



Commissioner of Domestic Taxes v Gulf Badr Group (Kenya) Limited (Income Tax Appeal E140 of 2023) [2024] KEHC 6277 (KLR) (Commercial and Tax) (31 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6277 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E140 OF 2023**

A. ONG'INJO, J

MAY 31, 2024

BETWEEN

COMMISSIONER OF DOMESTIC TAXES APPELLANT

AND

GULF BADR GROUP(KENYA) LIMITED RESPONDENT

JUDGMENT

1. By an objection decision dated 14th July 2022, the Appellant assessed and raised Withholding Tax of Kshs. 125,931,831.15/- against the Respondent pursuant to Section 35(1) (c) of the *Income Tax Act* that requires tax to be withheld from monies payable to a non-resident in respect of rent for the use of and occupation of property.
2. The non-resident company, Evergreen Line, which carries out international freight services to customers including Kenyan customers retained the Respondent as its shipping agent and it was not in dispute that in some instances it charges its Kenyan customers demurrage charges and such charges are paid through its disclosed agents in Kenya, the Respondent herein.
3. The Appellant verified the Respondent's tax declarations and established that the Respondent had collected demurrage and detention charges on behalf of Evergreen Line which was deemed to be income derived in Kenya and was subject to Withholding Tax.
4. The Respondent was aggrieved by the objection decision and by Memorandum of Appeal dated 26th August 2022, they appealed against the said objection on several grounds.
5. In its determination, the Tribunal found that Section 3, 10 and 35 of the *Income Tax Act* are very clear and the same do not impose demurrage as a taxable income and therefore Withholding Tax cannot be imposed on the same. They also distinguished the difference between demurrage and rental income



and stated that there was no mention of the term demurrage in the Income Tax before the enactment of the Finance Act, 2018 and the Respondent could not be assessed for the same at the time as a party can only be liable for taxes where the law is specifically binding on them.

6. The Tribunal also found that since the private ruling issued by the Appellant on 20th June 2018 to the Kenya Ship Agents Association had not been withdrawn, the Appellant could not deviate from it and therefore the Respondents were not liable to pay Withholding Tax for the period after the promulgation of the Finance Act, 2018.
7. The Appellant's objection was therefore set aside.
8. The decision of the Tribunal above culminated to the filing of the Appeal herein vide the Memorandum of Appeal dated 08.09.2023 on the following grounds: -
 - i. That the Tribunal erred in law in holding that there is no tax liability issuing on the Respondent on the basis of Sections 3, 10 and 35 of *Income Tax Act*.
 - ii. That the Tribunal erred in law in finding that the Appellant's actions and decisions in levying Withholding Tax were founded on illegalities and cannot be supported by the law.
 - iii. That the Tribunal misinterpreted the provisions erred in law in holding that according to Income Tax (Withholding) Rule 4 (1), 2001, hence arriving at the wrong decision.
 - iv. That the Tribunal erred in law in failing to determine that the Appellant's Notice of Objection issued on 21st April, 2021 was res judicata
 - v. That the Tribunal erred in law in failing to find that the demurrage charges were akin to rental income and that the Respondent was therefore bound to pay the same.
 - vi. That the Tribunal erred in law in finding that the private ruling has a binding effect on the Commissioner despite the same running contrary to the law.
 - vii. That the Tribunal erred in law in failing to find that there was and still is a legal obligation for the Respondent to withhold and remit taxes from payments collected on behalf of the principal prior to the enactment of the Finance Act, 2018.
 - viii. That the Tribunal erred in law in finding that the Respondent was not liable to pay WHT for the period after the promulgation of the Finance Act, 2018
9. The appeal was canvassed by way of written submissions dated 18th January 2024 and 20th February 2024 for the Appellant and Respondent respectively. The said submissions were highlighted by advocates for the respective parties on 20th March 2024.

Analysis and Determination

10. This court has considered the grounds of appeal, the opposition by the Respondent by their Statement of Facts as well as submissions and authorities by respective parties and the mandate of this court in such an appeal is to consider questions of law pursuant to Section 56 of the Tax Procedure Act which provides: -
 1. In any proceedings under this Part, the burden shall be on the taxpayer to prove that a tax decision is incorrect.
 2. An appeal to the High Court or to the Court of Appeal shall be on a question of law only.



3. In an appeal by a taxpayer to the Tribunal, High Court or Court of Appeal in relation to an appealable decision, the taxpayer shall rely only on the grounds stated in the objection to which the decision relates unless the Tribunal or Court allows the person to add new grounds.
11. The issues that arise for determination are: -
1. Whether demurrage charges were applicable in the *Income Tax Act* prior to its amendment by the Finance Act, 2018.
 2. Whether withholding tax on demurrage charges was payable after the Finance Act, 2018 in consideration of the private ruling by the Appellant.

