



ICEA Lion Life Assurance Company Ltd v Commissioner of Domestic Taxes (Income Tax Appeal E188 of 2021) [2023] KEHC 21122 (KLR) (Commercial and Tax) (21 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21122 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E188 OF 2021
DO CHEPKWONY, J
JULY 21, 2023

BETWEEN

ICEA LION LIFE ASSURANCE COMPANY LTD APPELLANT

AND

COMMISSIONER OF DOMESTIC TAXES RESPONDENT

(Being an appeal from the Judgment of the Tax Appeals Tribunal at Nairobi delivered on the 22nd day of October 2021 in Tax Appeals Tribunal Appeal No.82 of 2017)

JUDGMENT

1. The Appellant herein, ICEA Lion Life Assurance Company Ltd is a duly incorporated company under the laws of Kenya and licensed to provide life insurance in addition to management of several pension schemes. It appeals against the decision of the Tax Appeals Tribunal (“the Tribunal”) upholding the assessment of the Commissioner of Domestic Taxes (“the Commissioner”) dismissing the Appellant’s objection to the assessment thereof. The Tribunal upheld that although engaging in life assurance business, the Appellant was not exempted to paying capital gains for Kshs.59,315,625.00 pursuant to a sale agreement wherein the Appellant disposed its property.

Brief Facts

2. The facts leading to this appeal are set out in the statement of facts and the judgment of the Tribunal. They are not in dispute. The Appellant sold its building to Jomo Kenya University of Agriculture and Technology at a consideration of Kshs.1,800,000/=. Thereafter, vide a letter dated the 17th December, 2015, the Respondent requested the Appellant to provide proof of payment of Capital Gains Tax (CGT) following the sale of the ICEA Building. The Appellant responded vide a letter dated 9th February, 2016 contenting that the sale was exempted from payment of capital gains tax because the



Respondent engages in life assurance business which is subject to a different tax regime pursuant to Section 19 of the [Income Tax Act](#). In addition, the building was held under a deposit administration for a pool of composed of registered pension schemes that are exempted under 1st Schedule to the [Income Tax Act](#).

3. Upon considering the Appellant's case, vide a letter dated 11th July, 2016, the Respondent notified the Appellant that it was satisfied that no Capital Gains Tax was due and owing from it pursuant to the said sale and the matter had officially been closed. However, down the line, the Respondent changed tables and on 4th October, 2016 asked the Appellant to pay the Capital Gains Tax Pursuant to Sections 3(1) and (2) of the [Income Tax Act](#) or provide exemption certificate to that effect. In addition, vide its letter dated 23rd November, 2016, the Respondent explained that it had reviewed its initial decision owing to Respondent's failure to furnish the exemption certificate. The Respondent then proceeded to assess the Capital Gains Tax owing from the sale of the Appellant's property at Kshs.59,315,625.00 and communicated the same to the Appellant vide a letter dated 12th January, 2017.
4. Thereafter, the Appellant unsuccessfully challenged the commissioner's decision on assessment of Capital Gains Act payable. The tribunal had reached a conclusion that the Appellant was not exempted from payment of Capital Gains Tax pursuant to Section 3(2) of the [Income Tax Act](#) which provides that an Assurance Company's "other income" as defined under Section 3(2) was subject to taxation.

The Appeal

5. Aggrieved by the tribunal's decision, the Appellant preferred the instant appeal citing three (3) grounds namely: -
 - a. The Tribunal erred in failing to find the Respondent's letter dated 11th July, 2016 agreeing with the Appellant's position that "no Capital Gains Tax was payable on the transfer of the said building created a legitimate expectation that no Capital Gains Tax was payable on the transaction and the matter was at an end.
 - b. The Tribunal erred in failing to make a decision regarding the Respondent's breach of the Appellant's right to fair administrative action in violation of Article 47 of the [Constitution](#) and the [Fair Administrative Action Act](#), 2015. The Tribunal directed the Appellant to seek the necessary legal redress elsewhere as provided for in legislation, and in doing so, infringed the Appellant's right to seek redress before it in respect of any tax matter pursuant to Section 12 of the [Tax Appeals Tribunal Act](#), 2013.
 - c. The Tribunal erred in failing to find that the Appellant, being an Insurance Company, was only subject to tax under Section 19 of the [Income Tax Act](#) and could not be subject to tax on any other basis.
6. Directions were issued that the Appeal be canvassed by way of written submissions and as the record reflects that the Appellant filed two sets of submissions dated 2nd June, 2022 and 17th August, 2022 respectively while those of the Respondent are dated 12th July, 2022.
7. The Appellant submitted that by directing it to find redress on whether its constitutional rights were infringed elsewhere, the Tribunal failed to exercise the jurisdiction vested under Section 7(1) of the [Fair Administrative Action Act](#) which confers the Tribunal with Jurisdiction to review the commissioner's administrative actions. Since there were no actions preventing the filing of an appeal before the tribunal



