Commissioner for Domestic Taxes v Ralph Bunche Suites Limited (Income Tax Appeal E058 of 2020) [2021] KEHC 294 (KLR) (Commercial and Tax) (19 November 2021) (Judgment)

Neutral citation: [2021] KEHC 294 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INCOME TAX APPEAL E058 OF 2020

DAS MAJANJA, J

NOVEMBER 19, 2021

BETWEEN

COMMISSIONER FOR DOMESTIC TAXES .... APPELLANT

AND

RALPH BUNCHE SUITES LIMITED .... RESPONDENT

(Being an appeal against the judgment of the Tax Appeals Tribunal at Nairobi dated 31st March 2020 in Tax Appeal No. 142 of 2016)

JUDGMENT

Introduction and Background

1. The Appellant ("the Commissioner") seeks to set aside the decision of the Tax Appeals Tribunal ("the Tribunal") dated 31st March 2020 based on its Memorandum of Appeal dated 28th May 2020. It has also filed written submissions. The Respondent opposes the appeal. It has filed its Statement of Facts dated 20th July 2020 and written submissions as well.

2. The facts giving rise to this appeal are largely common ground. The Respondent is the registered proprietor of all that piece of land known as Land Reference 209/18174 (original No. 209/2072/3) along Ralph Bunche Road. It was involved in the construction of an office block called Highton Plaza in 2006 ("the suit property"). The construction stalled in 2009.

3. In order to complete the construction, the shareholders in the Respondent entered into a Share Sale Agreement ('the SSA") with two entities, EPCO Builders Limited ("EPCO") and Mayfair Insurance Company Limited ("MAYFAIR"). The purchasers intended to purchase the shares in order to take over and complete purchase of the suit property in consideration for the substituted shareholders

getting a sub-lease for half of the shops on the ground floor, one floor of the office block and 20 parking lots.

4. At the same time, EPCO and MAYFAIR entered into a Joint Venture Agreement ("the JVA") for the purpose of contributing monies to complete the development of the suit property.

5. The Commissioner conducted an audit of the books, records, and accounts of the Respondent for the years of income 2011 to 2014 which involved a review of the documents relating to the construction works undertaken by the Respondent. On 15th June 2016 the Commissioner issued additional assessments on the Respondent claiming KES. 208,823,665.00 inclusive of principal tax, penalty and interest on account of Corporation tax, KES. 6,739,250 inclusive of principal tax, penalty and interest on account of Withholding tax (WHT), and KES. 914,371.00 inclusive of principal tax, penalty and interest on account of Pay-as-you-Earn (PAYE).

6. The Respondent objected to these assessments through its letter dated 15th July 2016. On 13th September 2016, the Commissioner rendered its Objection Decision confirming its earlier assessments. Being dissatisfied with the Objection Decision, the Respondent appealed to the Tribunal. The Tribunal allowed the Respondent's appeal thus precipitating this appeal.

7. Although the Appellant raises several issues in its Memorandum of Appeal dated 28th May 2020, it condensed the grounds into the following three issue for determination based on the tax heads dealt with in the Objection Decision and the Tribunal:

   (a) Whether the sales of the Apartments were attributable to the Respondent for purposes of Corporation Tax;

   (b) Whether the Commissioner had a legal basis to assess additional withholding tax.

   (c) Whether the Commissioner was right in assessing PAYE on the salary paid to the Clerk of Works.

8. In resolving the three issues set out above, it is important to recall that the court's jurisdiction is circumscribed by section 56(2) of the *Tax Procedures Act, 2015* ("TPA") which states that, "An appeal to the High Court or to the Court of Appeal shall be on a question of law only". An appeal limited to questions of law does not permit the appellate court to substitute the Tribunal's decision with its own conclusions based on its own analysis and appreciation of the facts unless the conclusion reached by the Tribunal are so perverse that no reasonable tribunal would have arrived at them (see *John Munuve Mati v Returning Officer Mwingi North Constituency & 2 others [2018] eKLR*). I now turn to consider the issues raised in this appeal as framed by the Commissioner.

