

**REPUBLIC OF KENYA**  
**IN THE TAX APPEALS TRIBUNAL**  
**APPEAL NO. 37 of 2018**

**MENNONITE BOARD OF EAST AFRICA T/A  
ROSSLYN ACADEMY..... APPELLANT**

**VERSUS**

**COMMISSIONER OF INVESTIGATIONS &  
ENFORCEMENT.....RESPONDENT**

## **JUDGEMENT**

### **1. INTRODUCTION**

The Appellant operates a school registered under the business name Rosslyn Academy (Rosslyn or “the School”), being a Nairobi based International Christian School founded in 1947. The Appellant’s main objective is to provide a (K-12) North American and Christian oriented education for the children of missionaries and staff of Christian mission agencies based in Kenya. Subject to availability of vacancies, the Appellant also admits other categories of students such as privately sponsored students who are interested in receiving Christian religious instruction and are aligned with the philosophy of the Appellant.

2. The Respondent is an officer of the Kenya Revenue Authority appointed under Section 13 of the Kenya Revenue Authority Act, Cap 469 of the Laws of Kenya, whose primary duty for the purposes of this Appeal is to raise assessments and consider objections raised thereto by the taxpayers.

### **3. BACKGROUND**

The Respondent in 2012 carried out an audit into the affairs of the Appellant for the purpose of Corporation Tax and Pay As You Earn(PAYE) covering the period July 2007 to June 2011. As a result, the Respondent raised an assessment of Kes.53,616,128/= in respect of PAYE and Kes.51,950,068 for Corporation Tax.

4. Vide a letter dated 25<sup>th</sup> July 2013, the Appellant objected to the assessment on the following grounds;

- a. The Appellant's income was exempt from tax pursuant to Section 13 and paragraph 10 of the First Schedule to the Income Tax Act CAP 470 of the Laws of Kenya.
  - b. That the PAYE assessment was premised on the erroneous assumption that the employees had not been taxed on the school fees benefit earned by such employees.
5. Following a meeting between the Appellant and the Respondent, the Respondent issued a letter dated 9<sup>th</sup> May 2014 and vacated the assessment of Corporation Tax against the Appellant.
6. Upon the ITax system becoming mandatory in 2015, the Appellant found itself registered in the system as a partnership in the platform and as such, the system would only allow filing of partnership accounts. When the Appellant visited the offices of the Respondent to resolve the matter. It discovered that indeed that the Corporation Tax demand that had been vacated through the letter of the 9<sup>th</sup> of May 2014 had not been cleared from the Respondent's system.
7. The Appellant on 5<sup>th</sup> of November 2015 received a tax demand from the Respondent for Corporation Tax in the sum of Kes.112,864,127/= inclusive of penalties and interest. Vide a letter dated 4<sup>th</sup> April 2016, the Appellant responded to the tax demand requesting the Respondent to withdraw the said demand on account of it having been vacated by the Respondent's Investigations and Enforcement Department on the 9<sup>th</sup> of May 2014.
8. After a series of meetings with the Respondent, the Appellant received a letter from Respondent on the 15<sup>th</sup> of December 2016 to the effect that it was still reviewing the "exempt status of the Appellant". Consequently, the Appellant on the 5<sup>th</sup> of March 2018 received an assessment for Corporation Tax in the sum of Kes.112,089,939/= By the same letter, the Respondent had withdrawn its letter of the 9<sup>th</sup> of May 2014.

## 9. **APPEAL**

Dissatisfied with the Respondent's position, the Appellant filed a Notice of Appeal on the 12<sup>th</sup> of April 2018 and a Memorandum of Appeal on the 25<sup>th</sup> of April 2018. The Appeal is premised on the following grounds;

