



**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL AND TAX DIVISION**

**INCOME TAX APPEAL NO. 2 OF 2015**

**CORAM: D.S. MAJANJA J.**

**BETWEEN**

**FURAHA KENYA LIMITED.....APPELLANT**

**AND**

**COMMISSIONER OF INCOME TAX.....RESPONDENT**

**(Being an appeal from the decision of the Local Committee at Thika dated 22<sup>nd</sup> June 2015)**

**JUDGMENT**

### **Introduction and Background**

1. This is an appeal from the decision of the Local Income Tax Committee (“the Committee”) upholding the respondent’s (“Commissioner”) tax assessment notice dated 18<sup>th</sup> April 2014 inclusive of interest and penalties. Aggrieved by the Committee’s decision, the appellant appealed against it under three headings as follows:

- a. Doubtful Debts
- b. Undeclared sales.
- c. PAYE on shares purchased from Thika Chemists (K) Limited by the appellant and allocated to the appellant’s directors.

2. The facts leading to this case are that on 12<sup>th</sup> February 2013, the Commissioner issued a notice of intention to carry out an audit on the appellant for the period covering 2009 and 2010. The Commissioner began its audit on 14<sup>th</sup> March 2013, presented its findings to the appellant on 7<sup>th</sup> August 2013 and thereafter issued a demand notice claiming Kshs. 16,953,104.00 being taxes due for the year 2009 and 2010.

3. The appellant filed an objection to the assessment on the grounds that the assessed taxes were excessive and incorrect. In its objection, it contended that it would present documents to support its case. The appellant was given an opportunity to present its documents but did not do so. On 30<sup>th</sup> January 2014 the Commissioner sent the appellant a reminder but appellant did not respond. The Commissioner went ahead, confirmed the assessment and sent a notice to the appellant to that effect on 4<sup>th</sup> April 2014.

4. The appellant appealed to the Committee. When the appeal came up on 9<sup>th</sup> October 2014, the appellant was granted an opportunity to provide documents to support its case. The parties engaged in negotiations and agreed all issues except the three issues subject to this appeal. The Committee deliberated on the three issues before it and delivered its decision confirming the assessment.

5. The appellant challenged the Committee decision by the memorandum of appeal dated 3<sup>rd</sup> July 2015. Prior to the hearing of the appeal, the parties engaged in further negotiations and settled the issues concerning doubtful debts and undeclared sales. The only issue left for consideration relates to PAYE on shares purchased by the appellant on behalf of its directors. There is no dispute that if the appellant purchased the shares on behalf of its directors, it was required to deduct and remit any taxes accruing from that benefit by dint of **section 37**

of the **Income Tax Act**.

6. The matter for determination in this appeal is factual and its resolution depends on whether and when the shares for the purchase of Thika Chemists (K) Limited were transferred to the appellant's directors. The appellant contends that the shares were transferred to its directors by mistake and immediately after they realised the mistake, they passed a resolution to have the shares reversing the transfer which transfer was concluded on 4<sup>th</sup> April 2011. The respondent disputes this allegation and states that the resolution was passed 10<sup>th</sup> November 2014 after the assessment was done and that the resulting transaction amounted to tax avoidance.

7. The fact that appellant purchased shares of the Thika Chemists (K) Ltd on behalf of its directors is not in dispute and the Committee confirmed as much from the agreements presented before it in evidence. After reviewing the evidence, it reached the following conclusion;

From the foregoing submissions, the Committee finds that, the Directors of the Appellant benefited from the shares bought by the Appellant pursuant to the agreement dated 30<sup>th</sup> November 2010 and as the Respondent found out, the Appellant paid Kshs. 20,000,000.00 to the Directors of Thika Chemist Ltd who are also shareholders of the Appellant company. The said directors benefited from the said shares to the tune of the amount of Kshs. 20,000,000.00 paid in the year 2010 and is chargeable to tax. Furthermore, copies of the Annual Return made on 27<sup>th</sup> January 2011 and 14<sup>th</sup> October 2011 for the Appellant and Thika Chemist Ltd respectively list the past and present members and directors of the respective Companies as Dr Daniel Wachira, Stephen Kiama and Patrick Warutere Ndoria. During that period the two companies had the same owners and Directors as per the official record from the Registrar of Companies. The appellant failed to adduce evidence to the contrary. The appellant came to own the shares much later.

8. I have also independently considered the evidence on records and I note that at a special general meeting held on 10<sup>th</sup> November 2014, the appellant's Directors passed the following resolution:

The transfer of shares of Thika Chemists (K) Limited to directors be reversed. As per the purchase/sale agreement, the shares were bought by Furaha Kenya who own them.

Another special resolution was passed on 2<sup>nd</sup> December 2014 stating that;

That 99 ordinary shares held by the directors Patrick Warutere, Daniel Wachira and Stephen Kiama be transferred to Furaha (K) Ltd.

9. There are also transfer deeds indicating that the three directors transferred the said 100 shares from Thika Chemists (K) Ltd to the appellant at a total cost of Kshs. 99,000/- on 3<sup>rd</sup> December 2014. This is clear evidence that the transfer was not reversed in the year 2011 as alleged by the appellant. Since the shares were transferred to the appellant in December 2014, it means that the three directors enjoyed the benefits of the purchase of those shares by the appellant on their behalf for the year 2009 and 2010. The appellant was therefore required to remit the necessary taxes.

10. It is also clear that the purported reversal came after the assessment had been done the fact that the original transfer was for valuable consideration negates the appellant's contention that the transfer was inadvertent or a mistake.

11. For the reasons I have set out, I cannot say that the Local Committee erred in coming to the conclusion it did. I also find and hold that the appellant was liable to remit PAYE for the period which the shares were owned by the Directors. The appeal is devoid of merits and is therefore dismissed.

**SIGNED AT KISUMU**

**D.S. MAJANJA**

**JUDGE**

**DATED and DELIVERED at NAIROBI this 26<sup>th</sup> day of November ,2018.**

**F. TUIYOTT**

**JUDGE**

Mr Macharia instructed by Njoroge O. Kimani Advocates for the appellant.

Ms Odundo instructed by the Commissioner of Income Tax.