Space Investments Limited v Commissioner of Investigation & Enforcement (Income Tax Appeal E021 of 2020) [2021] KEHC 266 (KLR) (Commercial and Tax) (29 October 2021) (Judgment)

Neutral citation: [2021] KEHC 266 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INCOME TAX APPEAL E021 OF 2020

MW MUIGAI, J

OCTOBER 29, 2021

BETWEEN

SPACE INVESTMENTS LIMITED .... APPELLANT

AND

COMMISSIONER OF INVESTIGATION & ENFORCEMENT ..... RESPONDENT

JUDGMENT

1. The Honourable Tribunal erred in failing to find and hold that Mr. Jackson was reading 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 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.

2. 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 summary thereof in finding that Jonathan Jackson was not present in Kenya for an average period of 122 days in three year

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.

3. 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.

4. 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 finding that the gain of Kshs.1,261,349,807/- made on transfer of the parcel of land, LR. No. 195/288 by the Appellant is a revenue income subject to corporation Tax, notwithstanding the Appellant's the Appellant's claim duly supported by facts and evidence showing that the gain was capital in nature and therefore corporation tax was not due.

6. The finding of the Honourable tribunal that the sale of land was a trading activity and therefrom the gain made was revenue income subject to Corporation tax was contrary to the law and not supported by evidence or facts. At best, no evidence was provided by the Respondent that supported its finding. On one hand the Honourable Tribunal claimed to have undertaken a review of the appellant's financial statements in order to determine the intention of the appellant's financial statements in order to determine the intention of the Appellant. On the other it refused and/or disregarded the evidence placed before it by the Appellant demonstrating the intention and nature of the Appellant's business.

STATEMENT OF FACTS

1. The appeal before this Honourable court stems for the judgment and decree made by the Tax Appeals Tribunal in favour of an assessment made by the Commissioner of Investigations and Enforcements Department ("the respondent") agsinst space investments limited (the Appellant) dated 8th August 2016 assessing and demanding taxes in the sum of Kshs.33,882,309 being withholding taxes (inclusive of penalties and interest), Kshs.12,785,220/-being stamp duty and Kshs.789,888,169/- being corporate tax on profit on sale of property, subsequently amended by the Respondents objection decision dated 7th November 2016 sum of Kshs.33,882,309/ being withholding taxes (inclusive of penalties and interest), Kshs.12,785,220 being stamp duty and Kshs.812,499,920/- being corporate tax on profit on sale of property in the sum (inclusive of penalties and interest).

2. As part of its overall financial structures, the Appellant received interest free loans amounting to Kshs. 331,399,893/- from one Jonathan Jackson through his Euro Bank accounts held in Raiffesisen 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.

3. By letter dated 14th April, 2015, the Respondent issued a notice of intention to carry out investigations on the applicant and other related companies to cover the years of income 2011 to 2016 ("the audit period").

RESPONDENT'S STATEMENT OF FACTS

1. The Appellant is a Limited liability Company incorporated and carrying on business within the republic of Kenya. The Appellant's shareholders are Midwater Holdings Limited, Cyprus (99% and Jonathan Jackson (1%).

2. The Respondent's position on withholding tax on deemed interest was further based on the following:

   (i) in the books of accounts of the Appellant, it had indicated that interest free loan of kshs.332,399,893/- was received in 2008 from a related company Milwater Holdings limited.

   (ii) documents availed to the Respondent showed that the money came from Jonathan Jackson and Christopher Foot.

   (iii) If Jonathan Jackson was a resident as alleged by the Appellant, all his income earned in Czech Republic, South Africa, Britain, USA, UK and any other tax jurisdiction ought to have been declared in Kenya as per section 4(a) of the *Income Tax Act*;

   (iv) Even if the money was lent by Milwater Holdings limited as alleged by the Appellant, the company was a non–resident company which controlled the Appellant.

   (v) The contention that Jonathan Jackson had a permanent home in Kenya was incorrect since the evidence thereof was a corporate by Larkspur Limited, a related company of the Appellant. The apartment was also available for use by the other consultants when in Kenya.

   (vi) The transaction by the Appellant was one to avoid tax or reduce tax liability under Section 23 of the *Income Tax Act*.

3. On the gain made in sale of land being subject to corporation tax, the Respondent was further guided by the following in raising the assessment:-

   (a) The Appellant's allegation that the land had been purchased in 2008 was not proved nor was the purchase price disclosed;

   (b) The land was registered with the Registrar of Lands on 1st April, 2012 and not 2008;

   (c) The Appellant revalued the land from the alleged cost of Ksh.319,614,973/- and transferred it to Karen Hills Ltd in June 2012 for Kshs.1,580,964,780/-;

   (d) The land was transferred to Karen Hills Ltd (a related company of the Appellant) 3 months thereafter on 26th June 2012. Karen Hills limited was registered in April, 2012;

   (e) Karen Hills limited subdivided the land into 60 one acre plots and registered the plots 4 months later on 11th October 2012 and then put the leases on sale;

   (f) The allegation by the Appellant that the land was purchased for agricultural purposes was contrary to the terms of the grant;

   (g) The Memorandum and Articles of Association of the Appellant showed the principal objective of its establishment was real estate and therefore the gain made in the sale of land was trading profit and not a capital gain. This same objective was the one cited as the principal activity as per the Appellant's annual accounts;

   (h) The Appellant's dealings with its property before sale, its revaluation and resale to a related company in which it has the same shareholding was evidence of a well-tailored transaction for profit motive as opposed to incidental disposal of capital.

