Commissioner of Domestic Taxes v Baker Hughes EHO Limited (Kenya Branch) (Income Tax Appeal E199 of 2023) [2025] KEHC 8751 (KLR) (Commercial and Tax) (19 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8751 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INCOME TAX APPEAL E199 OF 2023

BK NJOROGE, J

JUNE 19, 2025

BETWEEN

COMMISSIONER OF DOMESTIC TAXES ..... APPELLANT

AND

BAKER HUGHES EHO LIMITED (KENYA BRANCH) ..... RESPONDENT

JUDGMENT

1. This is a Judgement arising out of a decision of the Tax Appeals Tribunal delivered on 6th October, 2023 in Tax Appeals Tribunal Tax Appeal No. 548 of 2021.

Background Facts

2. The Appellant conducted an audit of the Respondent's operations for the years 2014 to 2016 and issued preliminary findings on 24th September 2020, citing a potential tax liability of Kshs. 1,811,986,268. This was in respect of PAYE and Withholding Tax. The Respondent disputed the computation in a response dated 8th October 2020. However, the Appellant proceeded to issue an assessment on 14th October 2020 for Kshs. 1,766,717,347, inclusive of penalties.

3. The Respondent objected to this assessment on 13th November 2020, initiating a series of engagements that led to an Objection Decision dated 28th July 2021, which confirmed the full tax demand. Dissatisfied, the Respondent appealed to the Tax Appeals Tribunal (Appeal No. 589 of 2021). To amicably resolve the dispute, the Appellant initiated Alternative Dispute Resolution (ADR) proceedings. This culminated in an ADR agreement dated 14th September 2022, where the principal PAYE amount was agreed upon. This resulted in a partial consent filed and adopted by the Tribunal on 28th September 2022.

4. In its judgment delivered on 6th October 2023, the Tax Appeals Tribunal partially allowed the Respondent's appeal. Thus, setting aside the withholding tax assessment amounting to Kshs. 428,917,084. It also nullified the penalties and interest relating to tax assessments issued before 15th October 2015. This was on account of time bar. Additionally, the Tribunal ordered the Appellant to re-calculate penalties and interest specifically relating to PAYE for undisclosed payments from May to December 2015 and for late payments in May and September 2016. This was to be completed within 90 days.

5. The Appellant, being aggrieved with part of the judgment of the Tax Appeal Tribunal delivered on 6th October, 2023, appealed against part of the said judgment on the following grounds;

    a. The Tax Appeals Tribunal erred in law in finding that payments made to IPRL were not payment for management/ professional fees but reimbursement of employee salaries, thereby setting aside the Appellant's Withholding Tax assessments of Kshs.428, 917, 084

    b. The Tribunal erred in law in finding that part of the Appellant's assessment was time- barred against the evidence presented by the Appellant.

    c. The Tax Appeals Tribunal erred in law in finding that part of the assessment of penalties and interest was time barred, thereby setting aside any penalties and interest relating to tax assessments raised prior to 15th October, 2015.

6. The Appellant prayed that:

    a. The Tribunal's finding that part of the Appellant's assessment was time-barred be set aside.

    b. The Tribunal's judgment setting aside the Appellant's assessment for withholding tax amounting to Kshs.428,917,084 be vacated and the Appellant's assessment for withholding tax be upheld;

    c. The Tribunal's finding that part of the assessment for penalties and interest was time barred be set aside

    d. The Appellant's appeal be allowed with costs.

7. In contention, the Respondent filed a Statement of Facts dated 22nd April 2024. It stated that the penalties are without basis as the Respondent had already filed its manual tax returns by the time the Appellant's tax administration portal, iTax, was implemented. The directive by the Appellant for taxpayers to file retrospective returns triggered the penalties on iTax. That the penalties were auto generated as a result of the manner in which the system was configured. These penalties had no factual or legal basis as manual returns had already been filed and taxes paid on time, prior to the Appellant's directive.

8. The Appellant's assessment of late filing penalties for 2014 and 2015 is an attempt by the Appellant to profit from its directive to taxpayers to re-submit tax returns on the iTax platform. Therefore, the Tribunal correctly applied the facts and the law when it found that the penalties and interest should only have covered tax periods within the five-year timeline provided by law.

Issues for Determination

9. The Appeal was canvassed by way of written submissions which the Court has carefully considered. The issues for determination framed by the Court are as follows;

a. Whether the Tribunal erred in finding that payments made to IPRL (also known as IPRS) were not payment for management/professional fees but reimbursement of employee salaries thereby setting aside the Appellant's With Holding Tax assessments of Kshs.428,917,084;

b. Whether the Tribunal erred in finding that part of the Appellant's assessment was time barred against the evidence presented by the Appellant;

c. Whether the Tribunal erred in finding that part of the assessment of penalties and interest was time barred thereby setting aside any penalties and interest relating to assessments raised prior to 15th October 2015.

Analysis

10. In determining this appeal, the Court is exercising its appellate jurisdiction that is circumscribed by Section 56(2) of the TPA, which provides that

> " An appeal to the High Court or to the Court of Appeal shall be on a question of law only."

Whether the Tribunal erred in finding that payments made to IPRL (also known as IPRS) were not payment for management/professional fees but reimbursement of employee salaries thereby setting aside the Appellant's With Holding Tax assessments of Kshs.428,917,084;

11. The Appellant submitted that the Tribunal erred in finding that the individual expatriate employees were employees of the Respondent. This is by disregarding the employment contracts which had been exhibited by the Appellant, showing that these employees had entered into contracts of employment with IPRS and not the Respondent. Thus, the Respondent was not an employer of IPRS and therefore the exception under Section 2 of "payments made to an employee by his employer" cannot apply. This exception would only be relevant if there was an employee – employer relationship between the Respondent and IPRS.

