



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI MILIMANI(MILIMANI LAW COURTS)
MISC CIVIL APPL 1371 OF 2005

REPUBLIC.....APPLICANT

Versus

KENYA REVENUE AUTHORITY.....RESPONDENT

EX-PARTE STANBIC BANK KENYA LIMITED

JUDGMENT

Stanbic Bank (K) Ltd. filed the Notice of Motion dated 21st September 2007 seeking the following orders against the Kenya Revenue Authority, the Respondent herein. The orders are as follows;

- a) an order of certiorari removing to this court for purposes of being quashed the letter dated 2nd September 2002, written by V.M. Muhatia for the Deputy Commissioner, Large Tax Payer Office, Kenya Revenue Authority and addressed to Messrs KPMG Kenya and the letter of 8th September written by J.M. Ojee, Senior Assistant Commissioner, Large Tax Payer Office, Kenya Revenue Authority and addressed to the Finance Director, Stanbic Bank (K) Ltd.
- b) an order of prohibition to prohibit the Respondent or any of its agents from further demanding Kshs.7,954,342.00 from the Applicant with respect to this suit;
- c) An order of prohibition to prohibit the Respondent from taking any recovery measures forced or otherwise against the Applicant for the payment of the said sum of Kshs.7,954,342/= or any sum in respect of this suit.

The Notice of Motion is premised on a Statement dated 16th September 2005 and a Verifying Affidavit of Brenda Aluoch, Head of the Applicants Legal and Compliance Department, sworn and filed on 10th September 2005 and skeleton arguments dated 8th February 2007.

The Application was opposed and a Verifying Affidavit was sworn by James Masiro Ojee, a Senior Assistant Commissioner in the Large Tax payers Office of the Kenya Review Authority. The Respondent also filed skeleton submissions on 15th March 2007.

Brenda Aluoch deponed that on 2nd September 2002, the Applicant received a letter similar to another addressed to KPMG, Kenya, from the Respondent asking the Applicant to pay withholding tax on Reuters Services for the period 1996-1999 (BA 1). This is because Reuters is a non-resident entity in Kenya and

the Respondent contends that the payments made to Reuters, as consideration for technical services supplied to the Applicant, and which forms the basis on which financial decisions are made by the Applicant, qualifies to be taxed under the 'management or professional fee' category. The Applicant wrote back to the Respondent on 29th January 2003 objecting to the tax demand because the contract between the Applicant and Reuters is for news and information and the payment to Reuters is a subscription for a daily periodical and payments are not subject to withholding tax (BA 2); That S.35 (1) of the Income Tax Act does not provide for payment of such tax for provision of information by way of publication; that the period 1996-99, the Act did not define the term "managerial and professional fee" but that the term was introduced in 2000 and the Respondent cannot therefore apply the law retrospectively.

On 13th October 2004, the Respondent made another demand (BA 4) for Kshs.7,954,342 which includes the principal tax, penalties and interest. When negotiations between the parties failed, by letter of 1st July 2005 (BA 6) the Respondent threatened forced recovery of the taxes from the Applicant and the Applicants were prompted to file this Application.

Mr Ogunde counsel for the Applicant relied on the case of (1) **REP V COMMISSIONER OF INCOME TAX ex parte SDV TRANSAM MISC APPLICATION 212 OF 2004** which he contends is similar to the present case save that the news material supplied in the SDV case were termed as 'royalties' and therefore tax was chargeable. Counsel also relied on the case of (2) **KEROCHE INDUSTRIES V KRA & OTHERS MISC APPLICATION 743 of 2006** and (3) **COMMISSIONER OF INCOME TAX V WESTMONT (K) LTD MISC APPLICATION 626 of 2002** where the courts supported the principle that if there is a dispute as to the meaning or scope of a tax legislation, that dispute should be resolved in favour of the tax payer. He submitted that the Applicants are attempting to expand the application of S.35 (1) (a) of the Income Tax Act as clearly evidenced by the correspondences between the parties over the meaning. He urged that the dispute should be resolved in favour of the Applicant.

To the contrary, Mr. Ojee deponed that in 1999, the Respondent subjected the Applicant to an Income Tax Audit covering Pay As You Earn (PAYE) and withholding tax in respect of the years 1996-1999 and the findings (Ojee 1) were communicated to the Respondent and a demand for tax on various items which included payments made to Reuters. All queries raised in the report have been resolved except the one pertaining to Reuters of U.K. At paragraph 7 of the Affidavit, the nature of the Services and payments were set out and in the Respondents view, the said services and payments are income chargeable to Income Tax under Ss. 2, 35(1) and paragraph 3 of the 3rd schedule of the Income Tax Act, Cap 470 Laws of Kenya. It is also the contention of the Respondents that the information supplied by Reuters (UK) is of a technical nature and falls within the definition of "Management or professional fees" with the meaning under Income Tax Act; that the information is tailored in such a manner that it is of great value to the Applicant when making critical financial decisions and the said information cannot be accessed through the internet.