Whether the Commissioner was entitled to deem income and charge the Respondent corporation tax

9. Under this head, the Commissioner deemed that the Respondent made an income of KES. 444,019,745.00 and charged tax amounting to KES 208,823,665.00 inclusive of penalties and interest thereon. The Commissioner rejected the Respondent's position that it was all material times an agent of its shareholders, EPCO and MAYFAIR, and therefore the proceeds from the sales of the Apartments through the grant of leases was attributable to the said shareholders and not itself hence is could not be taxed on that income. The Tribunal agreed with the Respondent that the Commissioner failed to demonstrate that there were any gains or profits by the Respondent from the project beside marking the values to market and imposing taxes based on estimates. The Tribunal held that if any tax was due, it was attributable to MAYFAIR and EPCO who, under the Joint Venture, financed the project and shared the offices resulting from completion of the building.

10. The Commissioner submits that its assessment was based on its best judgement relying on the information in its possession as provided for under section 31 of the Tax Procedures Act ("the TPA") and which, despite several requests, the Respondent refused to provide sales information. It therefore used an average selling rate, taking into account the prevailing market rates in the area in order to determine the expected sales revenue and tax due. That, applying equity and reason, the Commissioner recognised that expenses were incurred in the construction project and further relying on the ledgers provided, allowed the expenses in full despite the fact that no primary documents were provided.

11. In deeming the income from the Respondent, the Commissioner also submits that at all material times, the Respondent remained the registered proprietor of the suit property even after leasing out the individual units to third parties. It submits that the shareholders did not have any interest in the suit property but only owned shares in the Respondent and made contributions to the Respondent through the JVA which in its Trial Balance were recognised as loans from shareholders. The contends that since the Respondent remained the registered owner of the suit property, it could not purport to be an agent over its own property.

12. The Commissioner relies on the *Land Registration Act*, 2012 and in particular section 23 (1) which provides that a certificate of title issued by the registrar to a purchaser of land, "shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof" and section 24 (a) thereof which provides that such registration, "shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto." It submits that based on these provisions, the Respondent's position as the registered owner remains as well as its obligations as a taxpayer despite the transfer of its shares.

13. The Commissioner submits that since the Respondent of was not a party to the JVA and the JVA did not change its status, the Respondent could not be an agent nor did it produce any documentary evidence to support its case that it was an agent. It points out that the Respondent's Trial Balance demonstrates that the shareholders interest was its share capital and their contributions made further to the JVA were recognised as loans and did not reflect any income as agency fees despite claiming that it was an agent.

14. Turning to the SSA, the Commissioner submits that what was contemplated under Clause 3 thereof was the transfer of shares evidenced by the fact that the new shareholders appointed two new directors who acted as its agents. Counsel referred to *Post Bank Credit Limited (In Liquidation) v Nyamangu Holdings Limited [2015] eKLR* where the court held that whereas a company is a juristic person, it acts through human persons, namely, the directors, officers, shareholders, and corporate managers for its management and day to day running and who represent it within the scope of the ostensible authority conferred upon them by the Memorandum and Articles of Association, in the name and on behalf of the company, they bind the company and not themselves. The Commissioner takes the view that under the SSA, the directors were agents of the shareholders in the company in line with the agency theory of corporate governance.

15. The Commissioner further submits that the SSA did discharge the Respondent from its duty to maintain proper accounts and report its income and expenditure as provided for under sections 148 and 147 of the *Companies Act* (Repealed). Further that the JVA was between the shareholders and not with the Respondent hence it could not be binding on the Respondent or purport to replace any enforceable legal obligation on the Respondent as this would be breach of the doctrine of privy to contract. The Commissioner therefore submits that since the Respondent does not have any standing under the JVA, no legally enforceable obligation can be imposed on it and neither can it be appointed as an agent. Counsel referred to the decision in *Agricultural Finance Corporation v Lengetia Limited*

and Jack Mwangi NRB CA Civil Appeal No. 104 of 1984 [1985] eKLR where the court reiterated the general rule that a contract only affects parties to it, and cannot be enforced by and against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it.

16. The Commissioner also supports its case by arguing that the Respondent failed to maintain audited Accounts and/or declined provide them when requested. It adds that the since the Respondent received funds advanced to it, it had an obligation to maintain proper book of account with respect to all money received and expended, all sales and purchases and all assets and liabilities as required under section 147 of the *Companies Act* (Repealed).