4. There were 3 issues for determination before the Tax appeals Tribunal (hereinafter referred to as "the Tribunal") as follows:-

   (a) Whether deemed interest applies on the interest free loan of Kshs.332,339,893 which was advanced in 2008 to the Appellant;

   (b) Whether gain of Kshs.1,261,349,807/- realized in June 2012 by the Appellant from the sale of LR. No.195/288 measuring 25.8 hectares situated in Karen amounts to a trading transaction or a capital gain;

   (c) Whether the stamp duty assessment of Kshs.12,785,220/- on the appellant's initial purchase of land indicated in the Appellant's ledger was correct.

5. The Respondent further states that the Appellant has failed to file a record of appeal and has filed a Statement of Facts contrary to the express provisions of section 56(2) of the *Tax Procedures Act* and Rule 5 of the Tax Appeals Tribunal (appeals to the High Court) rules, 2015. The Respondent shall at the first instance apply to strike out the said statement of Facts.

APPELLANT'S 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. In 2008, the appellant purchased all piece of land known as LR No. 195/228 (the said land) for Kshs.332,400,193 as a long term investment. This has not been credibly challenged by the Respondent. Four years later at and in line with the value of the properties in Karen area, the land was revalued at kshs.1,593,750/-. In exercise of its commercial judgment, as holding the said land was no longer regarded as a viable option and at market value to Karen Hills limited, a related company. Rejecting the Appellants position that this yielded a capital gain of kshs.1,261,349,807.00. the Tribunal erroneously at paragraph 20 of its judgment determined it was a ....trading receipt and corporate tax is due.... the tribunal not only overlooked or improperly discounted compelling evidence before it to the contrary showing the appellants intention at the time it acquired the property and its subsequent dealings with and treatment of the property in its books it was holding as an investment thus the proceeds of its sale court not be regarded as trading revenue, but also failed to faithfully apply relevant legal precedent.

4. Authoritative guidance for establishing whether an income or expense is capital or revenue in nature is available from both local as well as foreign cases. Courts have come up with what are now called the "Badges of Trade") the following authorities were cited:-

   (i) *Lionel Simon properties Ltd –vs- the Commissioner of Inland revenue* (1980)

   (ii) *Commissioner for Income Tax –vs- Lerematesho Ltd* [1976] eKLR

   (iii) *Marson vs Morton and Others*

5. The Appellant invited the Tribunal to closely peruse those badges of trade to the extent as applicable to the impugned sale of land. It failed to so and thus fell into error in upholding the Respondent position. Let's break down the analysis which, guided by the authorities which we have cited, two of which were binding on it, the tribunal ought to have undertaken-

   (a) Original intention

   (b) Period of ownership

   (c) Frequency and number of similar transactions

   (d) Supplementary works in connection with the property

   (e) Financial statements

   (f) ...

   (g) .....

6. The Appellant requests this Honourable court also have regard to commercial sense as stated in the decision of the court in the case of Regent Oil Co. Ltd. -vs- Strich (Inspector of Taxes [1966] AC 295 where it was held that: so it is no surprising that one test or principle or rule of thumb is paramount. The question is ultimately a question of law for the court but it is a question which must be answered in light of all the circumstances which it is reasonable to take into account and weight which must be given to a particular circumstance in a particular case must depend rather on common sense that on strict application of any single legal principle.....plainly looking at the matter in the round without attributing prominence to one or another factors but given them their due weight as summarized in paragraph 11 above, the gains from the sale of the said land were capital not trading profit.

RESPONDENT'S SUBMISSIONS:

1. The Respondent relies on the statement of fact filed by the respondent at the Tribunal and the Respondent's submissions filed in TAT appeal No. 174 of 2016. The Respondent also relies on

the submissions of the respondent filed in ITA E019 of 2020 – Epix Investment limited –vs- Commissioner of investigations and enforcement which is a related matter to be heard concurrently with the appeal herein.

2. The Tribunal decisions on deemed interest was supported by the law of facts. We humbly urge this Honourable curt to affirm the same. No legal basis has been presented by the appellant to warrant setting the findings of the Tribunal aside.

3. The Respondent on profit or gain cited the case of August –v- Commissioner of Taxation [2013] FCAFC 85

4. On profit motive the Respondent relied on the case of *Gray and Gillit –v- Tilley (Inspector of Taxes) [1944] 26 TC 80* .

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 and Kshs.812,499,920/- being corporate tax on profit on sale of property in the sum (inclusive of penalties and interest) is due and payable or the purchase and sale/transfer of land was trading transaction or capital gain?

c) If Kshs.12,785,220 being stamp duty was payable?

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

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, 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.

