Commissioner of Domestic Taxes v Kenya National Highways Authority (Tax Appeal E132 of 2024) [2025] KEHC 10356 (KLR) (Commercial & Admiralty) (16 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10356 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND ADMIRALTY

TAX APPEAL E132 OF 2024

JK NG'ARNG'AR, J

JULY 16, 2025

BETWEEN

COMMISSIONER OF DOMESTIC TAXES ..... APPELLANT

AND

KENYA NATIONAL HIGHWAYS AUTHORITY ..... RESPONDENT

(Being an Appeal from the Judgment and Decree of the Tax Appeals Tribunal delivered on 29th June 2023 in TAT No. 123 of 2023)

JUDGMENT

1. Pursuant to a notice of preliminary findings dated 19th May 2021, the appellant informed the respondent that the tax due to it totaled Kshs. 670,404,634.00 comprising of Withholding VAT (WVAT) of Kshs. 532,317,846.00 Withholding Income Tax (WHIT) on Foreign Consultant of Kshs. 56,273,431.00, WHT on interest on late payment of Kshs. 12,890,161.00 and reverse VAT of Kshs. 68,923,196.00. The respondent raised an objection disputing those preliminary findings in its letter dated 27th May 2021.

2. On 5th July 2021, the respondent issued a notice of assessment of Kshs. 664,825,208.00 comprising of WVAT of Kshs. 532,317,846.00, WHIT of Kshs. 74,747,322.00 and reverse VAT of Kshs. 57,760,040.00. The respondent objected to that assessment vide its letter dated 3rd August 2021.

3. By objection decision dated 24th December 2021, the appellant notified the respondent that it had reviewed its objection dated 3rd August 2021. The respondent was partially successful. The tax heads under WVAT of Kshs. 532,317,846.00 and reverse VAT of Kshs. 68,923,196.00 were allowed on the basis that the appellant had been advised by the National Treasury that the project being implemented by the respondent had been exempted from any form of VAT by dint of section 68 (4A) of the VAT

Act and the project qualified for zero rating. However, the appeal on WHIT on Foreign Consultant of Kshs. 74,747,322.00 was disallowed.

4. Aggrieved by those findings, the respondent lodged an appeal before the Tax Appeal Tribunal in TAT No. 123 of 2022. In its letter dated 12th January 2022, the respondent informed the appellant that it was appealing in line with section 12 of the Tax Appeals Tribunals Act. Parties filed their respective pleadings and submissions that were considered by the tribunal. In its decision dated, the tribunal allowed the respondent's appeal. Accordingly, the respondent's objection decision dated 24th December 2021 was set aside with each party bearing its own costs.

5. The appellant is dissatisfied with those findings. It filed its notice of appeal dated 28th July 2023. It also filed its memorandum of appeal dated 25th August 2023 that raised four grounds disputing the findings of the learned tribunal. Those grounds are summarized as follows: the tribunal failed to consider obligations for payment of any amount to a non-resident person not having a permanent establishment in Kenya as set out in section 35 of the *Income Tax Act*; the tribunal misconstrued the National Treasury Circular No. 15/2019 on the obligation of the respondent to withhold taxes; and the tribunal erred in finding that the respondent did not have an obligation to withhold the tax on money paid directly to the non-resident contractor from the non-resident development partner.

6. In view of the foregoing, the appellant prayed that the appeal be allowed by setting aside the judgment of the tribunal. It also prayed that its objection decision dated 24th December 2021 be allowed. Finally, it prayed for costs of this appeal.

7. The appeal was canvassed by way of written submissions. The appellant filed its written submissions, together with a list and bundle of authorities, all dated 9th June 2025. I must commend counsel's industry in drafting punctilious submissions. It submitted that by virtue of Article 210 of *the Constitution*, no tax may be imposed, waived or varied unless provided in legislation. It highlighted that on the strength of that provision of *the Constitution*, exemptions are only set out in Sections 13 & 35 and Part I of the first schedule of the *Income Tax Act* in regards to Income Tax.

8. It submitted that in view of the foregoing, the respondent failed to demonstrate how it was expressly exempted within the precincts of the law. It continued that the respondent was a withholding tax agent of payments made to contractors. It was therefore improper for the tribunal to find that by dint of the Circular, the respondent was exempt from remitting the contested tax. It urged this court to find that the tribunals findings at paragraphs 51, 52 and 54 were erroneous and ought to be interfered with.

9. Citing rules 4 (1) and 10 of the Income Tax (Withholding Tax) Rules 2010 and several decisions, the appellant implored this court to make a finding that it was illegal for the tribunal to find that there was no way for the respondent to withhold tax on money paid directly to non-resident contractors, despite having made a finding that the respondent was required by law to withhold the taxes. It reiterated that the circular could not be relied on by the respondent as an exemption from paying withholding tax and remitting withholding income tax.

