

REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
APPEAL NO.104 OF 2016

ST. ANDREW SCHOOL TURI.....APPELLANT

=VERSUS=

THE COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

JUDGEMENT

BACKGROUND:-

1. The Appellant is a private international school operating at Turi in Molo and offering the British Curriculum of education.
2. The Respondent is established under the Kenya Revenue Authority Act, CAP 469 of the Laws of Kenya and is charged with the mandate to collect revenue and administer the tax regime on behalf of the Government of Kenya.
3. The Appellant enjoys an exemption from payment of income tax for a period of 5 years running from the 26th day of May, 2017 and ending on the 26th May, 2019 in pursuant to an Income Tax Exemption Certificate issued by the Respondent to the Appellant on the 27th day of May, 2014.
4. The Appellant being an institution for learning is not registered for VAT as provision of educational services is exempt from a charge of VAT in pursuant to the provisions of the VAT Act, 2013.
5. The Respondent vide a letter dated the 1st day of December, 2015 issued to the Appellant a Notice of intention to undertake an in-depth audit for PAYE and Withholding Tax for the period running from January, 2012 to December, 2015.

6. The Respondent vide a letter dated 16th day of June 2015 communicated to the Appellant the findings of the concluded Audit process for tax assessments for the years of income 2012 to 2015 where the tax liability as relates to PAYE and Withholding Tax were assessed in the sums of Kshs.12,530,815/= and Kshs.2,289,868/= respectively.
7. The Respondent noted during the audit process that the Appellant was not applying the provisions of Section 5 of the VAT Act, 2013 and Section 6(6) of the VAT Act, CAP 476 of the Laws of Kenya (now repealed) and as a consequence thereof proceeded to compute the tax payable for VAT on the part of the Appellant at a sum of Kshs.16,485,868/=.
8. The Appellant objected to the Respondent's aforesaid tax assessment vide a letter dated the 29th June, 2016 through M/s Kimani and Associates Certified Public Accountants.
9. The Respondent vide a letter dated 4th day of July, 2016 addressed to the Appellant's tax Consultant to wit M/s Kimani and Associates Certified Public Accountants acknowledged the receipt of the Appellant's Objection to the tax assessment but proceeded to confirm the tax assessments made in the letter dated 16th June, 2016 without any amendments whatsoever.
10. The Appellant was thereby prompted to issue a Notice of Intention to Appeal on the 1st August, 2016 and subsequently proceeded to file its Memorandum of Appeal and Statements of Facts as against the confirmation of the tax assessments before the Tribunal on the 4th day of August, 2016.

THE APPEAL

11. The Memorandum of Appeal dated 1st August, 2016 is premised on the grounds that:-

- i) The VAT is not applicable under the VAT Act, 2013 in relation to imported services for unregistered persons.
 - ii) That with regard to the PAYE assessment made no credit of withholding tax for the respective peripatetic teachers had been given and Corporation tax rate had been wrongly used instead of individual tax rates.
 - iii) That as regards the Withholding Tax assessment the amounts subjected to tax were not subject to such tax, repeated transactions had been subjected to tax and wrong rates of tax had been applied.
12. The Appellant's prayer before the Tribunal was that the Respondent be directed to amend the assessments as follows:-
- a) The assessment as regards VAT assessment relating to the period prior to September, 2013 be vacated;
 - b) With regard to PAYE assessment to give full credit for Withholding Tax deducted and remitted in addition to applying personal graduated rates of tax to each individual peripatetic teacher; and
 - c) With regard to Withholding Tax assessment to assess tax under the confines of Section 35 of the Income Tax Act and apply appropriate rates of tax under Schedule 111 of the Act and to remove items taxed more than once.

THE RESPONSE BY THE RESPONDENT:-

13. The Respondent subsequent to being served with the Memorandum of Appeal and Statement of Facts filed before the Tribunal by the Appellant proceeded on 31st August, 2016 to file the Respondent's Statement of Facts dated the same day.
14. The Respondent contends that in pursuant to Section 5(1) (c) of the VAT Act, 2013 VAT is payable on supply of imported taxable services. The

imported services are chargeable to tax on both registered and non-registered persons.

15. The Respondent states that it is the statutory obligation of non-registered persons to pay VAT on imported services and that the Appellant had such obligation in relation to services rendered by peripatetic teachers in the school.
16. The Respondent maintained that under the provisions of the Income Tax Act the peripatetic teachers were employees of the Appellant and not self-employed contractors and as such PAYE was applicable to them.
17. That the actual facts as to the nature of the relationship between an employer and employee are very essential in establishing whether it is an independent contractor or an employer-employee relationship and how the relationship is defined by the parties is not material.
18. The Respondent averred that the rates applied for assessment of Withholding Tax on different entries are in accordance with the provisions of the Income Tax Act.
19. The Respondent further maintained that no item had been taxed twice and that any Withholding Tax deduction and paid by the Appellant had been taken into account in arriving at the final Withholding Tax assessment.
20. The Respondent's prayer is for the Tribunal to dismiss the Appeal and confirm the tax assessments following the findings of the in-depth tax audit.

THE HEARING:-

21. When the matter came up for hearing on 5th April, 2017 the parties indicated that a settlement had been reached upon in respect of the entire assessment as to the principal taxes payable under VAT, PAYE and Withholding Tax and that the thorny and pending issue preventing the execution and filing of a Consent arising from the negotiated agreement

was the period allowable for the Appellant to apply for waiver of interest and penalties accruing on the amounts of the principal taxes due and payable on the part of the Appellant.

