



Larkspur Properties Ltd v Commissioner of Investigations & Enforcement (Income Tax Appeal E018 of 2020) [2021] KEHC 178 (KLR) (Commercial and Tax) (15 October 2021) (Judgment)

Neutral citation: [2021] KEHC 178 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E018 OF 2020
MW MUIGAI, J
OCTOBER 15, 2021**

BETWEEN

LARKSPUR PROPERTIES LTD APPELLANT

AND

COMMISSIONER OF INVESTIGATIONS & ENFORCEMENT ... RESPONDENT

JUDGMENT

1. The Appellant lodged an appeal on 6th April 2020 against the Tax Appeals Tribunal’s Judgment of 9th March 2020 on the following grounds;
2. Honorable Tax Appeals 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.
3. 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....’
4. The Honourable Tribunal’s finding that Jonathan Jackson was non-resident for tax purposes is contrary to the evidence placed before it. The Honorable 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 was not considered by the Tribunal

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 the Mr. Jackson 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.
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.
6. 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.
7. The Hon 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.



RESPONDENTS' STATEMENTS OF FACTS:

8. The Appellant is a Limited liability Company Incorporated in Kenya in 2007. The appellant's holds a Personal Identification Number (PIN) P0513368238J.
9. The Appellant's shareholders are Midwater Holdings Limited, Cyprus (99% and Jonathan Jackson (1%).
10. The Appellant was put under investigations whose results indicated that the Appellant received an interest free loan of Kshs.82,874,711/- from one of its shareholders and directors Jonathan Jackson. The Appellant had however failed to deem interest on the interest free loan and account for Withholding tax of Kshs.9,241,165/-.
11. Further, the investigation revealed that the Appellant had acquired property L.R No. 209/3006 at Kshs. 75,000,000/- but had not proved remittance of Stamp duty.
12. Amended assessments on Withholding taxes on deemed interest for Kshs. 9,241,165/- and Stamp duty of Kshs.3,000,000/- was raised 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.82,875,711/- 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 of Kshs.82,875,711/- and withholding tax of Kshs.9,241,165/- on the deemed interest assessed and demanded in accordance with section 16(2) (j) and 35(1)(e) of the *Income Tax Act*.
15. On the issue of Stamp duty, it was the Respondent's position that:-
 - a. The Appellant purchased property L.R NO.209/3006 for a total purchase price of Kshs.75,000,000/-.
 - b. That despite several demands issued for the Appellant to avail prove of payment of Stamp duty, the Appellant failed to avail prove of payment of Stamp duty.
 - c. Stamp Duty of KShs.3,000,000/- being 4% of the Purchase price (KShs.75,000,000/-) was demanded.



16. The Tribunal identified two (2) issues for determination:-
- a. Whether deemed interest applies on the interest free loan of KShs.82,875,711/- which was advanced to the Appellant.
 - b. Whether the Respondent was right in assessing stamp duty on the transfer of the parcel of Land Registration No. L.R.209/3006.

APPELLANT’S WRITTEN SUBMISSIONS:

17. 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
- a. “....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...”
18. 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.
19. 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.
20. 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..’
21. 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....



RESPONDENT’S WRITTEN SUBMISSIONS:

22. 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.
23. 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.
24. 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.
25. 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
26. 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 questions 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.
27. 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.
28. From the foregoing, the Respondent having proved that Jonathan Jackson was not a Kenyan resident for tax purposes in the years under investigation, further he was not living permanently in Kenya during the period (Refer to Harding – Commissioner of Taxation [2019] FCAFC 29), it therefore follows that any monies sent from him to a company in Kenya such as the Appellant should be subject to deemed interest which attracts withholding tax as provided for under Section 35(1) of the *Income Tax Act*.
29. It is further not true as alleged by the Appellant that Jonathan Jackson personal effects as clothes, beddings etc were in the said apartment. The Respondent submitted that 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 as was confirmed by Investigators.

30. 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 v Republic (ex parte 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 that the relevant statute, the *Income Tax Act* must be the source of the meaning to be attached to it. The interpretation must be contextual. A statute ought to be looked at, in the context of its enactment and as a whole as opposed to picking and choosing words 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 v Peerless General Finance and Investment Co. Ltd...* 1987 SCR92) 1.

See also The *Engineers Board of Kenya V. Jesse Waweru Wahome & Others Civil Appeal No. 240 of 2013*.

The *Income Tax Act* has given the word “paid” a technical as opposed to an ordinary definition. Tax law is ever changing, complicated and highly technical. That is why we, with respect disagree with the learned Judge for insisting that “upon payment” must only convey the meaning that money or some valuable thing was delivered. He gave the phrase a very narrow construction. In the context of the *Income Tax Act*, payment is deemed to have been made even when no money has passed over. We therefore reject the contention that it was not practical to deduct and remit the tax without first actually paying the interest to the contractor. Although section 35(5) requires that where withholding tax is payable, the tax payer must “deduct” and remit the amount so deducted to the Commissioner, the sense in which the word “deduct” is used, as any accounting term refers to the act or process of subtraction of an item or expenditure from gross income to reduce the amount of income subject to income tax. This need not be done physically or practically but as a book entry.