10. Finally, the appellant urged this court to concur with the findings in TAT No. 230 of 2020 albeit a persuasive decision. In its view, the facts in that dispute were similar to the issues in the present appeal.

11. The respondent opposed the appeal. It filed its statement of facts dated 3rd April 2025. It abridged the facts giving rise to this appeal to urge this court to agree with the findings of the tribunal to the extent that it had no duty to advise a foreign non-resident development partner to withhold income tax on money paid to a non-resident contractor or implementor of the officially aided-funded projects. Secondly it also urged that it had no way of withholding the tax or money paid directly to the non-

resident contractor from the non-resident development partner. The respondent however did not file its respective written submissions as at the time of writing this judgment.

12. I have considered the memorandum of appeal, the appellant's written submissions as well as the respondent's statement of facts. I have also examined the record of appeal and supplementary record of appeal and analyzed the law. Section 32 of the *Tax Appeals Tribunal Act* provides that a party dissatisfied with the decision of the tribunal may, within thirty days of the decision may, appeal to the High Court. This provision is echoed in section 53 of the *Tax Procedures Act* which provides that a dissatisfied party before the Tribunal, in relation to an appealable decision may, within thirty days of the decision, appeal the decision to the High Court in accordance with the provisions of the *Tax Appeals Tribunal Act*.

13. This is a second appeal. As a second appellate court, the duty imposed upon this court is to determine mattes of law only unless it is shown that the courts below considered matters that they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. [See Otieno, Ragot & Company Advocates vs. National Bank of Kenya Limited [2020] eKLR].

14. The facts as established in the record before us are that the respondent set to the construction of two projects of road works. The first one was the Multinational Kapchorwa-Saum-Kitale and Eldoret Bypass which was a project under the Department of Infrastructure implemented by the appellant, China State Construction Engineering Corporation, China Wu Yi Limited, Abdul Mullick Associates and Sari Consulting. The second one was the Nuno-Modogashe Road project under the Department of Infrastructure. The same was implemented by the respondent, Zhongmei Engineering Group Limited and Abuljebain Engineering consulting office.

15. In its notice of preliminary findings dated 19th May 2021, the appellant informed the respondent that the tax due to it, arising from those two projects totaled Kshs. 670,404,634.00. The sum consisted of Withholding VAT (WVAT) of Kshs. 532,317,846.00, Withholding Income Tax (WHIT) on Foreign Consultant to the tune of Kshs. 12,890,161.00 and reverse VAT of Kshs. 68,923,196.00. The respondent raised an objection disputing those preliminary findings in its letter dated 27th May 2021.

16. On 5th July 2021, the appellant issued the respondent with an additional assessment for the period 1st January 2017 to 31st December 2020 for the Kapchorwa-Saum-Kitale road and Eldoret By pass project for a sum of Kshs. 265,268,981.00 as principal taxes and Kshs. 473,938,691.00 on the Nuno-Modogashe Road for the period 2016 to 2020. The taxes accounted for WVAT, WHIT and reverse VAT. The respondent objected to that assessment vide its letter dated 3rd August 2021.

17. By objection decision dated 24th December 2021, the appellant notified the respondent that it had reviewed its objection dated 3rd August 2021. The respondent was partially successful. To this extent, the appellant dropped the taxes on the Multinational Kapchorwa-Saum-Kitale and Eldoret By pass totaling Kshs. 532,317,846.00 and the reverse VAT of Kshs. 68,923,196.00 in respect to the Nuno-Modogashe Road project.

18. The tax heads were allowed on the basis that the appellant had been advised by the National Treasury that the project being implemented by the respondent had been exempted from any form of VAT by dint of section 68 (4A) of the VAT Act and the project qualified for zero rating. However, the appeal on WHIT on Foreign Consultant of Kshs. 74,747,322.00 was disallowed.

19. Aggrieved by those findings, the respondent lodged an appeal before the Tax Appeal Tribunal in TAT No. 123 of 2022. In its letter dated 12th January 2022, the respondent informed the appellant that it

was appealing in line with section 12 of the Tax Appeals Tribunals Act. Parties filed their respective pleadings and submissions. The appellant filed its statement of facts dated 9th March 2022 while respondent filed its statement of facts dated 3rd February 2022. The tribunal gave due consideration to those pleadings. In its decision dated 29th June 2023, the tribunal allowed the respondent's appeal.

20. The crux of this appeal lies in the circular from the National Treasury. The respondent submitted that the circular amounted to an exemption from its paying of any taxes arising from the project; an issue vehemently opposed by the appellant. That is the fulcrum of the issue for determination before this court.