17. The Commissioner contends that Article VII (clause 7.2) of the JVA which the Respondent relies on and which provides that the Respondent would act as the agent for the Joint Venturers in payment of taxes but each of the Joint Venturer would be responsible for payment of taxes attributable to the respective assets cannot purport to suspend the Respondent's statutory obligation. It submits that the clause can only be interpreted to give the Respondent extra responsibility over and above what the statute already places in terms of reporting for its incomes and expenditures. The Commissioner adds that the clause is in line with International Accounting Standard 28 (IAS 28) which provides that the costs incurred by shareholders constitute an investment duly recognized under IAS 28 (Equity Method) and ought to be recognised and treated as such. This investment will increase or diminish depending on the results realised by the entity carrying their shares. Where the entity carrying the investment makes profits, the investment will grow by the proportionate share from the profits after the taxes have been paid and where a loss is realized, the investment will diminish accordingly but not beyond the cost of investment. The movement of gain or loss from an investment is recorded in the balance sheet and will have no effect on the taxes paid in the books of the investor. This is because tax has already been accounted for in the books of the investee.

18. The Commissioner also relies on the report by the auditor for EPCO who gave a qualifying opinion when it realised that EPCO was not properly accounting for the investment in Respondent. The auditor stated that in 2010 EPCO acquired a 50% stake in the Respondent but did not account for using this equity in accordance with the requirements of the International Financial Reporting Standards (IAS 28: Investment in Associates). It stated that the investment was shown at cost contrary to the prescribed treatment for investments in associates. The Commission submits that the conflicting reporting by EPCO, MAYFAIR and the Respondent only serves to confirm the correctness of taxes charged and that it was entitled to use its best judgment to determine the taxes due in the circumstances.

19. In conclusion, the Commissioner submits that the Respondent is the owner, lessor and developer of the suit property but not an agent of the Joint Venturers and that it accrued consideration from the leases issued to third parties hence it rightfully brought the income therefrom to charge. The Commissioner maintains that the leases issued by the Respondent shows that the Respondent was the owner of the leasehold interest, that it developed the property agreed to grant the leasehold interest upon being paid consideration.

20. The Respondent opposes the appeal and supports the Tribunal's decision. It submits that EPCO and MAYFAIR, as the Joint Venturers, appointed it as an agent in the development of the suit property under Article III of the JVA which provides that, "The venturers shall purchase all the shares in Ralph Bunche Suites Company Limited, which is developing an office block on land reference 209/18174 and will maintain the Company as an agent for the joint venture development for the completion of the project."

21. The Respondent agrees with the Tribunal that the JVA set out the terms of financing the development and was an integral part to the Tribunal's determination and that the Commissioner could not argue that the Respondent could not rely on it when the Commissioner acknowledged its existence and relied on it to support its case. The Respondent agrees with the Tribunal's observation that there was no evidence of the transfer of the reversionary interest which would have constituted an outright sale. The Respondent also holds that the Tribunal was right to focus on the intention of the parties as opposed to the form of the agreement and determine if any income accrued, who was the beneficiary as opposed to who ought to have been the beneficiary and what was the taxable income generated and by whom, and if so, was the tax, if any, paid.

22. The Respondent submits that evidence shows that the shareholders contributed money on the basis set out in the JVA and that the income from the sub-leased apartments was accounted for by each shareholder to the Commissioner. MAYFAIR accrued rent from the leased units which was captured it in its financial reports available to the Commissioner. EPCO disposed of its units and accounted for the same in its financial reports. In either case, the Respondent submits that the Commissioner has not alleged that each shareholder has not declared responsibility for any taxes due or failed to account for the same.

23. The Respondent agrees with the Tribunal that income tax is determined from gains as opposed to Stamp Duty which is value based. It submits that the Commissioner based its assessment on the market values of the units and based the tax assessment to the Respondent on the same but the Tribunal disagreed with the Commissioner's basis for its demand for corporation tax and held that the proper point of taxation would be at the shareholder level either as corporation tax or alternatively as capital gains tax. Further, that the Commissioner failed to demonstrate that there were any gains or profits by the Respondent from the development besides marking the market value and imposing tax based on the estimates. The Respondent submits that if any tax is due, it is attributable to MAYFAIR and EPCO who financed, the development and shared out the office space.