That the Income Tax, both before and after the amendment of the Income Tax Act in 2000 covered the nature of services offered by Reuters UK to the Applicant for which withholding tax should have been paid and the Respondent therefore rightfully made the demand for payment of the unpaid tax, vide demand letter of 8th September 2005.

Mr. Matuku, Counsel for the Respondent in addition to Mr. Ojee's deposition submitted that the prayers sought in this Application cannot lie because the Respondent acted within the law in demanding taxes and the demand is not an illegality and cannot be quashed. Further that the Respondent cannot be prohibited from demanding taxes which is its mandate under S.5 (1) of Kenya Revenue Authority Act, Cap 468. As regards the decisions cited Counsel replied that they are not binding on this court as they are all High Court decisions, courts or with the same jurisdiction and can only be persuasive. That in any event, the **WEST MONT POWER LTD CASE (supra)** has been appealed against; and no decision yet made; that the **TRANSAMI CASE** is different from the instant case because it involved agency and royalties; that **KEROCHE CASE** is also different in that it dealt with customs issues on classification and calculation of Excise Duty.

In my view the issues raised by the Respondent's in their skeletons arguments are the questions that this court will attempt to answer.

They are as follows:

- 1) What is the nature of services provided to the Applicant by the entity known as Reuters (UK);
- 2) Whether the payments made to Reuters UK by the Applicant are subject to withholding tax under the Income Tax Act before payment to Reuters (UK) by the Applicant;
- 3) Whether the information supplied to the Applicant by Reuters is of a technical or consultancy nature and within the definition of "management or professional fees" as provided for under the Income Tax Act;
- 4) Whether between 1996 – 1999, the Income Tax Act defined the terms "management or professional fees";
- 5) Whether the payments that the Applicant has made to Reuters (UK) are in recognition of the technical or consultancy services that are offered by Reuters;
- 6) Whether the orders sought can be granted;
- 7) Who bears the costs of the Application.

What is the nature of the Agreement between the Applicant and Reuters UK?

The contract signed between the Applicant and Reuters (UK) was exhibited as BA 2, dated 15th November 2001. It is for provision of:

- 1) Information which includes still, moving and sound recordings;
- 2) Materials, hardware and/or software and related documentation;
- 3) Reuters Business information products;
- 4) Other services including support and maintenance.

The news and information relate to financial matters.

The information, services and materials are provided through terminals installed by Reuters (UK) in the Applicant's premises and payments are made to Reuters by way of subscription.

The next question and which is key in these proceedings is whether the payments made to Reuters were subject to withholding tax? The Applicants contend that in the period 1996 to 1999, S. 35 (1) of the Income Tax Act did not provide for payment of such tax for services such as provision of financial information by way of publication or otherwise by a non resident and it did not define what "management and professional fees" is

Section 35(1) (a) provides:

"A person shall, upon payment of an amount to a non-resident person not having a permanent establishment in Kenya in respect of:

- a) **management or professional fee, except a commission paid to a non resident agent in respect of flowers exported from Kenya and auctioned in any market outside Kenya.**

b)

c)

(2)

(3)

Which is chargeable to tax, deduct therefrom tax by the appropriate resident, withholding tax.”

Paragraph 3 (a) of the 3rd schedule of the Income Tax Act goes ahead to specify which withholding tax will apply and the percentage payable. It provides:

“3 the non resident tax rates shall be:

(a) in respect of management or professional fees other than management or professional fees deductible under paragraph 5 (2) (g) of the ninth schedule, twenty percent of the gross sum payable.

Section 2 of the Income Tax Act defines what “Management and professional fess” means-

“... means a payment made to a person other than a payment to an employee by his employer, as consideration for managerial, technical, agency, contractual or consultancy services however calculated.”

It is not disputed that Reuters (UK) is a non resident company. It is also common ground that the said Reuters do supply financial information to the Applicant Online following a contract between the Applicant and Respondents.

Whereas the Respondent refer to the Services provided by Reuters(UK) as technical services of a professional nature which brings the service within the definition of “Management and Professional fees” under S. 2 of the Income Tax Act, the Applicant maintains that the information received from Reuters (UK) on line does not fall within that definition and only assists them in making financial decisions after they give the said information some meaningful interpretation.

No doubt monies are paid to Reuters (UK) for services rendered as a result of the contract signed between the parties. The consideration by way of subscription is income to Reuters (UK). The question then is whether that income by Reuters is subject to tax under the Income Tax Act.

