



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 294 OF 2010

REPUBLICAPPLICANT

VERSUS

COMMISSIONER OF DOMESTIC TAXES1ST RESPONDENT

HON. ATTORNEY GENERAL2ND RESPONDENT

EX-PARTE

KENTON COLLEGE TRUST

JUDGEMENT

By the notice of motion application dated 21st September, 2010 Kenton College Trust, the ex-parte Applicant (Applicant) herein, prays for orders as follows:-

1. **THAT** the order for MANDAMUS do issue directed at the Respondents to grant to the Ex-parte Applicant its tax exemption status, the applicant having satisfied the criteria set out in the Income Tax Act Cap 470, under the provisions of Paragraph 10 of the First Schedule to the said Act.
2. **THAT** an order of CERTIORARI do issue for purposes of quashing the decision dated 19th March, 2012 by the 1st Respondent.
3. **THAT** the costs of and occasioned by this application be provided for.

The Commissioner of Domestic Taxes (the Commissioner) and the Attorney General are the 1st and 2nd respondents respectively.

In brief, the Applicant is an education institution operating in Kenya. In 1989 it sought and obtained exemption, from paying income tax, from the 1st Respondent. The exemption was granted in accordance with Section 13 and Paragraph 10 of the First Schedule of the Income Tax Act, Cap 470, Laws of Kenya (the Act).

Subsequently the Commissioner issued a directive to the effect that an application for exemption from payment of income tax should be renewed after every three years. In 2004 the Applicant successfully applied for renewal of the exemption. In 2008 the Applicant in compliance with the said directive applied for renewal of exemption and received a reply through a letter dated 19th March, 2010 which read as

follows:-

PIN P051182475A

19th March, 2010

Kimani & Associates,

Certified Public Accountants

P O Box 20122-00200

NAIROBI

ATTN: Mr N. O. Kimani

Dear Sir,

**RE KENTON COLLEGE TRUST – APPLCIATION FOR TAX EXEMPTION UNDER
PARAGRAPH 10 TO THE FIRST SHCHEDULE**

Reference is made to your application for income tax exemption.

On review of your application the following observations were made:

- 1. The fees charged by the School are exorbitant and cannot be afforded by a majority of the Kenyan public. In addition there is no indication of any scholarships offered to needy students;**
- 2. The School run by the Trust operates under the British curriculum which is not open to a majority of Kenyan children who study under the 8-4-4 curriculum**

In light of the foregoing, it is in our opinion that the Trust has not met the conditions set out under paragraph 10 of the First Schedule of the Income Tax Act, Chapter 470 of the Laws of Kenya. This is because it has not been established for the advancement of education of the poor as it caters to a very small section of the population and is limited to a particular class of people.

That being the case we regret to inform you that your application for exemption under the aforesaid provisions of the law has been denied.

Consequently you are required to make arrangements, to pay the resultant taxes for the year of income 2008 and 2009 as well as instalment taxes for the year 2010.

Yours faithfully,

A N KIURA

FOR SENIOR ASSISTANT COMMISSIONER

WEST OF NAIROBI

This is the letter that has brought the Applicant to court. It is the Applicant's case that for one to qualify for exemption from payment of income tax, there is need to only show that the body "is established solely for the purposes of education." The Applicant argues that the reasons given by the Commissioner for the revocation of the exemption are not valid reasons and the Commissioner did not therefore exercise his discretion judiciously and fairly. The Applicant argues that by revoking the exemption, the Commissioner exceeded the powers granted to him by statute. The Applicant contends that the Commissioner has failed to exercise his statutory mandate by refusing to exercise his power to extend the

exemption status to the Applicant.

The 2nd Respondent did not file any response. It only sought to be exempted from these proceedings.

The Commissioner opposed the application through a replying affidavit sworn by Monica Kuyoh on 27th January, 2011. Through the said affidavit the Commissioner reiterates the contents of the letter dated 19th March, 2010. The Commissioner's case is that the Applicant had failed to comply with the conditions of the grant of the exemption and he was therefore entitled to revoke its exemption status. It is the Commissioner's assertion that he was entitled to cap the period of exemption to three years since he is entitled to do so by Section 13(1) of the Act.

In my view the issue for the determination of this court is whether the Commissioner was entitled to revoke the Applicant's exempt status and if so, whether the revocation was fair considering the circumstances of this particular case.

The starting point would be to look at the law. Section 13 of the Act provides that:-

“13. (1) Notwithstanding anything in Part II, the income specified in Part I of the First Schedule, which accrued in or was derived from Kenya shall be exempt from tax to the extent so specified.

(2) The Minister may, by notice in the Gazette, provide -

(a) that income or a class of income which accrued in or

was derived from Kenya shall be exempt from tax to the extent specified in the notice;

(b) that an exemption under subsection (1) shall cease to have effect either generally or to the extent specified in the notice.

(3) A notice under subsection (2) shall be laid before the National Assembly without unreasonable delay, and if a resolution is not passed by the assembly within twenty days on which it next sits after the notice is so laid that the notice be annulled, it shall thenceforth be void, but without prejudice to the validity of anything previously done thereunder, or to the issuing of a new notice.”