24. In response to the Commissioner, the Respondent went further to explain the nature of the transaction between the various parties to demonstrate that it was no liable to pay corporate tax. It stated that prior to the JVA, the Respondent was owned by three shareholders from whom EPCO and MAYFAIR purchased the shares through the SSA for a separate consideration and subsequently EPCO and MAYFAIR entered into the JVA for the development of the suit property in their own names and appointed the Respondent as the agent for the joint venture. The Respondent thus contends that the SSA and JVA are separate and distinct; the JVA clearly elaborated the parties' intention to develop the office block and in order to achieve this, EPCO and MAYFAIR deposited their contribution in a joint venture account in their own right as Principals. They also maintained the Respondent as an agent for the joint venture project. Upon completion of the project and being the beneficial/equitable owners of the development, the Joint Venturers caused the Respondent to execute subleases to them in order to give effect to their ownership of the development and to protect their monetary investment in the development with the Respondent holding the head lease of the suit property for purpose of the reversionary interest.

25. EPCO subsequently earned income from the sale of its units in and accounted for corporate tax to the Commissioner while MAYFAIR continues to receive rental income from its units for which it accounts to the Commissioner. The Respondent explains that under the JVA, all agency taxes including PAYE, withholding tax and VAT and any other statutory requirements were to be undertaken by the Respondent as the agent of the Joint Venturers for tax purposes and any profits from the joint venture would be attributable to EPCO and MAYFAIR who will be responsible to pay income tax arising from any sale or disposition attributable to the assets belonging to each of the Joint Venturers.

26. The Respondent submits that as the appointed agent for the joint venture, it prepared the memorandum of accounts of the joint venture and did not have any transactions of its own. That all costs incurred in construction of the project were the costs capitalised by EPCO and MAYFAIR which were granted commercial building allowance by the Commissioner in accordance with the *Income Tax Act* ('the ITA").

27. The Respondent relies on the case of *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another NRB CA Civil Appeal No. 95 of 1999 [2001] eKLR* and urges the court to uphold the sanctity of the intention of the parties just as written in the JVA. It submitted that the Commissioner cannot rewrite the JVA by unlawfully taxing the *Respondent. It cites Customs and Excise Commissioners v Latchmere Properties Ltd [2005] BVC 653* to buttress the point that there was no profit or gain attributable to the Respondent chargeable to tax under section 3(1) of the ITA as the subject property developed did not belong to the Respondent but to the Joint Venturers despite the Respondent being the registered owner. The Respondent urges the Court to look at the both the reality and the form of the transaction between and uphold the Tribunal's finding that there was no gain or profit attributable to the Respondent. In light of the circumstances, the Respondent rejects the Commissioner's contention that income tax is chargeable on deemed income by use of market values to calculate income chargeable as the Commissioner did.

28. The Respondent further contends that the ITA does not contain any provision that provides for the use of market values for resident companies and that the Commissioner was therefore unlawfully taxing the Respondent by inference which is against the strict interpretation of the ITA. The Respondent submits that gains and profits should be realised and not estimated based on market value before tax is charged thereon. The Respondent states that the Commissioner has not produced any evidence to support the values claimed as market values and that the Commissioner cannot just pick figures and impose it on the taxpayer without any justification as such an action is arbitrary and an abuse of power. The Respondent cites *Republic v Kenya Revenue Authority Ex parte Jaffer Mujtab Mohamed NRB JR Misc. Application No. 312 of 2011 [2015] eKLR* where the court held that a taxing authority is not entitled to pluck a figure from the air and impose it upon a taxpayer without some rational basis for arriving at that figure and not another figure and that such action would be arbitrary, capricious and in bad faith and an unreasonable exercise of power and discretion and that would justify the Court in intervening. In this case, the Respondent submits that it provided the Commissioner with all the relevant supporting documentation to enable the Commissioner to come to the right determination of taxes applicable.

29. The Respondent submits that the Commissioner did not lose any revenue because the project was recognised in the accounts of EPCO and MAYFAIR. In the case of EPCO, it is charged income tax at 30% from the sales after deducting the actual cost incurred on the project. As regards MAYFAIR, it continues to rent its units and the Commissioner continues to receive tax on rental income, a fact the Commissioner has not controverted. In view of the foregoing, the Respondent submits that taxing it after taxing the Joint Venturers will result in double taxation by the Commissioner over the same transaction. The Respondent further submits that its transactions and accounting were in line with the practice of a joint venture where the profits and gains of the joint venture are attributed to the individual joint venture partners, in this case, EPCO and MAYFAIR who recognised the constructing costs of the project in their own accounts and deducted them in accordance with the ITA upon sale or renting of their respective units.