- a. **THAT** the Respondent erred in fact and in law in finding that a registration of a business name establishes a legal entity separate and distinct from its owners;
  - b. **THAT** the Respondent erred in fact and law in alleging that the Appellant was not exempt from Corporation Tax under Section 13 and paragraph 10 of the First Schedule to the Income Tax Act, Cap 470 of the Laws of Kenya;
  - c. **THAT** the Respondent erred in fact and law in demanding taxes without any basis in law, in relation to a matter that had been concluded and taxes vacated;
  - d. **THAT** the Respondent had no legal basis to re-open and demand taxes in relation to a matter that had been finally and conclusively closed under the Income Tax Act, Cap 470 of the Laws of Kenya;
  - e. **THAT** the Respondent erred in fact and law by relying on an incorrect provision of the law to bring a tax claim against the Appellant despite a conclusive finding by the Respondent that the Appellant is tax exempt and is not liable to pay Corporation Tax;
  - f. **THAT** the actions of the Respondent in raising an Assessment relating to a matter that was closed nearly four years earlier is unfair, unreasonable and prejudicial to the Appellant and in breach of the Constitution.
10. The Appellant prays that the Tribunal sets aside and annuls the Assessment by the Respondent and orders that the Respondent pays the costs of the Appeal.
11. The Respondent defends its assessment and states that;
- a. Mennonite Board of East Africa was issued the first exemption letter on 18<sup>th</sup> September 1990, serial number 01828. The said exemption granted Mennonite Board of East Africa and its affiliates specified thereon exemption in respect of investment income specifically dividends and interest payable.
  - b. Under the first exemption certificate, the Appellant although granted an exemption under the umbrella of the Mennonite

Board of East Africa the exemption certificate did not give a blanket exemption for Income Tax it was only in respect of dividends and interest.

- c. Subsequently, the Commissioner exercising its right to review tax exemption of exempt bodies, issued a directive to the effect that an application for exemption from payment of Income Tax should be renewed after every three years. The effect of this was revocation of all exemption certificates including that of the Appellant and requiring the beneficiaries to apply afresh for the exemption.
- d. The Appellant did not have a valid exemption certificate for the period of February 2010 and the year of income 2011 as the second certificate serial number 20120911/1422 was issued on 11<sup>th</sup> September 2012 specifically to Mennonite Board of East Africa with no reference to the Appellant or any of its affiliates.
- e. Eligibility for exemption does not translate to automatic exemption and the same cannot be assumed. The Appellant ought to have made an application for the Commissioner's consideration.
- f. The Appellant did not have a valid Income Tax exemption for the period and cannot purport to rely on the exemption certificate granted to Mennonite Board of East Africa in 2012 to confer on it exemption status that it had not been granted.
- g. For the reasons stated above the Respondent states that the Appellant did not have a valid exemption and the taxes are payable as demanded by the Respondent for income derived by the Appellant from the admission of various categories of students admitted and which the Appellant had failed to declare.
- h. The Respondent's records show that the Mennonite Board of East Africa was issued with a tax exemption certificate in 2012. However, that certificate was specific to it and not any other affiliates or associated parties.
- i. While it is true that the Commissioner had vide a letter dated 9<sup>th</sup> May 2014 vacated the Corporation Tax assessment the same was erroneous as the Commissioner was still reviewing the

exemption status of the Appellant and the same was communicated to the Appellant vide a letter dated 5<sup>th</sup> March 2018.

- j. The rectification of the assessment was made pursuant to the provisions of Section 79 of the Tax Procedures Act, 2015 which provides that *“when a notice of an assessment or other document served by the Commissioner under a tax law contains a mistake that is apparent from the record and the mistake does not involve a dispute as to the interpretation of the law or facts of the case, the Commissioner may, for the purposes of rectifying the mistake, amend the assessment or document any time before the expiry of five years of the date of service of the notice of the assessment or other document”*.
- k. The Commissioner had gone through the available records relating to the Appellant’s exemption and from Corporation Tax necessitating the rectification of the assessment that had been issued vacating the Corporation Taxes.
- l. The Appellant was subjected to investigations for the period between July 2005 and June 2011. The said investigations were occasioned by the discovery that there was a problem with the purported exemption status of the Appellant.
- m. The Commissioner had gone through the available records and it was evident that the Appellant was not exempt from Corporation Tax necessitating the rectification of the assessment that had been issued vacating Corporation Taxes pursuant to Section 79 of the Tax Procedure Act, 2015.
- n. The initial vacation of taxes had been communicated to the Appellant on 9<sup>th</sup> May 2014. However, upon the realization that the Appellant had indeed not been granted an exemption, the Commissioner formally communicated to the taxpayer for the purposes of rectifying the mistake.
- o. The amended assessment was issued to the taxpayer well within the timelines prescribed under Section 79. Further, the Commissioner could not presume the existence of the exemption letter in the absence of a certificate specifically exempting the Appellant from Corporation Tax.

