of payments.
5. The Cross Appeal was filed out of time without leave and is dismissed.
6. The judgment of Hon. Tax Appeals Tribunal is upheld.

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

M.W. MUIGAI

JUDGE

MR. W. AMOKO FOR APPELLANT

MRC.LEPARAN LEMISO FOR RESPONDENT