Whether demurrage charges were applicable in the Income Tax Act prior to its amendment by the Finance Act, 2018

12. The Appellant's position in regards to this issue was that Section 35(1)(c) of the *Income Tax Act* requires tax to be withheld from any monies paid to a non-resident in respect of rent for the use of and occupation of property and that the Respondent was responsible to withhold taxes from remittances in favor of Evergreen Line. The Appellant was of the view that even prior to the enactment of the Finance Act, 2018, the Respondent had a duty to withhold and remit taxes from payments collected on behalf of its principal. The Appellant contended further that the demurrage charges levied on the importer of the prolonged and contracted usage of the shipping container are in the character of rental income and hence subject to withholding tax.
13. On the other hand, the Respondent contended that withholding tax on demurrage was not in the list of items qualifying for withholding tax prior to amendment by the Finance Act, 2018. That it was introduced on 21st September 2018 and the Appellant could not demand non-deducted withholding tax from the Respondent for the period between 1st June 2016 to 7th November 2019 as if it was tax due and payable from the Respondent. The Respondent's counsel argued that if there was a legal basis to charge withholding tax to demurrage prior to the Finance Act, 2018, parliament would not have found it necessary to introduce the amendment. It was their view that the Appellant had no legal basis to charge withholding tax on the amount prior to enactment of the Finance, Act 2018.
14. The Respondent urged the court to interpret the provisions of Section 10 and 35 of the *Income Tax Act* strictly as legislation does not leave room for intendment or implication as was held in *Stanbic Bank Kenya Limited v Kenya Revenue Authority (2009) eKLR*, where the late Aganyanya, J. as he then was held: -

“...Tax law entails strict application and except that the application before the learned Judge was for Judicial Review, there is no question of the exercise of discretion by the Court when dealing with matters pertaining thereto...”

15. Section 35(1)(c) of the *Income Tax Act* provides: -
1. Every person shall, upon payment of any amount to any non-resident person not having a permanent establishment in Kenya in respect of: -
 - (c) a rent, premium or similar consideration for the use or occupation of property, except aircraft or aircraft engines, locomotives or rolling stock:
Provided that: -



- i. where the bond, loan, claim, obligation or other evidence of indebtedness is acquired by a person exempt under the First Schedule or a financial institution specified in the Fourth Schedule from a non-resident person, such an exempt person or financial institution shall deduct tax from the difference between the acquisition price and the original issue price; and
 - ii. where a non-resident person disposes of a bond, loan, claim, obligation or other evidence of indebtedness acquired from a person exempt under the First Schedule or a financial institution specified in the Fourth Schedule, tax shall be deducted upon final redemption from the difference between the final redemption price and the acquisition price, if the exempt person or financial institution certifies the acquisition price to the satisfaction of the Commissioner;
16. It is not in dispute that the Respondent was an agent for purposes of collecting and remitting demurrage charges to its principal, Evergreen Line. It is also not in dispute that prior to the enactment of the Finance Act, 2018, the term ‘demurrage’ did not exist in the ITA and that the same was introduced by amendment through the Finance Act, 2018. What is in dispute is whether the term demurrage and rental income as provided in Section 35(1)(c) of the *Income Tax Act* are one and the same thing and whether reference to rent in the same Section can be construed to mean that withholding tax on demurrage charges was payable despite lack of provision for the same in the Act.
17. The Appellants have heavily relied on the decision in *Ocean Freight (E.A) Limited v Commissioner of Domestic Taxes (2020) eKLR*, where Tuiyott J, (as he then was) held: -
- “21. Whether that charge for the late return of the container is called a penalty or rent, it is an income to the owner of the container, which is the shipping line. By way of analogy, when Banks charge penalty interest on late repayment of a facility that charge is income just as the regular interest charge on punctual repayment. As the charge on demurrage would have been derived from or accrued in Kenya, it is subject to income tax legislation in Kenya.
- ...
- 23. It is true that following amendment to the Act made in 2018, specific provisions of the law were made in respect to demurrage. Under Section 2 demurrage was defined to mean: -
- “Demurrage charges” means the penalty paid for exceeding the period allowed for taking delivery of goods, or returning of any equipment used for transportation of goods”.
- 24. In Section 10, an amended was made to specifically include demurrage charges in the category of income which accrued in or is derived from Kenya.
 - 25. Section 35 was amended to expressly provide for withholding tax on demurrage and paragraph 3 of the third schedule was amended to provide the withholding tax rate on demurrage to be at 20%.
- ...
- 31. On my own assessment and for reasons I have given, I have come to the conclusion that demurrage charges on containers was chargeable to income



tax even under the statutory regime that existed at the material time. Any amendments that come later may have served to reinforce legislation that was already clear and without ambiguity.”

18. The above decision is subject of an appeal and it turns on its own facts which may not necessarily be similar to the ones herein and as pointed out by Mr. Ruto, the legal regime obtaining then included the Finance Act, 2016 which was not applicable to the current case and therefore it is safe to await the outcome of the appeal.
19. This court is in agreement with the argument that the Appellant could not demand for withholding tax where the same was not provided for by the law.
20. Article 210 (1) of *the Constitution* provides: -

No tax or licensing fee may be imposed, waived or varied except as provided by legislation.
21. Although the Respondent’s principal derived an income in Kenya in the form of demurrage charges, there was no law requiring the Respondent prior to 1st July 2018 to withhold tax arising therefrom and can only be held liable for taxes where the law is specifically binding on it. The argument that demurrage charges are akin to rental income cannot be sustained and making such implications would be extraneous and contrary to the law.

