



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

TAX APPEAL NO. 6 OF 2015

ENASOIT RANCH LIMITED.....APPELLANT

- VERSUS -

THE COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

JUDGMENT

1. This appeal is filed by **ENASOIT RANCH LIMITED** (hereinafter the Ranch). The Ranch is a limited liability company incorporated under the Laws of Kenya and is situated in Dol Dol, Laikipia. It is engaged in the business of Ranching and provision of camping activities such as accommodation, game drive and horse riding. The respondent is the **COMMISSIONER OF DOMESTIC TAXES** (hereinafter the Commissioner) who is responsible for assessment, collection and accounting for all revenue due to the Kenya government. This appeal is against the decision of the local committee dated 5th June 2015. By that decision the local committee dismissed the appeal of the Ranch against the commissioner's assessment on **withholding Tax** (WHT) on deemed interest on loan(s) advanced by **Mr. Halvor Nicolai (deceased)** (Halvor) who financed the Ranch through his two companies both registered in the British Virgin Islands. The years of income that was under consideration before the local committee were 2007, 2008, 2010 and 2011.

2. Before the local committee the parties in this appeal agreed that the resolution of the residency status of Halvor during the years under appeal would resolve the WHT on deemed interest. The local committee identified the issue before it as follows:

“The issue for determination by the committee is whether Mr Halvor had a permanent residence in Kenya. A determination of the said issue will resolve the contentious issue of withholding tax on deemed interest.”

3. The local committee on hearing the parties' submissions made the following findings:

“However, an element of permanence must accompany the home in defining as a permanent home. In the case of Mr. Halvor, no evidence of a permanent home was submitted. There was no evidence of a permanent structure, nor was there evidence of a temporary structure or a room which could be stated to have belonged to Mr. Halvor permanently, and which he lived in on his visits to Kenya. His occupation of any room or tent within Enasoit Ranch during his visits is not sufficient to confer the definition of such a room, tent etc. the permanent home status. The fact that Mr. Halvor was a majority shareholder in Enasoit Ranch Limited does not confer upon him a permanent residence status either.

From the foregoing the Appellant has failed to prove that Mr. Halvor had a permanent home.

.....

The Double taxation arrangement between Kenya and Norway is still valid and applicable. Such agreements are part of subsidiary legislations that give effect to the application of certain sections of the Income Tax Act.

Article 4(2)(C) of the double taxation Arrangement notice stated that if a person has “a habitual abode in both contracting states or neither or them, he shall be deemed to be a resident of the contracting state of which he is a national”. Consequently, the committee rules that Mr. Halvor was a Norwegian National and that The Double Taxation Arrangement Notice is applicable.

Given the foregoing this committee rules that the appeal in the matter of taxation of deemed interest fails and is dismissed.”

4. The Ranch brought the following grounds in support of its appeal:

i. The local committee erred in fact and law in failing to find that Mr Astrup was resident in Kenya

ii. The local committee erred in law in declining to allow the appellant to adduce evidence to prove that Mr. Astrup had a permanent home in Kenya.

iii. The Local Committee erred in law and breached the Appellant's Constitutional right to a fair hearing in declining to admit the Appellant's evidence which demonstrated that Mr Astrup had a permanent home in Kenya.

iv. The Local Committee erred in fact and law in failing to conclude that the cottage at Enasoit were permanent structures that constituted a permanent home and not temporary tents.

v. The Local Committee erred in law and fact in disregarding Mr. Astrup's resident permit which demonstrated his close connection to Kenya.

vi. The Local Committee erred in law in allowing the Respondent to introduce the Double Taxation Relief (Kenya/Norway) Arrangements notice 1973 in the middle of the proceedings despite that fact the Respondent had not made reference to the said notice in its assessment.

vii. The Local Committee erred in law in failing to find that the Double Taxation Relief (Kenya/Norway) Arrangements notice 1973 could not be relied upon by the Respondent as the Respondent had failed to prove that Mr Astrup had a habitual abode in Norway.

viii. The local committee erred in law in placing emphasis on the meaning of residency as prescribed in the Double Taxation Relief (Kenya/Norway) Arrangements Notice 1973 and failing to realise that the meaning prescribed therein only applied to the said convention.

ix. The local committee erred in law in failing to find that the Double Taxation Relief (Kenya/Norway) Arrangements Notice 1973 was in any event not applicable to the appeal.

x. The said decision of the local committee is therefore wrong in law and fact.