Paragraph 10 of the First Schedule of the Act provides that:-

“10. Subject to section 26, the income of an institution, body of persons, or irrevocable trust, of a public character established solely for the purposes of the relief of the poverty or distress of the public, or for the advancement of religion or education:-

(a) established in Kenya; or

(b) whose regional headquarters is situated in Kenya,

in so far as the Commissioner is satisfied that the income is to be expended either in Kenya or in circumstances in which the expenditure of that income is for purposes which result in the benefit of the residents of Kenya:

Provided that any such income which consists of gains or profits from a business shall not be exempt from tax unless those gains or profits are applied solely to those purposes and either -

(i) the business is carried on in the course of the actual execution of those purposes; or

(ii) the work in connection with the business is mainly carried on by beneficiaries under those purposes; or

(iii) the gains or profits consist of rents (including premiums or similar consideration in the nature of rent) received from the leasing or letting of land and chattels leased or let therewith.”

From the above cited provisions it is clear that income of an institution, body of persons or irrevocable trust, of a public character established solely for the purposes of the relief of the poverty or distress of the public, or for the advancement of religion or education can be exempted from tax. Before the Commissioner grants an exempt, he must satisfy himself that an applicant meets the conditions for grant of such an exemption. In the case before me, the Applicant made its application in 1982 and an exemption was granted in 1989. The Commissioner must therefore have been satisfied that the Applicant met the conditions for grant of an exemption.

There was an argument about the legality of a review of the tax exempt status every three years. The communication to that effect has not been placed before this court and I do not think it would be proper for me to comment or make a determination on a document which I have not seen. I will leave the issue at that.

Counsel for the Commissioner appears to have argued that the tax-exempt status was wrongly granted to the Applicant in the first instance. I do not think this line of argument serves any purpose since the much it can do is to expose the Commissioner's incompetence. I do not think that an application that took over seven years to consider can be said to have been allowed improperly.

On the other hand counsel for the Applicant appears to have submitted that tax exemption once granted is for life. I do not buy this argument. If the status of a body that has been exempted from tax changes then the Commissioner has a right to review the tax-exemption status of such a body. I am persuaded by the argument of Mr. Ontweka for the Commissioner that an exemption may be modified or rectified by:-

1. A notice to the organization enjoying the tax exemption;
2. Enactment of legislation or rectification of a tax treaty; and
3. A decision of the High Court.

There could be other circumstances which can allow the revocation or modification of an exemption. An exemption from payment of tax on income cannot therefore be said to be for life. I therefore find that the Commissioner has jurisdiction to revoke or modify an exemption. In doing so, the Commissioner must act reasonably and fairly.

The question is whether the Commissioner acted reasonably or fairly before revoking the Applicant's exemption. In order to revoke the exemption, the Commissioner must act on information that contravenes the information that was supplied at the time the exemption was granted. None of the parties has given the court any evidence as to the information that was supplied to the Commissioner at the time the exemption was granted. Looking at the letter dated 19th March, 2010, it is noted that the Commissioner is saying, among other things, that since the Applicant does not offer the 8-4-4 curriculum then the exemption cannot be extended.

It is a fact in the public domain that the 8-4-4 system of education was in place in 2004 when the exemption was extended for three years. This cannot therefore be good reason for the revocation of the exemption. There is no evidence that the Applicant had converted itself into a business operation and should therefore be asked to pay tax on income. It was incumbent upon the Commissioner to establish that the income from the Applicant's activities was being applied to activities not related the objectives of the trust. There is no evidence that this was not done.

After reviewing various decisions and books, I have come to the conclusion that for one to successfully rely on the principle of legitimate expectation it must be demonstrated that:-

- a. The representation underlying the expectation is clear, unambiguous and devoid of relevant qualification;
- b. The expectation is reasonable;
- c. The representation was made by the decision-maker; and
- d. The decision-maker had the competence and legal backing for making such representation.

Applying these principles to the facts of this case, I find that the Applicant had legitimate expectation that it would continue to enjoy the exemption so long as it conducted its operations according to its objectives. These objectives must have been brought to the attention of the Commissioner at the time the exemption was granted. Payment of taxes must be certain and it cannot be left to the whim of the taxman. The Applicant ought to have been confronted with sufficient evidence to show that it had veered off the track of its objectives. The Commissioner ought to have clearly told the Applicant the reasons for the grant of the exemption in the first place and how those conditions had changed to warrant payment of tax. Reasons ought to have been given to the Applicant explaining why the application for the renewal of the tax exempt status was being rejected. There was need to confront the Applicant with evidence of its changed status.

It cannot be said that the action taken by the Commissioner was illegal. What happened is that the Applicant was treated unfairly by the Commissioner. It was never informed that its objectives had changed to warrant the revocation of the tax-exempt status. In my view this application should succeed. That being so, an order of certiorari is issued calling into this court the Commissioner's letter dated 19th March, 2010 and quashing the same. The Applicant shall continue enjoying the tax exempt status subject to its revocation or modification in accordance with the law. There will be no order as to costs.

Dated, signed and delivered at Nairobi this 28th day of August , 2013

W. K. KORIR,

JUDGE