- p. The Appellant's exemption from tax was provided for under Section 13 of the Income Tax Act as read together with Paragraph 10 of Part 1 of the First Schedule to the Act. However, for the period under investigation the Appellant did not have a valid tax exemption because;
- i. The tax exemption was granted to the Appellant (as an affiliate body of Mennonite Board of East Africa) on 18<sup>th</sup> September 1990 and it was only in respect of dividends and interest not income derived from the admission of various categories of students admitted which the Appellant had failed to declare.
  - ii. The Appellant did not have a valid exemption certificate for the period of February 2010 and the year of Income 2011 as the Second certificate serial number 20120911/1422 was issued on 11<sup>th</sup> September 2012.
  - iii. The second exemption certificate was specifically issued to Mennonite Board of East Africa with no reference to the Appellant or any of its affiliates.
- q. According to the Respondent, there is no estoppel against statute and legitimate expectation cannot be contrary to statutory provisions. Therefore, the demand made by the Respondent on Corporation Tax was anchored in law and it cannot be said to have been arbitrary or unreasonable as claimed by the Appellant.

12. Consequently, the Respondent makes the following prayers;

- a. That the confirmed assessment dated 5<sup>th</sup> March 2018 for taxes amounting to Kes.112,080,939/= was proper in law.
- b. That the confirmed tax assessment subject of the Appeal amounting to Kes.112,080,939/= are due and payable by the Appellant.
- c. That the Appeal herein be dismissed with costs to the Respondent.



### 13. PARTIES SUBMISSIONS

#### 1. APPELLANT

Counsel for the Appellant submitted that arising from the audit which is the same one in Tax Appeal No.17 of 2017 where in that particular case the assessment was in respect to PAYE and Corporation Tax. The Appellant raised an objection on 25<sup>th</sup> July 2013 demonstrating that the Appellant's income was tax exempt. In this regard the Appellant relied on the Respondent's letter dated 9<sup>th</sup> May 2014 vacating a demand for Corporation Tax. However, two and half years later the Respondent issued an assessment covering the same period. Counsel submitted that the Respondent demanded taxes that it had already vacated. Reliance was placed on Sections 84, 85, and 88 of the Income Tax Act. That there is no legal standing in this matter in line with the doctrine of *functus officio* as in the case of ***RAILA ODINGA & TWO OTHERS vs THE IEBC***.

14. It was further averred that the Tax Procedures Act, 2015, which the Respondent has relied on was not in existence at the time of the assessment. The Act was passed in 2015 and the assessment covered up to 2011. Applying it would be to apply the law retrospectively. The Respondent herein cannot rely on Section 79 of the Tax Procedures Act, 2015 because this case contains a dispute regarding the law and facts.
15. The Appellant responded to the Respondent's contention that the Appellant (the school) and the Mennonite Board of East Africa are separate entities and that the exemptions only applied to interest and dividend income. Counsel relied on the Appellant's certificate of registration under the Business Names Act indicating that the Appellant carries on business under the name Rosslyn Academy.
16. On the second issue, the Appellant submitted that the exemption certificate issued by Respondent indicates that the Appellant, firstly, is exempt from Income Tax and secondly that the interests and dividends payable to all these entities should be paid gross without deduction of Income Tax. To that end Counsel for the Appellant submitted that the actions of the Respondent were in breach of Article 47 of the Constitution, 2010.
17. **THE RESPONDENT**  
The Respondent relied on the transitional and savings clause of the Tax Procedures Act, 2015 applying it to an act or omission of the Respondent. That there was no appeal as at the commencement of the Tax Procedures Act in 2015 and therefore, the Act applies to the present

case. The Respondent is relying on Section 79 of the Act because it did not address the facts and the law surrounding the assessment. Counsel for the Respondent submitted that the Appellant does not deny the existence of the income but rather relies solely on the exemption certificate.