5. In support of those grounds it was submitted that Halvor purchased the Ranch in the year 2001. During his life time Halvor was the sole financier of the Ranch. Pursuant to an audit by the commissioner for the years 2007, 2008, 2010 and 2011 the commissioner deemed interest on loans advanced by Halvor and charged the Ranch WHT on the deemed interest. Since deemed interest is only applicable where the loan is advanced by a non-resident, it was argued that Halvor's residence in Kenya was within the meaning of section 2 of the Income Tax Act Cap 470, because he had a permanent home in the form of a main house within the Ranch. Further that Halvor was a resident of Kenya because he was a holder of class K resident permit as at 9th June 2006 and was renewed up to prior his passing away on 30th June 2011. Also that Halvor had been issued with Kenyan alien card. That Halvor was in Kenya regularly for a period of 30 years and was a Philanthropist and supported several charity projects within Kenya, such as Lewa Wildlife Conservancy, Namunyak Wildlife Conservation Trust, Milgis Trust and School project within Lamu area, amongst others.

6. The Ranch's contention is that Halvor had a permanent home in Kenya within the meaning or residence under section 2 of Cap 470. That although the local committee was provided with photographs proving the existence of that permanent home the same were not considered in their decision under appeal. As consequence the Ranch sought to have those photographs considered in this appeal and by this court's Ruling of 24th July 2019 the Ranch were permitted to provide those photographs in this appeal through an affidavit.

7. In opposing this appeal, the commissioner relies on statements of facts and submissions to the effect that Halvor was a resident of Norway and that no evidence was adduced to prove a permanent residence in Kenya of Halvor. That the Ranch invoiced Halvor for his stay at the Ranch indicating he was a paying guest. That this therefore proved that he had no permanent house within the Ranch. Further that Halvor's passport revealed he was in Kenya for 102,79 and 89 days for the years 2009, 2010 and 2011 respectively. That those days did not meet the threshold of residence in section 2 of Cap 470.

ANALYSIS AND DETERMINATION

8. I need to start by stating that this court is hampered in determining this appeal because the record of the proceedings before the local committee were not available. That committee either did not record the proceedings or misplaced them. It is because they were unable to produce the proceedings that the Ranch sought and obtained leave of this court to provide copies of photographs of Halvor's home within the Ranch, in this appeal.

9. The commissioner demanded deemed interest on loans advanced to the Ranch on the basis of section 16(2) (j) of Cap 470. That section is in the following terms:

(j) interest payments in proportion to the extent that the highest amount of all loans held by the company at any time during the year of income exceeds the

greater of—

(i) three times the sum of the revenue reserves and the issued and paid up capital of all classes of shares of the company; or

(ii) the sum of all loans acquired by the company prior to the 16th June, 1988 and still outstanding in that year,

or an amount of deemed interest where the company is in the control of a non-resident person alone or together with four or fewer other persons and where the company is not a bank or a financial institution licensed under the Banking Act (Cap. 488); and for the purposes of this paragraph "control" shall have the meaning ascribed to it in paragraph 32(1) of the Second Schedule:

Provided that this paragraph shall also apply to loans advanced to the company by a non-resident associate of the non-resident company controlling the resident company; (emphasis mine)

10. The local committee and the parties in this appeal identified the issue which will determine whether the Ranch is liable to pay WHT for the deemed interest on its loans advanced by Halvor. That is the determination of the residence of Halvor in Kenya. Residence is defined under section 2 of Cap 470 as:

"resident", when applied in relation—

(a) to an individual, means—

(i) **that he has a permanent home in Kenya and was present in Kenya for any period in any 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; (emphasis mine)

11. The Ranch submitted to this court, that the local committee had before it the photographs of the house within the Ranch that Halvor used to occupy when he was in Kenya. As stated before the file that was before the local committee was not available in this appeal. Both parties confirmed that. It follows that in considering the photographic evidence the court will be inclined to accept as true that the evidence of the Ranch, that those photographs were before the local committee. It would follow that the local committee erred to state in its Ruling that:

"...an element of permanence must accompany the home in defining as permanent home. In case of Mr. Halvor, no evidence of a permanent home was submitted. There was no evidence of a permanent structure, nor was there evidence of temporary structure or a room which could have been stated to have belonged to Mr. Halvor permanently, and which he lived in on his visits to Kenya."

