



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC CIV APPLI 525 OF 2006

IN THE MATTER OF: ORDER LIII OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF: THE LAW REFORM ACT CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF: THE INCOME TAX ACT CAP 470 LAWS OF KENYA

AND

**IN THE MATTER OF: AN APPLICATION BY PILI MANAGEMENT
CONSULTANTS LIMITED TO APPLY FOR
JUDICIAL REVIEW ORDERS**

AND

**IN THE MATTER OF: A DECISION AND ORDER MADE BY THE
COMMISSIONER OF INCOME TAX, KENYA**

**REVENUE AUTHORITY, INVESTIGATION AND
ENFORCEMENT DEPARTMENT ON 8TH JUNE 2006
DECLARING CITIBANK N.A. AGENT OF THE
APPLICANT.**

BETWEEN

PILI MANAGEMENT CONSULTANTS LIMITEDAPPLICANT

VERSUS

THE COMMISSIONER OF INCOME TAX

KENYA REVENUE AUTHORITYRESPONDENT

J U D G M E N T

By a notice of motion dated 16TH June 2006, Pili Management Consultants Ltd, the applicant herein, applied to this court to issue the following judicial review orders against the Commissioner of Income Tax, Kenya Revenue Authority, the Respondent herein:

- (a) An order of certiorari to quash the agency notice dated 8th June 2006 issued by the Respondent to declare Citibank N.A. as agent for the applicant for purposes of collection and recovery of tax allegedly due from the applicant and demanding for payment in the sum of Kshs.10 million from Citibank N.A when the applicant had no tax liability.
- (b) An order of prohibition to prohibit the Respondent from implementing the said decision and order made vide an agency notice dated 8th June 2006 and or from demanding, collecting and or retaining any money held by Citibank N.A. and to refund, return all moneys collected from Citibank N.A. belonging to the applicant pursuant to the decision and or order contained in the agency notice dated 8/6/2006.
- (c) Costs of the application.

The Respondent opposed the motion by filing the replying affidavit of Samuel Aboge sworn on 17th July 2006.

The history of this matter appears to have started when Kenya Revenue Authority (Respondent) issued an agency notice dated 8th June 2006 to Citibank N.A. declaring it an agent of Pili Management Consultants Ltd (Applicant) and others and demanding payment of Kshs.50,000,000/- as tax due from the applicant. The Respondent issued the agency notice pursuant to the provisions of Section 96 of the Income Tax Act. The agency notice was copied to the applicant. Upon receipt of the same, the applicant

then instituted these judicial review proceedings to challenge the notice and to prohibit the Respondent from implementing the decision.

It is the argument of Mr. Asige advocate for the applicant that the agency notice was issued by the Respondent in contravention of Sections 77,78,84 and 96 of the Income Tax Act (Chapter 470 Laws of Kenya). It is submitted by the learned Counsel that the agency notice could only be lawfully issued when there is tax due under Section 96 of the Income Tax Act. According to the applicant, a nil return had been filed on 31.12.2004 hence there was no tax due by the time the notice was issued. In response to this submission Mrs. Kamande learned advocate for the Respondent was of the view that the Respondent had carried out investigations and had discovered that there was tax due in view of the deposits in the applicant's accounts held by Citibank N.A.

It is also the argument of Mr. Asige that the agency notice did not specify the year it relates. According to the learned advocate this defect made the agency notice fatally defective in that it was not certain as to when the tax became due. In response to this ground Mrs. Kamande was of the view that the Respondent had the discretion to charge tax on any income received and or earned pursuant to Section 3(2) and for any period.

It is further argued by the applicant that the tax was not due by the time the agency notice was issued. In response to this argument Mrs. Kamande was of the firm view that that tax was from the applicant as of 30th April 2005, that is 4 months from the date of filing return which in this case was on 31.12.04. Section 92 A was cited as the law setting the period when tax will be deemed to be due.

The applicant's advocate submitted also to the effect that the agency notice should not have been issued before hearing the application in objection to assessment as envisaged under Section 84 of the Act. In his view Mr. Asige submitted that the applicant lost the right to prior hearing. In response to this view Mrs. Kamande argued that the applicant had not lost the right to be heard. She was of the view that had the applicant been heard, the money could have been cleared from the account as manifested by the attempt by the applicant to withdraw the money held by Citibank N.A. upon obtaining stay orders granted at the leave stage. In any case it is argued that the applicant is still open to seek for the internal redress mechanism under Sections 84 and 85 of the Income Tax Act.

It has been stated that the Respondent acted oppressively and in abuse of his powers. The Respondent has been accused of arbitrarily fixing the amount of tax due without following the laid down procedures. It is Mr. Asige's view that the Respondent plucked out figures from the air. Mrs. Kamande was of the contrary view that the Respondent properly exercised his discretion under Sections 72,73,74, 77 and 94 of the Income Tax Act, in assessing tax.

I have carefully considered the able submissions made by

learned counsels from both sides. What is not in dispute is that the Respondent is empowered under Section 96 of the Income Tax Act to issue an agency notice like the one of 8/6/2005. It is therefore not correct to allege that the Respondent acted without jurisdiction. Perhaps what is of my concern is whether the power was properly exercised. I keep in mind the fact that these are judicial review proceedings which are only concerned with the decision making process and not the merits of the decision. It has been alleged that the Respondent issued such a notice when there was no tax due hence the Respondent acted capriciously. I have agonized in considering this submission. It is not denied that the Respondent carried out certain investigations in respect of tax evasions pursuant to the provisions of Sections 113, 119 & 120 Income Tax Act amongst other, Provisions of the Act. The investigations revealed that though the applicant had filed a nil return on 31.12.2004, there was evidence that there was some money deposited in the applicant's accounts held by Citibank N.A. I do not see how the respondent can be said to have acted capriciously in view of these revelations. In any case it is clear from the provisions of S.3(2) of the Income Tax Act that the Commissioner has the discretion to demand tax due in respect of any period. I agree with Respondent that a dispute as to assessment of tax can be sorted out under S.84 of the Income Tax Act which in any case is shown that the applicant has raised an objection so far. It is also not denied that the Respondent has a mechanism for refund of the excess tax paid under

Section 105 of the Act.

Upon a careful consideration of the arguments presented before this court I have formed the opinion that the Respondent acted within the powers donated to him by parliament.

There was nothing to suggest that such powers were exercised unreasonably, capriciously and or irrationally. What has emerged is that the applicant is questioning the merits of the decision. Such disputes can be sorted out within the provisions of the Income Tax Act or through the normal civil process.

For the above reasons the motion is ordered dismissed with costs to the Respondent.

Dated and delivered at Mombasa this 6th day of February 2007.

J.K. SERGON

J U D G E