- the tribunal erred in stating that the Appellant ought to have sought redress somewhere else and this court has the jurisdiction to interfere with the Tribunal's discretion.
8. The Appellant further submitted that the Respondent's letter dated 11th July, 2016 stating that Capital Gains was not payable in the transaction had created a legitimate expectation and the court ought not to allow the Appellant to suffer such disappointment. Reliance was placed on the Supreme Court decision in the case of *Communications Commission of Kenya & Others v Royal Media Services and Others* (2014)eKLR wherein the superior court listed the elements of legitimate expectation as: there must be an express, clear and unambiguous promise given by a public authority, the expectation itself must be reasonable, the representation must be one which it was competent and lawful for the decision maker to make and there cannot be legitimate expectation against clear provisions of the law or Constitution. According to the Appellant, the facts in this appeal satisfy the above prerequisites and urges the court to find in its favour that the letter dated 11th July, 2016 created a legitimate expectation.
 9. Lastly, the Appellant urged the court to find in its favour that being an Insurance Company, it is only subject to tax under Section 19 of the *Income Tax Act* and cannot be subject to tax under any provision of the *Income Tax Act*. Therefore, the use on the phrase notwithstanding meant that other taxes under the Act including Capital Gains Tax would not be applicable on the Appellant business.
 10. In its submissions dated 12th July, 2022, the Respondent submitted that although it did communicate to the Appellant vide the letter dated 11th July, 2016, that the sale of its property LR 209/8287 for Kshs.1.8 Billion was not subject to Capital Gains Tax. That upon receipt of further information about the ownership of the said property, it reviewed the initial position and since no tax exemption certificate was presented, it was justified for the Respondent to conclude that Capital Gains Tax was payable from the transaction. According to the Respondent, legitimate expectation cannot be created where a wrong position has been considered in law and later reviewed.
 11. It is submitted that in this case, the Appellant had misled the Respondent that the building was an investment from a registered pension scheme whereas no evidence supported the assertions. It then came out that the sale of the property was not an insurance income within the meaning of Section 2 of the *Insurance Act*, and Sections 3(1) and 19(1) both of the *Income Tax Act*. Therefore, the proceeds of such sale can only be classified as "other income" under Section 19(8) of the *Income Tax Act*, and as a long-term investment in the Appellant's business, the same is subject to payment of Capital Gains Tax.
 12. I have read through the Respondent's submission and the above summary gives a gist thereof. I have also read through the Appellant's submissions dated 17th August, 2022 filed in response to the respondent's submissions. This Court appreciates the parties for their extensive and well elaborated submissions filed in this matter.

Analysis and Determination

13. In view of the above, the court is persuaded that the issues which do crystalize for determination are as follows: -
 - a. Whether the Respondent's letter dated 11th July, 2016 created a legitimate expectation.
 - (b) Whether the Respondent was correct in concluding that the Appellant was liable to payment of Capital Gains Tax for sale of its property LR 209/8287.
14. The two issues highlighted above are so intertwined such that one cannot be addressed separately from the other, in that the 2nd issue will be addressed in the course of determining the first issue. However,