This Court considered the following;

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.

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 of Space Investments Limited and Chairman of Lordship companies that operates in Europe & Africa. The loans advanced are interest free

Milwater Holdings advanced money to Space Investments in 2008.The monies were used to purchase land in Karen.

The conduct of the Audit by Respondent on 4th May, 2015 is not disputed. The letter of 8th August 2016 by the Respondent in reference to tax investigation and 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 Space 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.2

In view of the above, we shall deem interest on interest free loan granted to the Company and charge Witholding tax in accordance with Section 35 of the *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 Space Investments Limited is not disclosed in figures and duration save what was alleged by the Appellant and resultant investigations by the Respondent. 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 Space 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.

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.

CORPORATE TAX

Vide a letter dated 7th November, 2016 by the Respondent it was alleged that;

(a) Corporation Tax on sale of land

Purchase of land plot number 195/228

It was alleged that Appellant's client purchased plot No.195/228 in 2008 at a cost of Kshs.332,400,193/-. Except the book entry in the appellant's ledger, the Appellant has not provided evidentiary support of this such as:-

(a) The sale agreement signed between Space Investment and the seller of the land.

(b) Copy of the signed transfer agreement between the seller and Space Investment.

(c) Bank statement showing proof of the payment of purchase monies.

(d) Proof of payment of stamp duty.

(b) TRANSFER OF LAND FROM SPACE INVESTMENTS LIMITED TO KAREN HILLS LIMITED

(a) The land was transferred to Karen Hills Limited on 13th June, 2012. Karen Hills Ltd (which was registered in April 2012) subsequently subdivided the land into 60 ones acre plots and registered the same on the 11th October, 2012. The leases were then put on sale.

(b) The alleged initial purpose of purchase of the land as being cattle and sheep rearing and herding has not been corroborated and is contrary to the use indicated in the initial grant.

(c) The land was not sold at fair market value as it has been alleged but rather it was quickly revalued and transferred to Karen Hills Ltd.

(d) It is not true that Space Investments Ltd could not sell the land as they are not registered as developers neither are they a development company as per the memorandum and Articles of Association. Article 3(a) of the memorandum and of association is very clear that the principal objective for the establishment of the company is real estate. This is further corroborated by the principal activity as per the annual accounts of the company which disclose the principal activity as real estate development.

(e) There is ample case law to support that gains from one off land transactions may be constituted to be assessable income if the property generating the profit or gain was acquired in a business operation or commercial transaction for the purpose of profit-making by the means giving rise to the profit irrespective of the period the land had been held.

Whether the acquisition and subsequent sale or transfer of Lr No 195/288 comprised of 25.80 acres was trading transaction or capital gain is in contention. The Appellant urged that this was capital gain and applying the badges of trade the result would be capital gain and not trading transaction. The Hon.Tax Tribunal considered the badges of trade & case of *Marson (HM Inspector of Taxes)vs Morton & Related* Appeals [1986] BTC 377. In Considering the following;

(h) Original intention- whether the sale was/is with a Profit seeking motive

(a) Period of ownership Length of ownership

(b) Frequency and number of similar transactions; were there many transactions of a similar nature

(c) Supplementary works in connection with the property

(d) Financial statements

(e) Connection with existing trade

The land in question was vast 25 acres or so and naturally land appreciates in value overtime more so with developments. The Appellant revalued the land from the alleged cost of Ksh.319,614,973/- and transferred it to Karen Hills Ltd in June 2012 for Kshs.1,580,964,780/-; That is why subsequent valuation the same land increased its value from Kshs.319,614,973/- to Ksh 1, 580,964,780/- it was a trading transaction for profit which translates to income for the Appellant which is subject to tax under Section 2 & 3 of *Income Tax Act*.

The Court also notes that the allegation by the Respondent to the Appellant that land sold and/or transferred Karen Hills Ltd another affiliated Company which subsequently subdivided the land into 60 oneacre plots and registered the same on the 11th October, 2012. The leases were then put on sale. This fact was not controverted. The affiliated Company (similar shareholding and directorship) was to implement real estate business which the Appellant was also authorized to conduct but instead would receive payments from the subsequent sales. Clearly these are multiple sales and certainly trading transactions over the same land property.

The appellant alleged that the land was bought from loan, the sale agreement signed between Space Investment and the seller of the land, the copy of the signed transfer agreement between the seller and Space Investment Ltd and Bank statements showing proof of the payment of purchase monies were not availed. So it is possible, the appellant acquired the land and transferred to affiliated Company to conduct sale of subdivided portions with a view to making profit as there is no proof of a loan to repay.

The said profit from multiple sale of subdivided portions was/is subject to tax as it is profit, income made by the Appellant Company. Therefore, Corporate tax was/is payable.

Stamp duty was shown/proved and deemed to have been paid.

DISPOSITION

The Court upholds the Decision of the Hon Tax Tribunal and dismisses the appeal

Each party to bear its own costs.

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

M.W. MUIGAI

JUDGE

FOR APPELLANT

MR. AMOKO FOR RESPONDENT

MS JUDITH GITHINJI FOR RESPONDENT