REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

INCOME TAX APPEAL NO. 7 OF 2014

NATIONAL SOCIAL SECURITY

FUND BOARD OF TRUSTEES.................................APPELLANT

VERSUS

COMMISSIONER OF DOMESTIC

TAXES, KENYA REVENUE AUTHORITY.................RESPONDENT

JUDGMENT

1. This appeal emanates from the decision of the Nairobi Local Committee, dated 19th June 2014.

2. It was the decision of the Local Committee that the appellant was liable for income tax since it had lost its conditional exemption through non-compliance.

3. In the year 2013 the respondent, **THE COMMISSIONER** of **DOMESTIC TAXES, KENYA REVENUE AUTHORITY** conducted income tax assessments on the appellant, **NATIONAL SOCIAL SECURITY FUND BOARD of TRUSTEES.** The said assessments were in respect to the years 2004 upto 2006, and the respondent assessed the tax in the sum of Kshs. 2,155,859,151/-. That sum was said to be inclusive of the income tax, penalty and interest.

4. Both parties are in agreement, that the appellant ***(“NSSF?)*** enjoyed some exemption from taxation. The said exemption is provided for at paragraph 45 of part 1 of the 1st Schedule to the Income Tax Act.

5. Both parties also agree that ***NSSF’s*** income was exempt from income tax provided that the Fund complied with such conditions as may be prescribed.

6. The point of departure, between the parties, is the effect of non-compliance. In other words, when **NSSF** failed to comply with the prescribed conditions, does that imply that the exemption was extinguished, as the respondent has asserted? In the alternative, does the failure by the **NSSF** to comply trigger nothing more than a penalty, as **NSSF** asserted?

7. The appellant’s other contention was that the assessment and claim for income tax for the years 2004 and 2005 were time-barred, in any event.

8. By dint of the provisions of Section 79 of the Income Tax Act, an assessment may be made at any time prior to the expiry of 7 years after the year of income. However is a proviso in the following words;

> ***"a) where fraud or gross or willful neglect has been committed by or on behalf of a person in connection with or in relation to tax for a year of income, an assessment in relation to that year of income may be made at any time?.***

<u>Tax Exemption Status</u>

9. Rule 3 of the Income Tax *(National Social Security Fund) (Exemption)* Rules, 2002 provides as follows;

> **"The income of the National Social Security Fund shall be exempt from income tax subject to the following conditions being complied with by the National Social Security Fund Board of Trustees –**
>
> *a.* ***the Board of Trustees shall cause the accounts of the Fund to be audited every year;***
>
> *b.****the Board of Trustees shall ensure that the annual audit includes:***
>
> *i.* ***the determination of the market value of the assets of the Fund:***
>
> *ii.* ***the determination of the surplus amount of the market value, not allocated to the account of a member of the Fund, excluding the reserve fund that does not exceed ten percent of the market value of the Fund in the year of audit.***
>
> *c.* ***the Board of Trustees shall allocate the surplus amount to respective accounts of individual members in proportion to the value of the amounts allocated to the accounts of all members of the Fund from time to time.***
>
> *d.* ***the Board of Trustees shall cause the audit report to be published in the Gazette and in at least two newspapers of national circulation within nine months of the end of the accounting period of the fund and shall include a list of the assets of the Fund at book and market values;***
>
> *e.* ***the Board of Trustees shall submit the annual audit report to the Commissioner within nine months of the end of the accounting period to which the audit report relates?.***

10. The language of Rule 2 is clear. It says that the income of **NSSF** shall be exempt from income tax <u>subject</u> to compliance with the conditions set.

11. The appellant conceded that it had not met some of the conditions specified. However, for the purposes of this appeal, it is not necessary to go into the details of the conditions which were not complied with. I so hold because there was no dispute about the fact that there was a failure to comply.

12. The question that arises is whether the failure to comply meant that the exemption status was not secured during the period of non-compliance, or if the said non-compliance only attracted the penalty of a fine.

13. In my understanding, the use of the words *"subject to the conditions set?* meant that the exemption was not automatic. It had to be earned, by meeting the conditions stipulated.

14. Thus, if the **NSSF** Board of Trustees met the conditions, the Fund would enjoy the exemption from income tax.

15. The converse was equally true; that if the Board of Trustees failed to meet the conditions, the fund

would not enjoy exemption, for as long as the failure persisted.

16. Therefore, when the **NSSF** Board of Trustees had not met the stipulated conditions, the Kenya Revenue Authority was entitled to assess the tax which was payable, and to thereafter demand that it be paid.