Whether withholding tax on demurrage charges was payable after the Finance Act, 2018 in consideration of the private ruling by the Appellant

22. The Appellant argued that its interpretation in the private ruling envisaged two scenarios that create obligations to withhold that is the payment of the income and the payment on account of the income earned and that the Respondent was the proper payer for withholding tax purposes.
23. The Respondent also argued that its role was limited to collection of demurrage and retention charges from importers of cargo and that even if such payments were subject to withholding tax, it was not the payer and as such bore no obligation to deduct and account for withholding tax as this obligation lay with the person who makes the payment, that is the importers of the cargo.
24. The Respondent relied on the Tribunal’s decision in Appeal No. 269 of 2018 to support their position that the law unequivocally places the burden to deduct and account for withholding tax to the payer.
25. In *Ocean Freight (E.A) Limited v Commissioner of Domestic Taxes (Supra)* it was held: -

“When Section 35(1) and Rules (2) and 4(1) of the Income Tax (withholding tax) Rules 2007 are read together then it becomes clear that the person who bears the responsibility to withhold tax is the one who makes the payment of the income. This is apparent from the definition of who a payer and payee are under Rule (2) of the Withholding Tax Rules which reads: -

“Payee’ A person who receives income from a payer for the purpose of these rules”.

“Payer’ A Person who deducts Withholding Tax for the purposes of these Rules”.”
26. It is provided under Rule 4(1) of the Income Tax (withholding Tax) Rules 2001 that: -



- (1) A person who makes a payment of, or on account of, any income which is subject to withholding tax shall deduct tax therefrom in the amount specified: -
- (a) under paragraphs 3 and 5 of Head B of the Third Schedule; and
 - (b) where the Government of Kenya has double taxation agreement with the Government of another country, in the terms of that agreement:
 Provided that the rates of tax under this subrule shall not exceed the rates specified under paragraph (a).
27. In consideration of the above rule, it is apparent that the Respondent who collects the demurrage charges and remits to its agent which is a non-resident, has the obligation to ensure that tax that ought to be withheld is withheld before remittance to its non-resident principal to avoid a leak on tax. In the circumstances, the Respondents are the payers for purposes of Section 35(1) of the *Income Tax Act* and the tax withheld is not part of the income but the income of their principals.
28. On whether the private ruling by the Appellant that withholding tax ought to have been withheld by the payers of costs and that the private ruling bound the Appellant as stipulated by Section 65 of the *Tax Procedures Act*, it would appear that the private ruling was a policy guideline pending the enactment of the Finance Act, 2018 which dates of commencement to different sections are specified in the preamble as follows: -
- (a) sections 48, 49, 50, 54, 56, 58, 60, 61, 62, 63, 64, 65, 66, 67, 68, and 78, on the 1st October, 2018;
 - (b) sections 4, 6, 7, 11(a), and 11(c) on the 1st January, 2019;
 - (c) all other sections on the 1st July, 2018.
29. Section 65 of the *Tax Procedures Act* provides: -
1. A taxpayer may apply to the Commissioner for a private ruling which shall set out the Commissioner's interpretation of a tax law in relation to a transaction entered into, or proposed to be entered into, by the taxpayer.
 2. An application under this section shall be in writing and: -
 - a. shall include all relevant details of the transaction to which the application relates together with all relevant documents;
 - b. shall specify precisely the question on which the Commissioner's interpretation is required; and
 - c. shall give a full statement setting out the interpretation by the applicant of the tax law in relation to the transaction.
 3. Subject to section 66, the Commissioner shall issue a private ruling to an applicant within sixty days of receiving an application for a private ruling under this section.
 4. If the taxpayer has made a complete and accurate disclosure of the transaction in relation to an application for a private ruling and the transaction has proceeded in all material respects as described in the application, the private ruling shall be binding on the Commissioner.
 5. A private ruling shall not be binding on a taxpayer.



6. A private ruling that is inconsistent with a public ruling that is in existence at the time of the making of the private ruling shall supersede the public ruling to the extent of the inconsistency with the public ruling.
30. It would appear that a private ruling under Section 65 of the *Tax Procedures Act* applies to a specific applicant, for a specific transaction subject to complete and accurate disclosure of the transaction. In this instance, had this court found that the Respondent was liable to withhold tax, then it could have been subject to the decision in Ocean Freight E.A. Limited and not to the private ruling by the Commissioner. Considering that there is a statutory provision and a decision of the court that the shipping agent is liable to withhold tax for payment it receives on behalf of its principal, the private ruling would thereby be overtaken by events.
31. In conclusion, this court finds that the appeal lacks merit, the Tribunal's judgment delivered on 14th July 2023 is upheld. Each party to bear its own costs.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,
THIS 31ST DAY OF MAY 2024**

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of: -

Esther - Court Assistant

Mr. Chabala Advocate for the Appellant

Mr. Ruto Advocate for the Respondent

HON. LADY JUSTICE A. ONG'INJO

JUDGE