- there was a preliminary issue on whether the tribunal erred in failing to address the issue of whether the Appellant's constitutional right was infringed based on its legitimate expectation as represented in the letter dated 11th June, 2016.
15. In this Court's view, what the tribunal did not belabour on is whether a legitimate expectation was created or not; or whether there could be redress for breach of those constitutional rights, but in its Judgment, it did confirm the Respondent's position that the income from the sale transaction was subject to payment of Capital Gains Tax.
 16. A decision can also be said to have been made where a court or a tribunal reserves itself from making an opinion on an issue presented before it. In any event, this Court is persuaded that the tribunal had jurisdiction to address all the questions and issues arising to the Respondent's decision by Virtue of Section 7 of the *Income Tax Act* including whether a legitimate expectation arose vide the letter dated 11th June, 2016. However, even having found that the tribunal so erred, the same will not mitigate on the two questions that have been highlighted for determination.
 17. On the issue of whether the Respondent's letter dated 11th July, 2016 created a legitimate expectation, it is not disputed that vide the said letter, the Respondent communicated to the Appellant that it was satisfied that the income on proceeds for the sale of its property LR 209/8287 was exempted from payment of Capital Gains Tax by virtue of Section 19(1) of the *Income Tax Act*. However, the Respondent reviewed this position on grounds that it received further information on the ownership of the subject property. It does not state what form of the other information it received with respect to title and ownership of the property, but the Respondent asserts that the income from the sale of the subject property was outside the scope of the Insurance business so as to afford the Appellant exemption under Sections 19(1) of *Income Tax Act*. Therefore, without presentation of the necessary tax exemption certificate, the Appellant is liable to pay Capital Gains Tax from the proceeds of the sale.
 18. Unlike the Appellant, the Respondent avers that a legitimate expectation does not arise where an earlier proposition is reneged to reflect the correct standing in law. Thus, according to the Respondent the correct position from the facts of this case is that the income from the sale of the property is to be classified as "other income" under Section 19(8) of the *Income Tax Act* which is chargeable to tax. On that basis the Respondent submitted that were it to uphold the Appeal, the court would be waiving taxes payable by the Appellant.
 19. For the Appellant, it seeks the court to adopt a holistic approach in interpreting the provisions of Section 19(1)(5) and (8) of the *Income Tax Act*, and in that regard, the provision to be read together with Eighth Schedule of the Act and by extension Section 3(2)(f) of the same *Act*. The true picture would then be, and as reiterated in the *Insurance (Investments Management) Guidelines, 2017*, that for purposes of calculating the capital adequacy for an Insurance Company, the property and investments thereof related shall be considered as part of the insurance business without limiting the same to income from the mainstream insurance business as the Respondent mistakenly believes.
 20. Both parties however seem to be in agreement on the principles guiding the evaluation on existence of a legitimate expectation. Generally, a legitimate expectation arises either by a promise or by an established practice of consultation. More often than not, it would arise where a public body represents or arouses an expectation that is within its powers to fulfil. The decision in the case of *Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others* [2014]eKLR which both



parties sought to rely on bespeaks of the condition an applicant in a plea for legitimate expectation ought to fulfil, which are as follows: -

- a. There must be an express, clear and unambiguous promise given by a public authority;
 - b. the expectation itself must be reasonable.
 - c. The Representation must be one which it was competent and lawful for the decision-maker to make; and
 - d. there cannot be a legitimate expectation against clear provisions of the law or the Constitution .
21. In considering the above principles alongside the facts in this case, it is admitted that the Respondent vide its letter dated 11th July, 2016 clearly and unambiguously represented to the Appellant that the sale of its property LR.209/8287 was exempted from payment of Capital Gains Tax, and the matter thereof had been marked as closed. It is as well not denied that where a transaction is classified and or associated to life insurance business for the subject sale of property, just as alleged in their case, it is lawfully within the powers of the Respondent to classify the same as tax-exempted. And once such position is confirmed, it is reasonable for the party to whom the promise is made to hold the keep expectation that the matter is closed for good and never can they be liable to tax payment under the same transaction in the future.
22. What appears to be contentious in the facts within this case is whether the proceeds of the sale by the Appellant of its property LR. 209/8287 are within the scope of life insurance business so as to enjoy the exemption under Section 19(1) of the Income Tax Act. In the court's view, the interpretation of the Life Insurance Business by the Respondent is wrong from the particulars of the facts presented before it. The same is not particularly confined to income on premiums by depositors since life Insurance Companies are allowed within Insurance (Investments Management) Guidelines to Invest out of the funds within the pool of premiums made by the depositors. Once its is alleged that the property owned by the Insurance company is an extension of the premiums so deposited, the burden shifts to the party disputing such grounds to prove otherwise.
23. Based on the material placed before the court, it has no reason to doubt that property LR.209/8287 was an extension of the premiums held in the pool deposited with the Appellant and from which the Appellant is expected to pay from, in the event of a contingency. It then follows that the income from the proceeds for sale of LR.209/8287 by the Appellant was well covered as part of its insurance business under Section 19(1) and therefore, the Tribunal erred in classifying the same as "other income" under Sections 19(5) and (8) of the same Act.
24. The above finding drives to conclusion that the representation made in the respondent's letter dated 11th July, 2016 did not vary the scope under Section 19 of the Income Tax Act. Consequently, the Appellant's legitimate expectation did not seek to override any law and neither was it repugnant to any provision of the law.
25. For that reason, this Court finds the appeal merited and the same is allowed with further orders that each party bears its costs.

It is so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 21ST DAY OF JULY, 2023.



D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. James Kirui for Appellant

No appearance for the Respondent

Court Assistant - Martin