18. The exemption certificate issued to the Appellant and its affiliates only covers investment income and is not a blanket exemption for all Income Tax for purposes of Corporation Tax. That exemption certificate was issued to the Mennonite Board of East Africa on 11th of September 2012 and expired on 11th of September 2015. Further, that around February 2010 the conditions of exemption of Income Tax were reviewed by the Respondent to the effect that all previous exemption certificates were revoked so the tax payers were to apply afresh. Hence the reason why the Mennonite Board of East Africa, the umbrella body under which the Appellant incorporated applied for this certificate. Rosslyn Academy is not stated anywhere as having been covered by this exemption certificate. The Appellant and each of its affiliates have their own pin and the Respondent requires each of them to declare their income in their pin numbers.

19. **ISSUES FOR DETERMINATION**

In our considered view there is only one issue for determination in this Appeal, namely;

- a. *Whether the Appellant is Income Tax exempt?*

20. **ANALYSIS**

The bone of contention in this matter, as stated above is whether the Appellant is Income Tax exempt. As such the proper starting point is the provisions of Section 13 and paragraph 10 of Part I of the First Schedule to the Income Tax Act, Cap 470 of the Laws of Kenya. Section 13 of the Act thus states;

- (1) Notwithstanding anything in Part II, the 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.*

21. Additionally, paragraph 10 of Part I of the First Schedule to the Income Tax Act provides;



*Subject to Section 26, the income of an institution, body of persons or irrevocable trust, of a public character established solely for the purposes of the relief of the poverty or distress of the public, or for the advancement of religion or education—*

*(a) established in Kenya; or*

*(b) whose regional headquarters is situated in Kenya,*

*in so far as the Commissioner is satisfied that the income is to be expended either in Kenya or in circumstances in which the expenditure of that income is for the purposes which result in the benefit of the residents of Kenya:*

*Provided that any such income which consists of gains or profits from a business shall not be exempt from tax unless such gains or profits are applied solely to such purposes and either—*

- (i) such business is carried on in the course of the actual execution of such purposes;*
- (ii) The work in connection with such business is mainly carried on by beneficiaries under such purposes; or*
- (iii) such gains or profits consist of rents (including premiums or any similar consideration in the nature of rent) received from the leasing or letting of land and any chattels leased or let therewith; and provided further that an exemption under this paragraph—*

*(A) shall be valid for a period of five years but may be revoked by the Commissioner for any just cause; and*

*(B) shall, where an applicant has complied with all the requirements of this paragraph, be issued within sixty days of the lodging of the application.*

22. From the above cited provisions of the law, it is evident income of an institution, body of persons or irrevocable trust of a public character established solely for the purpose of the relief of poverty or distress of the public or for the advancement of religion or education can be exempt from tax. In doing so, the Commissioner, before granting such exemption

is required to satisfy himself that an Applicant meets the conditions set forth in the above provisions. The Appellant herein, which trades as Rosslyn Academy, was deemed to have met these requirements when it was issued with an exemption certificate on 18<sup>th</sup> September 1990.

23. The exemption certificate specifically states that the Appellant is exempt from Income Tax and dividends and interests payable. The Respondent categorically acknowledged this position in its letter of 9<sup>th</sup> May 2014. To the recapitulate this, the letter in part read;

*“...After further deliberations within ourselves, we are in agreement with the position stated by your representatives and the Corporation Tax assessed has hereby been vacated.”*

24. For good measure, the Respondent advanced an argument to the effect that the Appellant herein and Rosslyn Academy are two distinct and separate entities. Having said that, the evidence before this Tribunal suggests that Rosslyn Academy is the name the Appellant uses for the purpose of carrying on its business. As such this Tribunal is not persuaded by the Respondent's assertion. The defect with the Respondent's arguments is that it results in the creation of an unlawful distinction between the owner and his business, in this case between the Appellant and Rosslyn Academy. This is contrary to provisions of Section 4 of the Business Names Act, Cap 499. A business name is not a juristic person capable of being sued. The Tribunal takes a cue from the High Court holding in **MARY RUGURU NJOROGE v JOHN SAMUEL GACHUMA MBUGUA & 4 OTHERS (2014) eKLR**. In the premise, the Tribunal finds that Rosslyn Academy, the Appellant's Business Name, is Income Tax exempt.
25. That aside, in a complete and dramatic turnabout by a letter dated 5<sup>th</sup> November 2015 the Respondent raised a demand for Corporation Tax against the Appellant. The effect of this being that the Respondent had abandoned its grant of exemption status to the Appellant. To this the Appellant submitted that the Respondent must be estopped from demanding these taxes on account of its previous representation. That the actions of the Respondent are contrary to the edicts of the *functus officio* doctrine, which prevents decision making bodies such as the Respondent from reviewing or varying its own decisions. This, the Tribunal reckons to be a correct interpretation and application of the doctrine. It is in line with the holding of the Supreme Court in **RAILA ODINGA & 2 OTHERS v INDEPENDENT ELECTORAL & BOUNDARIES COMMISSIONS (2013) eKLR**;