12. Section 2 of the *Income Tax Act* has been relied upon by both parties with respect to payments of management or professional fee. The relevant part of the section provides as follows –

> " management or professional fee" means payment made to a person, other than a payment made to an employee by his employer, as consideration for managerial, technical, agency, contractual, professional or consultancy services however calculated"

13. Therefore, was the Respondent an employer and if not, were the payments made by the Respondent management/professional fees?

14. The Appellant maintained that the Respondent did not have any contractual relationship with the employees since their employment contract were between the individual employees and IPRL. That therefore the employees belonged to IPRL so to speak and not to the Respondent.

15. The Appellant pointed out that the contract executed between Barry Arthur and James W. Briley was for and on behalf of International Professional Resources Limited. The Respondent was not a party to this contract and therefore cannot allege that the Individual employees were its employees. The Individual employees were employed and signed a contract with IPRL and therefore IPRL was the employer. The employment could not be implied and there was no evidence before the Tribunal that there was any contract of employment between these individual employees with the Respondent.

16. The Appellant further submitted that the Individual employees were employees of IPRS and not the Respondent. Meaning that when the employees were seconded to the Respondent based on the Payroll Administration Service Agreement, the Respondent was receiving specialized labour from IPRL through the seconded employees. That therefore that specialized labour qualified as management or professional services as defined in Section 2 of the ITA. The payments made under paragraph 4.1 of the PSA therefore qualified to be subjected to Withholding Tax under section 10(1) (a) and section 35 (1) of the ITA

17. On the other hand, it was the Respondent's case that under Clause 3.3 of the Payroll Administration Service, the Respondent had the obligation of accounting for the taxes in respect of the employees in Kenya. This was because the Respondent was a representative so responsible in Kenya on behalf of a non-resident employer as contemplated in the definition of employer in Section 3 of ITA. Therefore, the salary costs are borne by the Respondent (the employer) and payments to IPRL are merely a re-imbursement of employee salaries already paid by IPRL to the employees. Consequently, these reimbursements fall outside the scope of Withholding Tax as defined in the ITA.

18. Under the PSA (Payroll Services Agreement) the Respondent herein is acknowledged as the Employer and this is undisputed by the Appellant. The obligations of IPRS (International Professional Resources) were;

    2. 1 pay individuals on behalf of Employer and maintain benefits and training programs for the individuals;

    2. 2 Acknowledge that Employer has total control over individuals while the individuals are performing services for Employer;

    2. 3 acknowledge that no labor relationship exists between IPRS and Individuals within the countries, but that such relationship exists between employer and individuals; and

    2. 4 for the avoidance of doubt, IPRS will provide the payroll administration services exclusively outside the countries.

19. The Court notes that there are employment contracts referred to by the Appellant with IPRL being listed in the contracts as the employer of record. The contracts appear on the Respondent's letterhead, indicating the PSA's intended relationship between the Respondent and IPRL.

20. Moreover, while the Appellant commented on some of the contracts nothing was said regarding the contract of employment for employees such as Unyime Obot, which identified the Respondent as the employer. subsequent employment contracts, which clarified the relationship. These contracts state:

    > " This contract of employment covers that employment of [employee name] by International Professional Resources Limited as an internationally mobile employee within Baker Hughes Incorporated including its various affiliates, business units and subsidiaries"

21. Further to the above, and as found by the Tribunal, the payment or compensation for IPRL's services comprising overhead charge and a mark up was subject to Withholding Tax (WHT) which the Respondent duly withheld and remitted to the Appellant.

22. In light of the above, the Court finds that the payments made to IPRL for reimbursements of employee salaries were not payment for specialized services thus not management or professional fees, and therefore not subject to WHT.

Whether the Tribunal erred in finding that part of the Appellant's assessment was time barred against the evidence presented by the Appellant;

23. As regards the 2nd and 3rd issue, that is the time-barred assessments, the Appellant argued that the Respondent did not submit any evidence to demonstrate that the PAYE returns for 2014 were filed on time. This is because they had not provided duly acknowledged returns received by the Appellant showing the date on which they were lodged.

24. On this the Tribunal found that there was an attached iTax ledger reconciliations for the year 2014, 2015, 2016 complete with PRN numbers for the paid amounts as well as KRA acknowledgement receipt numbers for the received original assessments for the said years. The Tribunal also noted that the Appellant further provided P10s for the period January to March 2014 as well as evidence of payment of taxes for the same period.

25. Section 31(1)(b)(i) of the *Tax Procedures Act* grants the Appellant the power to amend an assessment by altering or adding to the original assessment for a reporting period within five years from the date the taxpayer filed the self-assessment return, unless the assessment concerns gross or willful neglect, evasion, or fraud by the taxpayer.

26. It is undisputed that the Appellant issued its assessment on 14th October 2020, meaning it ought to have issued the latest assessment in relation to returns filed after 14th October 2015. Therefore, the tax assessments for January 2014 – September 2015 were time-barred as found by the Tribunal.

Whether the Tribunal erred in finding that part of the assessment of penalties and interest was time barred thereby setting aside any penalties and interest relating to assessments raised prior to 15th October 2015.

27. Similarly, the penalties and interest should only have covered tax periods within the five-year timeline provided by law.

28. The upshot is that the Court upholds the decision of the Tribunal and finds that the Appeal is without merit.

Determination

29. The Appeal is dismissed in its entirety.

30. Each party to bear its own cost.

31. It is so ordered

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF JUNE, 2025

NJOROGE BENJAMIN K.

JUDGE

In the presence of: -

Miss Kithinji for the Appellant

N/A for IKM Advocates for the Respondent

Court Assistant Mr Luyai