30. The Respondent submits that it was was an agent of the joint venture and the profits of the joint venture were attributable to EPCO and MAYFAIR as the Principals. It relies on the case of *Motaku Shipping Agencies Limited v Commissioner of Income Tax MSA ITA 60 of 2013 [2014] eKLR* where

the court recognised the Principal/Agent relationship and held that payments made by the agents were legally made on behalf of the Principals.

31. The Respondent accuses the Commissioner of misleading the court by alleging at that the money used in the project by the Joint Venturers should be accounted for in accordance with IAS 28. The Respondent submits that IAS 28 only relates to the purchase of shares in the Respondent which is an entirely different transaction governed by the SSA. In its view, the matter before the Court involves the development of the project which is governed by the JVA and in that regard, the Joint Venturers correctly accounted for their purchase of shares in the Respondent in accordance with the requirement of IAS 28 and recognised the cost of the project separately in accordance with IFRS 15 and section 15 and 16 of the ITA.

32. The Respondent submits without prejudice to the above that even if the income were to be recognised by the Respondent, which is denied, such income would have been subject to capital gains tax which was suspended on the date of the alleged transfer. Capital gains tax which was re-introduced in January 2015 in the Eighth Schedule of the ITA would not be applicable to the Respondent's sublease that were executed in 2012 prior to the coming into force of the Eighth Schedule.

33. Corporation tax is income tax payable by corporations such as the Respondent. It is common ground that section 3 of the ITA is the charging section with respect to all income accrued or derived in Kenya and no tax may be levied on any income unless the charge for the same originates under the said section. Section 3 provides, in part, as follows:

 3.

 (1) Subject to, and in accordance with, this Act, a tax to be known as income tax shall be charged for each year of income upon all the income of a person, whether resident or non-resident, which accrued in or was derived from Kenya.

 (2) Subject to this Act, income upon which tax is chargeable under this Act is income in respect of-

 (a) gains or profits from –

 (i) a business, for whatever period of time carried on;

 (ii) employment or services rendered.

34. The Commissioner's decision to subject the Respondent to pay Corporation Tax was based on the fact that Respondent was the registered proprietor of the suit property and the transfer of units in the said property to various lessees which the Commissioner contended was a 'sale' by the Respondent. In determining the corporation tax payable, the Commissioner used the prevailing market rate prices for the said units transferred. The Commissioner rejected the Respondent's contention that it was an agent of EPCO and MAYFAIR under the JVA and that there was no 'actual sale' that took place per se as the said transfers were done in consideration of the financial input or investment injected into the development of the suit property by EPCO and MAYFAIR as equity shareholders of the Respondent.

35. The questions that arises from the above are, whether there was any benefit, gain or profit that was received by the Respondent and whether the same was chargeable to Corporation Tax? The resolution of this issue depends on the nature of relationship between the Respondent, EPCO and MAYFAIR and in this respect the court ought to give the agreements their proper construction in order to give effect to the parties' intention.

36. This relationship between the parties was consummated and governed by the SSA and JVA. As the Respondent explained, the purpose of the two agreements was to enable the Joint Venturers, EPCO and MAYFAIR, purchase shares in the Respondent, take over the stalled construction project and complete it through the Joint Venture. In this respect the JVA had the following key clauses;Article III which states, "The Venturers shall purchase all the shares in Ralph Bunche Suites Company Limited, which is developing an office block on Land Reference Number 209/18174 and will maintain the company as an agent for the Joint Venture Development for the completion of the project."Article III, Clause 7.2 which states, "All applicable taxes including PAYE, withholding tax and VAT and any other statutory requirements will be undertaken in Ralph Bunche Suits who shall act as agent of the venturers for tax purposes. However, any profits from the venture will be attributable to the parties who shall be responsible to pay income tax arising from any sale attributable to the asset belonging to the joint venture parties."

37. In essence, while the Respondent retained the ownership of the subject property, the principal shareholders, who are the Joint Venturers, appointed the Respondent as their agent and undertook to development by completing the stalled building and selling or leasing the units to recover their investment. It is for this reason that the Company was constituted as an agent of the Joint Venturers in order to facilitate the Joint Venture. As the key clauses show, the benefit or gain was to accrue to the EPCO and MAYFAIR and accountable by them rather than to the Respondent.