17. My said reading is informed by the rules which govern the interpretation of laws on taxation.

18. In **KEROCHE INDUSTRIES LIMITED Vs KENYA REVENUE AUTHORITY & OTHERS Misc. CIVIL APPLICATION No. 743 of 2006, Nyamu** J. quoted with approval, the following words from **CAPE BRANDY SYNDICATE Vs INLAND REVENUE COMMISSIONERS [1921] KB 64.**

> ***"…in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing to be implied. One can only look fairly on the language used?.***

19. That authority was cited by the appellant. And I have no doubt about its correctness.

20. Therefore, when the appellant reasoned thus;

> ***"All other registered pension and provident funds are exempt from income tax as the provisions of paragraph 14 and 15 of the First Schedule, part 1 Income Tax Act, Cap. 470 and therefore the appellant is equally exempt from the same?;***

> this court says to it that there cannot be any presumption in the interpretation of tax law. Also, there is nothing that can be implied, as **NSSF** has suggested.

21. Paragraphs 14 and 15 of the First Schedule, part 1 of the Income Tax Act does not mention the **NSSF,** therefore the appellant cannot seek to derive any benefit from the said paragraphs.

22. In any event, the paragraphs expressly cite *"all other registered pension and provident funds?.*

23. As **NSSF** is dealt with expressly under paragraph 45, First Schedule, part 1 of the Income Tax Act, it cannot be arguable that **NSSF** was capable of being incorporated into the group comprising *"other registered pension and provident funds?.*

24. Once **NSSF** was dealt with under paragraph 45, it cannot also be construed as being one of the *"other?* pension or provident funds.

<u>Consequence of non-compliance with the conditions set out in Rule 3.</u>

25 Rule 5 of the **NSSF** Rules provides as follows:

> ***"Failure by the Board of Trustees to comply with the conditions of rule 2 shall cause the Board of Trustees to be liable to a penalty not exceeding ten thousand shillings for every such failure?.***

25. That rule does not require any intricate interpretation. It is literally straightforward.

26. The rule imposes a penalty on the Board of Trustees, for non compliance. So for every single financial year when there was a failure to comply with rule 3, a penalty would be imposed.

27. Meanwhile, there is no nexus between rule 45 and rule 5. Whilst the latter imposes a penalty for non-compliance, the provisions of rule 45 simply point out that if the specified conditions were complied with, the **NSSF** Fund would be exempt from income tax.

28. The payment of penalties for the failure to comply with rule 5 could not also mean that the Board of

Trustees had, *(by paying the penalty)* also complied with the conditions in rule 45.

29. The two rules are separate and distinct from each other.

Was the assessment and claim for the years 2004 to 2006 time barred?

30. Section 79 of the Income Tax Act provides as follows:

> ***"An assessment may be made under this Act at any time prior to the expiry of seven years after the year of income to which the assessment relates, but where fraud or gross or willful neglect has been committed by or on behalf of a person in connection with or in relation to tax for a year of income, an assessment in relation to that year of income may be made at any time?.***

31. In effect, the assessment of income tax should ordinarily be carried out prior to the expiry of 7 years after the year of income in issue. That would mean that in relation to the years 2004 to 2006, the tax assessments should have been carried out between 2011 and 2013.

32. However, where there was fraud, or gross or willful neglect, committed by or on behalf of the tax payer, in relation to any particular year of income, the Kenya Revenue Authority would be entitled to assess the tax for such a year, at any time.

33. In order for the Kenya Revenue Authority to become entitled to carry out a tax assessment for any of the 3 years in issue, it would have needed to specify, in respect to each year, the factor which they deemed to enlarge time.

34. In its decision, the Local Committee made the following observation;

> ***"The Respondent, using Section 79 (1) (a) said that there had been willful neglect since compliance commenced only in 2007 following the External Auditor pointing out that the Rules had not been complied with hence such income was taxable the Appellant did not dispute the fact that the audit triggered the compliance?.***

35. There is a world of difference between an assertion and proof. That which a party states to be his case is an assertion. The party needs to adduce evidence to support his said assertion, with a view to proving his case.

36. I have carefully perused the record provided, but did not find proof of any alleged gross or willful neglect.

37. Indeed, when the Tribunal held that it was the External Audit which triggered compliance, that is more akin with a party who took action as soon as its attention was drawn to its previous failure to comply.

38. The tribunal did not make any express finding of willful neglect on the part of the appellant. Secondly, any such finding would have had to relate to each specific year of income, in relation to which the Kenya Revenue Authority had produced sufficient proof.

39. As there was no evidence to support the allegations or assertions of willful neglect, I find that there was no basis upon which the 7 year period for the assessment of tax could have been extended. Accordingly, the appeal is well merited.

40. The assessments for the years 2004 upto 2006 are set aside.

41. The appellant is awarded the costs of the appeal.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **29th day** of **June** 2016.

FRED A. OCHIENG

JUDGE

<u>Judgement read in open court in the presence of:</u>

Mrs. Cheruiyot for the Appellant

Mrs. Ng'ang'a for the Respondent

Collins Odhiambo – Court clerk.