22. The Tribunal was in the circumstances prompted to request the parties to record before it Consent in respect of their part settlement and to let the Tribunal deal and determine the pending issue as relates to interest and penalties payable on the assessed principal taxes.
23. With the Consent of Dr. Njoroge Kimani for the Appellant and Ms. Angeline Chinga appearing for the Respondent the Tribunal entered a partial Consent Judgment in the matter to the effect that the taxes due for the period of income 2012 to 2015 be adjusted following the reconciliations thereof on the part of the parties as under:-
 - a) The VAT payable is a sum of Kshs. 2,675,721/=, inclusive of interest and penalties;
 - b) The PAYE payable is a sum of Kshs. 8,623,451/= being the principal tax excluding interest and penalties; and
 - c) The Withholding Tax payable is a sum of Kshs. 749,669/= being the principal tax excluding interest and penalties.
24. The parties upon recording the Consent on the reconciled tax assessments and which amount was agreed between the Parties as having been duly remitted were directed by the Tribunal to file and serve upon each other with Written Submissions on the pending issue as to the period allowable for the enforcement of payment on the part of the Respondent and/or for the Appellant to apply and secure a waiver on the payment of accrued interest and penalties on the reconciled sums for PAYE and Withholding Tax.
25. When the matter came up for Mention on the 25th April, 2017 for the purposes of confirming the filing of the Written Submissions and for the Counsels for the Parties to highlight on the Written Submissions filed,

both parties had duly filed and served on the other with their separate Written Submissions and both Counsels did not find the need to highlight on the Written Submissions.

ANALYSIS AND DETERMINATION:-

26. The purport of the issue for the due determination by the Tribunal is essentially whether the Respondent has the authority to grant latitude to the Appellant in respect of it's enforcement of payment of penalties and interest accruing on assessed principal taxes.
27. The Appellant in it's Written Submissions is of the considered view that there ought to be no limit provided as to within what period the Appellant ought to secure a waiver on the payment of the accrued penalties and interest on the principal taxes payable under PAYE and Withholding Tax on the basis of the facts that the Cabinet Secretary for Treasury has no time limit provided for him in any tax statute to act on an application for waiver of penalties and interest on an assessed principal tax and that the obtaining system for dealing with such applications makes the follow up by a tax payer difficult or impossible.
28. The Appellant maintained that given the fact that the Appellant has no way of expediting the process for the waiver of penalties and interest it ought to be allowed an open ended opportunity to apply for a waiver on the accrued penalties and interests on the assessed and now settled principal tax liability on PAYE and Withholding Tax.
29. The Respondent submitted that under the provisions of the Tax Procedures Act the Respondent has no power to waive any taxes but has the power to enforce collection of any taxes that are found due and payable.
30. The Respondent in emphasizing on it's mandate made reference to the decision in *Republic =Vs= Commissioner of Domestic Taxes Ex-parte*

Affiliated Business Contacts Limited (2015) eKLR in which the Court held that :-

“where tax has been assessed, the Respondent should endeavor to recover the same within a reasonable period of time.”

31. The Tribunal which is a creature of the Tax Appeals Tribunal Act, 2013 has absolutely no jurisdiction under the parent statute in determining an application for the waiver of penalties and interest accruing on any principal amount of a tax found due and payable. The Tribunal has to determine the liability or otherwise of a party to pay any assessed taxes and is a stranger to the subsequent execution of its Judgment and/or the enforcement by the Respondent of the payment of any tax found due and payable on the part of a tax payer.
32. With the Parties having fully reconciled on the amount of the principal taxes payable on the part of the Appellant the accrued penalties and interest are payable unless appropriately waived by the Cabinet Secretary for Treasury. The Tribunal has absolutely no control of such an administrative process and none of the Parties can ascertain with certainty the outcome of the application lodged by the Appellant for the waiver of penalties and interest on the reconciled principal amounts for PAYE and Withholding Tax.

FINDINGS ON FINAL DETERMINATION:-

33. In the circumstances the Tribunal finds that the Appeal as relates to the assessment and confirmation of the taxes under the VAT, PAYE and Withholding Tax lacks merit and accordingly orders as follows:-
 - a) By Consent of the Parties the Appellant to pay the settled and/or reconciled taxes as under:-
 - i) VAT in the sum of **Kshs. 2,675,721/=**, inclusive of penalties and interest;

- ii) PAYE in the sum of Kshs. 8,623,451/= being the principal tax excluding penalties and interest; and
 - iii) Withholding Tax in the sum of Kshs. 749,669/= being the principal tax excluding penalties and interest.
- b) The Appellant to pay the penalties and interest on the foregoing reconciled principal amounts for PAYE and Withholding Tax; and
- c) Each party to bear its own costs.

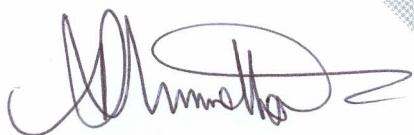
DATED and DELIVERED at NAIROBI this 2nd.....DAY OF August, 2017.

In the presence of:-.....Mr. Nanyingi h/b for Dr. Kimani.....for the Appellant

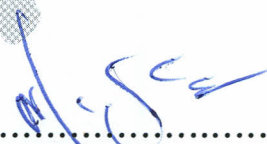
.....Mr. Nyaga h/b for Ms. Chinga.....for the Respondent



ERIC NYONGESA WAFULA
CHAIRMAN



PHILOMENA KIROKEN
MEMBER



PONANGIPALLI V.R. RAO
MEMBER



JOSEPH M. WACHIURI
MEMBER



GABRIEL KITENGA
MEMBER