38. To accept the Commissioner's arguments would amount to ignoring the SSA and JVA. First, there is nothing in law that prevents principals from appointing an agent on such terms as they deem fit. Nor is there any law that requires an agent to be paid for services rendered. In this case, the consideration for the agency was that the Joint Venturers were, in terms of the JVA, completing the construction of the Respondent's property, which has stalled, and which would appreciate in value once completed. Second, while the fact that the various leases were in the name of the Respondent and the consideration was stated to the be paid to the Respondent as the proprietor of the subject property, the consideration was in fact paid to the Joint Venturers and accounted for in their accounts. The Respondent ceded the right to receive income in consideration of the Joint Venturers developing the suit property. The record also indicates that the Commissioner did not challenge the contention made by the Respondent that EPCO and MAYFAIR have already accounted for their respective units and paid their respective taxes on the same which is that; EPCO have already sold their units to third parties and accounted for the taxes therein and that MAYFAIR is still in possession of its units and is currently renting them out and accounting for rental income tax from the same. Third, I did not hear the Commissioner challenging the contention that there were no actual payments made to the Respondent by EPCO and MAYFAIR in respect of the sub-leases.

39. At the end of the day, the question for resolution is whether there was a gain or profit within the meaning of section 3(2)(a) the ITA to attract income tax. Having reviewed the record and considered the submissions, I accept the Tribunal's conclusion that was no income, 'gain' or 'profit' made by the Respondent in respect of the sub-leases the Respondent made to EPCO and MAYFAIR. The totality of the evidence shows that EPCO and MAYFAIR invested in the JVA, which investment was shown as a shareholders' loan required to be paid back and was duly accounted for by them in their books. In the circumstances, there was no basis upon which the Commissioner could resort to deeming income when the relationship between the Respondent and its shareholders was clear and defined and the income from the Joint Venture accounted for by the respective shareholders. I do not find any reason to interfere with the Tribunal's decision on Corporation Tax hence this ground of appeal is dismissed.

Withholding Tax

40. During the period under audit, the Respondent claimed that it deducted and paid withholding taxes for items attracting tax in accordance with the 3rd Schedule to the ITA. On its part, the Commissioner took the view that since the Respondent was the Developer and responsible for payment of WHT, it was responsible for providing all the supporting documents but since it did not, the Commissioner was entitled to consider all the service providers and consultants and then apply the appropriate rate.

41. The Tribunal held that the Commissioner did not provide any basis for applying a rate outside that specified under the ITA which was what the Respondent had applied hence there was no WHT due from the Respondent.

42. The Commissioner submits that the services the Respondent received from third parties during the project were subject to withholding tax. Its case is that during the audit, the Respondent refused to avail the primary documentation like contracts, fee notes and invoices hence the Commissioner was forced to apply its best judgment and general practice on how projects of such nature are treated. It contends that in the absence of the documents, it was not possible to establish whether the services provided was by a professional or contractor and that the Respondent has not contested the fact that the expenses it incurred during the process were allowed in full and that despite the fact that they were not supported, the Commissioner reasonably recognized that for there to be revenue, there must be expenses. The Commissioner states that the Respondent did not avail the contracts to demonstrate the nature of the relationship between itself and the service providers with which the services were being provided despite several requests.

43. The Commissioner further contends that the Respondent did not provide any evidence as to why it opines that if withholding tax was chargeable, it ought to be charged at 3% and not 5%. The Commissioner contends that even the appointment letter provided at the Tribunal by the Respondent with regard to the Clerks of work clearly showed it intended to withhold 5% from his allowance which further contradicts the position the Respondent is taking that the works relating to the construction are contractual fees and ought to have been changed at 3%.

44. The Commissioner relies on Section 56 of the TPA which places the burden on the Respondent to prove that the assessment was not correct which burden the Respondent failed to discharge. The Commissioner therefore submits that it took into account the documents that were availed to it and the law, rightly charging 5% withholding tax on the charges made to the service providers.

45. The Court of Appeal, in *Kenya Revenue Authority v Republic (Exparte Fintel Ltd) NRB CA Civil Appeal No. 311 of 2013 [2019] eKLR* held that withholding tax is where the tax payer of certain incomes is responsible for deducting tax at source from payments made and remitting the deducted tax to the revenue body, that is the Commissioner in this case. Sections 2, 3, 10 and 35 of the ITA are the relevant provisions when determining matters of WHT as they provide for important definitions together with the payments that are subject to WHT. The Third Schedule of the ITA provides for the applicable rate of tax in respect of the various payments subject to WHT

46. The Respondent does not deny that it was obligated to remit WHT for payments that it made and that it was guided by the rates provided for in the Third Schedule to deduct the same. However, it faulted the Commissioner for applying a wrong rate (5%) to issue its assessment and that this is what caused the variance between the computations of the Respondent and that of the Commissioner. The Tribunal went through the rates applied by both parties in respect of the various payments made and concluded that the Commissioner applied a rate that was outside what was specified by the ITA and that the rate used by the Respondent to deduct the WHT was correct.