It is important to look at what the two terms technical and consultancy mean. In the Concise Oxford English Dictionary, ‘**technical**’ means

“1) of, or relating to a particular subject, art or craft or its techniques requiring special knowledge to be understood;

2) Of, involving or concerned with applied and industrial sciences relating to the operation of machines;

3) according to a strict application or interpretation of the law or rules.”

The Oxford Advanced Learners Dictionary sixth Ed. Defines ‘technical’ as;

“1. connected with the practical use of machinery, methods etc in accounts in science and industry;

2. connected with the skills needed in a particular job, sport, art etc;

3. **connected with a particular subject and therefore difficult to understand if you do not know about that subject;**

4. **connected with the details of a law or set of rules.**

In the concise Oxford English dictionary, consultancy is defined as

“A company that gives expert advice on a particular subject to other companies, people or organizations.

2. **expert advice that a company or person is paid to provide on a particular subject.”**

Section 2 of the Income Tax Act defines consultancy fees as payments made to any person for acting in advisory capacity or provided services on consultancy issue.

From the above definition of the terms technical, I am satisfied that the service offered by Reuters (UK) to the applicant is technical in nature. It is information on financial matters that assists the Applicant make sound financial decisions in its day to day affairs in the business of a bank. That information cannot be obtained ordinarily.

Can Reuters (UK) be considered as consultancy? Reuters offers specialised information on financial markets which the Applicant says they have to interpret in order to apply to their special circumstances. It is expert advice on a particular subject, that is, financial markets which enables the bank easily perform its functions and carry out business. In my view the services by Reuters would fall squarely into the definition of a consultancy.

The Applicants in my view have adopted a restricted interpretation of what may be covered under Section 2 of the Income Tax Act. The Act cannot be expected to cover every detail of what managerial, technical, agency, contractual or consultancy services will entail. In this age of advanced technology, consultancy can easily be carried out on line.

The next issue then is whether the Income Tax Act had defined the term “Managerial and professional” fees in the period 1996 to 1999.

In the Income Tax Act 1995, Management and professional fees was defined as **“a payment made to a person, other than a payment made to an employee by his employer, as consideration for managerial, technical or consultancy services however calculated.”**

I have earlier set out Section 2 of the 2000 Act,. The only amendment to that Section is that it added the terms **“agency and Contractual”** to that Section.

It is apparent that both definitions in the 1995 and 2000 Acts include **‘technical service and consultancy’** for which management and fees are payable. The definition in the 2000 Act does not therefore have any retrospective effect. The period for which withholding tax is claimed against the Applicant was covered both in the 1995 and 2000 Acts and management and professional fees were payable for technical and consultancy services.

I have considered the authorities that were cited. In the **SDV TRANSAMI CASE**, it was a claim for withholding tax not deducted from non residents. It was a claim for payments made to SITA for on line information on the movements of ships and shipping companies. It related to agency fees and royalties. In that case, the court found no evidence of an agency relationship between UPS and Transami and found that relationship to fall under a different category other than that relied upon

The other decisions of **KEROCHE INDUSTRIES AND WESTMONT POWER LTD** only go to reinforce the need for certainty and clarity in the tax law statutes for purposes of better business planning. In **WESTMONT POWER LTD**. Justice Visram cited the case of **COMMISSIONER OF INLAND**

REVENUE V SCOTTISH CENTRAL ELECTRICITY POWER CO. (1931) 15 tc 8761 where the court said at page 790

“But in a taxing Act, I venture to think that it would be contrary to all principles to seek for an implication against a tax payer”

So that in the event of any ambiguity in a tax law, it is supposed to be resolved in favour of the tax payer but not the Revenue Authority. Is there any ambiguity in the provisions of law relied upon? I find none. In adopting a purposeful approach, I am of the considered view that the services rendered by Reuters (UK) to the Applicant do fall under the “management and professional fees” category as the services rendered by Reuters (UK) were technical and consultancy.

Can the orders sought lie?

Judicial Review orders are discretionary in nature. I have found in my judgment that the services rendered by the Applicant are technical and consultancy and subject to withholding tax. S. 5 of the Income Tax Act mandates the Respondent to collect taxes and Reuters having received income from the Applicant, it was the duty of the Applicant to remit withholding tax to the Respondents. The Respondents have not acted outside their mandate under the statutory provisions of Income Tax nor has the Act been applied retrospectively as alleged. The Applicants have not demonstrated that they are entitled to the orders sought and the same will not be granted. The Motion is dismissed with costs to the Respondents.

Dated and delivered this 23rd day of November 2007.

R.P.V. WENDOH

JUDGE

Read in the presence of:

Mr. Ogunde for Applicant

Ms Lavuma holding brief for Matuku for Respondent

Daniel: Court Clerk