12. The local committee failed to acknowledge that the Ranch had produced photographs of permanent structures. The photographs were produced in this appeal through the affidavit of Christopher Kiprop Aubrey Foot, the Chairman of the Ranch. In that affidavit he deponed:

(2) *THAT I am aware as the Chairman of Enasoit Ranch Limited (hereinafter referred to as "Enasoit Ranch) that Enasoit Ranch was purchased by Mr Halvor Astrup in 2001.*

(3) *THAT at the time Mr Astrup purchased Enasoit Ranch, there was only an old house on the ranch. Mr Astrup subsequently demolished the old house and built a new five bedroom house.*

(4) *THAT the main house was built as Mr Astrup's home at Enasoit Ranch.*

(5) *THAT the new house was built to Mr Astrup's specifications and photographs of the house are annexed herewith as "CKAF 1". The photographs are also annexed to the Appellant's Statement of Facts filed on 22nd July 2015 at pages "C5-8".*

(6) *THAT after constructing the house, Mr Astrup then proceeded to construct a two bedroom pool house next to the main house. The pool house was used by some of Mr Astrup's guests when they visited Enasoit. Annexed herewith and marked "CKAF 2" are photographs of the pool house which are also annexed to the Appellant's statement of facts at pages "C9-14".*

(7) *THAT it was common among the ranches in the area to have cottages, which were let out to paying guests. Similarly, sometime after constructing the houses (main house and pool house) Mr Astrup constructed camp cottages in a central, more scenic part of the ranch in front of a watering hole and near the main dam.*

(8) *THAT as the cottages were on a very scenic part of the ranch, depending on the season and whether he had guests whom he knew staying at the cottages, Mr Astrup would then stay in a specific cottage rather than the main house.*

(9) *THAT all the camp cottages were permanent structures as they had concrete floors covered in wood, concrete walls, fireplaces, electricity, sitting rooms, bathrooms, flushing toilets, showers and proper piped plumbing. The cottages included some minor canvas design elements. The camp cottages were serviced by a fully equipped kitchen, dining room, sitting room, staff quarters,*

borehole, cess pits, TV and computer room and facilities associated with a permanent structure. Mr Astrup always stayed in a particular cottage when staying at the camp cottages. Annexed herewith and marked "CKAF3" are photographs of the specific cottage that Mr Astrup resided in, when staying at the camp cottages as well as the permanent kitchen. Photographs of the camp cottage that Mr Astrup stayed in are also annexed to the Appellant's Statement of Facts at pages "C15-18".

(10) THAT the structures built by Mr Astrup were occupied by him as a home as is evident from his family photographs and personal effects appearing in some of the annexures

(11) THAT initially the cottages were used solely by Mr Astrup and his friends and family but over time the cottages were occasionally let out to paying guests.

(12) THAT as the cottages were let out to paying guests and in compliance with the Kenyan tax obligations, Mr Astrup would at times pay for the guest he had brought to the ranch.

13. Because the local committee failed to consider the photographs mentioned in the affidavit, reproduced above, and because they failed to produce the file and the proceedings before them, this court is then required to consider those photographs de novo in this appeal. The depositions of Mr. Foot were not contradicted by the commissioner. Those depositions show that indeed Halvor had permanent house and cottage that he occupied, at the Ranch, when he was in Kenya. A home is where one lives permanently with or without family members. With afore stated deposition, which was not contradicted, the local committee erred to find that there was no proof that Halvor had a permanent home in Kenya. The proof is there. That proof I find and I hold satisfies the definition of residence under section 2 of Cap 470. Halvor was resident in Kenya and accordingly there ought not to have been deemed interest on the loans Halvor granted the Ranch as required under section 16 (2) (j) of Cap 470.

14. The fact that there are invoices raised by the Ranch in Halvor's name does not deter the court finding as above. This is because of Mr. Foot's deposition that Halvor often paid for his friends who visited the Ranch. The deposition was not contradicted.

15. I concur with the submissions of the learned counsel for the Ranch that the Local Committee erred to have considered The Double Taxation Relief (Kenya/Norway) Arrangements Notice 1973. The determination of the residence or otherwise of Halvor ought to have been as provided in Cap 470. Under that legislation the term residence is defined and there was no need to go beyond that legislation.

16. In the end the appeal does succeed. The Ruling of the local committee (Nyeri) dated 5th June 2015 is hereby set aside. The Respondent shall pay the costs of this appeal.

DATED, SIGNED and DELIVERED at NAIROBI this 5th day of AUGUST 2020.

MARY KASANGO

JUDGE

Before Justice Mary Kasango

C/A Sophie

For the Appellant:

For the Respondent:

ORDER

This decision is hereby virtually delivered this 5th day of **August, 2020.**

MARY KASANGO

JUDGE