47. In my view, the determination of whether the Commissioner applied the correct rate in assessing the WHT payable by the Respondent is a matter of fact as it will involve going through the individual payments made by the Respondent and confirming whether the correct rate was applied. As stated before, this court is limited to questions of law and as such, it is not permitted to substitute the Tribunal's decision with its own conclusions based on its own analysis and appreciation of the facts unless the Commissioner demonstrates that the Tribunal's findings were perverse, which it has not.

PAYE for the Clerk of Works

48. Under this head, the Commissioner assessed PAYE on the basis that according to the documents availed to it, John K. Wainaina was engaged as a Clerk of Works as employee and not an independent contractor. In its findings, the Tribunal held that a Clerk of Works could be engaged either as an Independent Consultant or employee. It however concluded that, "From the facts before us it is abundantly clear Mr Wainaina was treated as an Independent Consultant and his emoluments treated as such. We see no compelling reason for departure from the approach adopted by the Appellant."

49. The gravamen of the Commissioner's case is that based on the letter of appointment issued to Mr Wainaina it was entitled to conclude that he was an employee rather than an independent contractor. It pointed out that Mr. Wainaina was a salaried employee with a fixed salary and work was determined and controlled by the Respondent. The working hours was prescribed by the Respondent and the terms and conditions for the engagement were predetermined and he was only to acknowledge acceptance making him an employee.

50. The Commissioner submitted that the Respondent did not provide any documents to demonstrate that its relationship with Mr Wainaina was that of an independent contractor. It adds that the Commissioner failed to discharge it burden under section 56(1) of the TPA which provides that, ''In any proceedings under this Part, the burden shall be on the taxpayer to prove that a tax decision is incorrect.''

51. The Respondent contends that it engaged Mr Wainaina as a consultant to provide the services of a clerk of works for the project on an agreed fee less withholding tax at the rate of 5%. It states that it withheld and remitted the withholding tax at 5% of the clerk of work's fees in accordance with the contract and the ITA.

52. Whether Mr Wainaina was a consultant or independent contractor or an employee is a question of fact. This is borne out by the authorities cited by both sides setting out various factors the court is to consider when resolving this issue. The Tribunals finding is that, ''Mr Wainaina was treated as an Independent Consultant and his emoluments treated as such'' is devoid of any analysis and findings. Moreover, whether Mr Wainaina is an employee or independent contractor does not depend on the label attached to him by the Respondent, it depends on the substance of the relationship. Finally, by stating that, "We see no compelling reason for departure from the approach adopted by the Appellant," the Tribunal was effectively discharging the burden imposed on the Respondent by section 56(1) of the TPA to show that the tax decision was incorrect.

53. Unfortunately, the Tribunal did not engage with the facts in its judgment that would call upon this court to review the facts which were presented by the parties and reach its own conclusion. As I have pointed out earlier, the jurisdiction of this court is limited to questions of law and it can only point out where the Tribunal reached a conclusion not supported by the evidence. Since the Tribunal failed to re-valuate the evidence, the proper cause is to order a rehearing of the matter in respect of the PAYE demand by the Commissioner (see *Commissioner of Investigations and Enforcement v Menengai Oils Limited [2021]eKLR*).

Disposition

54. For the reasons I have set out above, I dismiss the appeal save that the Tribunal is hereby directed to rehear and therefore determine whether Mr Wainaina was an employee or independent contractor in order to determine whether the Respondent was liable to pay PAYE. In the event the Tribunal concludes that Mr Wainaina is an employee, it shall give the Respondent credit for the amount paid as Withholding Tax.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF NOVEMBER 2021.

D. S. MAJANJA

JUDGE

Mr Shijenje, Advocate instructed by Kenya Revenue Authority for the Appellant.

Mr Mbaye instructed by Humphrey and Company LLP Advocates for the Respondent.