21. In submitting that the respondent was not exempt from paying taxes, the appellant relied on section 13 and 35 of the *Income Tax Act* as well as Part I of the First Schedule. Section 13 (1) provides that 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. Section 35 provides that every person shall, upon payment of any amount to any non-resident person not having a permanent establishment or any resident having a permanent establishment in Kenya in respect of several sources of income listed in (a) to (t) of subsection 1 & 3, which is chargeable to tax, deduct therefrom tax at the appropriate resident withholding tax.

22. Under subsection 4, no deduction shall be made under subsection (1) or (3) from a payment which is income exempt from tax under this Act, or to which an order made under this Act, or to which an order made under subsection (7) or (8) applies.

23. On one hand, the appellant submitted and stated that on 12th January 2016, the National Treasury advised it that the construction of the Nuno-Modogashe-Road was an official aid-funded project financed by the Arab Bank for Economic Development in Africa, the Kuwait Fund for Arab Development, SFD and ADFD. In its view, that letter did not exempt Withholding Income Tax or Income Tax. Looking at the National Treasury circular No. 15/2019, it reiterated that the respondent ought to have issued instructions to the payer or the National Treasury to deduct the Withholding Tax to the appellant. That the respondent did not benefit from the statutory exemption set out in section 35 and Part 1 of the first schedule.

24. On the other hand, the respondent's position was that the implemented projects were officially declared aid-funded by the National Treasury vide a letter dated 12th January 2016. Arising therefrom, the contested tax was to be deducted at the source emanating from payments made to the supervising consultant. It argued that a reading of the Income Tax together with the National Treasury's circular no. 15/2019 exempted Withholding Tax under the Income Tax having been expressly provided for under the financing agreement between the Republic of Kenya and the Kuwait Fund for Arab Economic Development. In cited sections 4.17 and 4.18 of the agreement for this assertion.

25. Taking a reading of the National Treasury Circular No. 15/2019 dated 11th December 2019 at Part III, the tribunal rightly found that while the agreement at clauses 4.17 and 4.18 expressly exempted the taxes due, the respondent failed to demonstrate how the part of the *Income Tax Act* that exempts Withholding Income Tax from MDAs applied to it. Indeed, as rightly stated, the appellant was in fact a withholding tax agent. That regardless, was the respondent exempt from paying the contested taxes? In its analysis, the tribunal held:

> "51. The Tribunal observes however that the Circular by the National Treasury perceives a situation where the contract sum is directly paid by a non-resident development partner directly to a contractor who is resident in Kenya. The Circular does not provide for a scenario where the contractor is also a non-

resident legal person that is directly paid by a development partner who is a non-resident.

52. The Respondent's argument that the Appellant ought to have "advised" the contractor and/or the development partner to withhold from the partner boarders on an absurdity as the failure by the Appellant to "advise" a development partner who has not been established as an agent to withhold income paid to a non-resident contractor is not enough reason for the Respondent to demand the same from the Appellant. No part of the law or the Circular from the National Treasury on the Guidelines for Withholding Income Tax on Officially Aid Funded Projects or the Income Tax provides that the Appellant ought to have "advised" a foreign non-resident development partner to withhold income tax on money paid to a non-resident contractor or implementor of the OAFP.

54. To this end, the Tribunal agrees with the Appellant in the sense that there was no way for the Appellant to withhold the tax on money paid directly to the non-resident contractor from the non-resident development partner. The Tribunal, therefore, finds that the Respondent erred in charging Withholding income tax on the Appellant."

26. I find that the analysis and determination of the tribunal was sound, lawful and justifiable. Indeed, there was no way for the respondent to withholding tax on money paid directly to the non-resident contractor from the non-resident development partner. The appellant placed an unfair and irrational burden on the respondent that was no known in law. The appellant urged us to be persuaded by the decision in TAT No. of 2020. However, I am not persuaded for the reason that there was no circular similar to the one in the present suit thereby brining a stark difference in the matter. Secondly, it is possible that the decision may have been appealed against. The danger in adopting a persuasive authority without knowledge of whether it has been appealed against or not would create absurdity and awkwardness in jurisdiction.

27. Accordingly, I find that the pronouncements of the tribunal were lawful to the extent that the respondents were not supposed to settle the contested taxes. I will therefore not interfere with those findings. Accordingly, the appeal lacks merit and it is dismissed. I however direct each party to bear its own costs of the appeal.

It is so ordered.

JUDGEMENT DATED, SIGNED AND DELIVERED VIRTUALLY THIS 16TH DAY OF JULY, 2025 IN THE PRESENCE OF;

.....

J. NG'ARNG'AR

JUDGE

Nyapara for the Appellant

Njuguna for the Respondent

Mark/Siele (Count Assistants)