*...” the functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter...The principle is that once such a decision has been given, [it is subject to any right of appeal to a superior body or functionary] final and conclusive, such a decision cannot be reviewed or varied by the decision maker.”*

26. The Respondent has tried to re-open the vacated assessment on the basis of the provisions of Section 79 of the Tax Procedures Act, 2015, which states;

*When a notice of an assessment or other document served by the Commissioner under a tax law contains a mistake that is apparent from the record and the mistake does not involve a dispute as to the interpretation of the law or facts of the case, the Commissioner may, for the purposes of rectifying the mistake, amend the assessment or document any time before the expiry of five years of the date of service of the notice of the assessment or other document.*

27. This Tribunal finds that the provisions of Section 79 as cited above only apply when an assessment or any document issued by the Commissioner contains a mistake that is apparent from the record. In **CHANDRAKHANT JOSHBHAI PATEL v R (2004) TLR** it was held that an error apparent on the face of the record must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long drawn process of reading on points which may be conceivably be two opinions.
28. Noteworthy, the case herein contains a dispute as to facts and points of law. It is a fact that the Appellant was exempt from Income Tax by the Respondent. Similarly, it is fact that after wrongfully claiming Corporation Tax from the Appellant, the Respondent via its letter dated 9<sup>th</sup> May 2014 vacated the said demand. As such, this Tribunal does not see a basis in law for again demanding for Corporation Tax given the Respondent’s previous conduct. The Appellant had legitimate expectation and rightly so from the said conduct. In the premise, the Tribunal finds the assessment for Corporation Tax as meting an unlawful and untenable disadvantage upon the Appellant.

29. Additionally, the Tribunal finds the Respondent's conduct to be in gross violation of Article 47 of the Constitution, 2010. The cornerstone of Article 47 of the Constitution is that administrative bodies, such as the Respondent herein, are required to make decisions that are lawful and reasonable. The Respondent's action of revoking the Appellant's exemption certificate and raising the demand for Corporation Tax has no basis in law. In this regard, the Tribunal associates with the observations made by the Court of Appeal in **JUDICIAL SERVICE COMMISSION v MBALU MUTAVA & ANOTHER (2015) eKLR**, where it was stated;

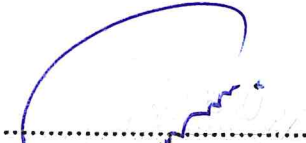
*"...Article 47 (1) encompasses several duties- duty to act expeditiously, duty to act fairly, duty to act lawfully, duty to act reasonably and in the special case mentioned in article 47 (2), the duty to give reasons for administrative action. The duty to act lawfully and duty to act reasonably refers to the substantive justice of the decision whereas the duty to act expeditiously, efficiently and by fair procedure refers to procedural justice."*

### 30. DETERMINATION

The Tribunal makes the following orders;

- a. The Appeal herein is merited.
- b. The Appellant is exempt from Income Tax as per the provisions of Section 13 and paragraph 10 of the Part I of the First Schedule of the Income Tax Act.
- c. The Respondent's assessment for Corporation Tax has no basis in law and is hereby vacated.
- d. There shall be no Orders as to Costs.

DATED and DELIVERED at NAIROBI this 27<sup>th</sup> day of March 2020.



.....  
MOSES B. OBONYO  
CHAIRMAN



.....  
MAHAT SOMANE  
MEMBER



.....  
PATRICIA MAGIRI-ANAMPIU  
MEMBER



.....  
TIMOTHY K. CHESIRE  
MEMBER