We believe it is accurate to state that the income tax regime tax is based on accrual system. This is clear from Section 3 and 10, among others.

31. It is the Respondent’s submission pursuant to the definition of resident under section 2 of the ITA Jonathan Jackson was a non-resident for the tax period under review and for that case therefore withholding tax is due on deemed interest from the interest-free loan of KShs.82,875,711/- advanced by the said Jonathan Jackson to the Appellant at the rate of 15% in terms of Section 35(1) (e) of the Act as read with Paragraph 3(3)(i) of the Third schedule to the Act.

DETERMINATION

32. The issues to be determined on appeal are;
- a. Whether, the Hon Tax Appeals Tribunal finding that the Appellant payment of withholding tax on deemed interest is upheld or vacated
 - b. Whether Mr Jackson was resident or non-resident for tax purposes for the period of tax review.



a. Is Withholding tax on deemed interest due and owing to the Respondent by the Appellant?

33. The Hon Tax Appeals Tribunal found that Withholding Tax on deemed interest is due by definitions prescribed to Section 2 & 35 of *Income Tax Act* (ITA)
34. The Appellant submitted that Withholding Tax on deemed interest is due upon payment and since the Appellant had made any repayments of the Loan the Withholding tax on deemed interest was not due.
35. 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: ‘.....[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 loans were advanced by Jonathan Jackson from his Companies and he was/is resident in Kenya during the period under review.

36. 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.
37. 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 Larkspur Properties and Chairman of Lordship companies that operates in Europe & Africa. The loans advanced are interest free Milwater holdings advanced money to Larkspur Properties in 2011. The monies were used to purchase LR No 209/3006 Bishops Court. The total cost of land purchased was Ksh 75,000,000.

Withholding Tax of Ksh 9,241,165 was/is due and computations were/are attached.

38. The conduct of the Audit by Respondent on 4th May, 2015 is not disputed. 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. 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 accountin Prague of one Christopher Foot.

You have not demonstrated how the moneys were eventually lent out to Larkspur Properties 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]

39. 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. First, this means that payment of Withholding tax



is not contested but its timing which is at the point of repayment of loan. Either way, whether now or later, it implies that withholding tax is due and owing until payment is made.

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

(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.

40. The instant case unlike the cited case above save for allegation of loans advanced by Milwater Holding Company and as 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 Republic vs Kenya Revenue Authority, payment of tax is timebound.

41. 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*.

42. 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.

43. 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.

44. The scenario herein is complicated further by the fact that the Respondent’s finding that the monies advanced were used to purchase LR No 209/3006 Bishops Court and which is used as an office from the related companies mainly Lordship Africa, Epix & Karen Hill which operate from the Apartment as an office with no payment of rent as indicated in the letter of 8th June 2016. There is no evidence that any repayments were/are anticipated to be made to Milwater Holdings and no Agreement confirmed such an arrangement.

45. From the remittance of funds from Milwater Holdings to Larkspur Properties Limited where Mr.Jonathan Jackson is beneficial owner and shareholder in both Companies the funds were from and to the same person, namely Mr Jonathan Jackson, through named Companies and therefore it is not feasible that there would be repayment of a loan advanced to oneself.



46. From the evidence as presented to the Hon Tax Appeals Tribunal and referred to by this Court, and relying on the case *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.
- b. Whether Mr Jackson was resident or non-resident for tax purposes for the period of tax review
47. The Hon Tax Appeals Tribunal found that Mr. Jonathan Jackson was not a resident of Kenya during the period under review.
48. The Appellant relied on the following facts to confirm being a resident as defined under Section 2 of *Income tax Act*;
- a. He was born in Eldoret and is holder of ID 336667886
- b. He has a permanent home, Apartment No 6 on LR No 209/3006
- c. He had a lease of the Apartment for 1 year
- d. He had testimony of the Housekeeper to confirm residence in Kenya.
- e. He was present in Kenya for a period averaging 122 days from 2013 – 2016 as shown by entries in the passports provided.
49. The Appellant relied on the case of *Unilever Kenya Ltd vs Commissioner of Income Tax [2005] eKLR* which relied on OECD Model Commentary 13 prescribes;
- 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)
50. 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.
51. 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)
52. 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.
53. 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 and personal effects as clothes, beddings etc of Mr. Jonathan Jackson were not found/seen in the said Apartment. 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.
54. 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.

55. 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.
56. 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.
57. The legal and evidential position is that he who alleges must prove, in the absence of such proof 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.
58. 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 anon 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 – in view of the above, we shall deem interest on the interest free loan granted to the Company and charge Withholding 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.

59. 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.



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 regarding payment of Stamp Duty is not varied but upheld that the Appellant paid Stamp Duty and provided documentary evidence to the Tribunal of proof of payment.
5. The judgment of Hon. Tax Appeals Tribunal is upheld.

DELIVERED SIGNED& DATED IN OPEN COURT ON 15TH OCTOBER 2021. (VIRTUAL CONFERENCE)

M.W. MUIGAI

JUDGE

MR W. AMOKO FOR APPELLANT

MR LEPARAN LEMISO FOR RESPONDENT

