



Grant Thornton

An instinct for growth™

Recent Updates on Tax Case Law

Presentation By:
Mbiki Kamanjiri

Objections and Appeals Process

Procedure



Objection to Commissioner

Within 30 days having paid tax not in dispute
Commissioner to respond within 60 days

High Court

If still aggrieved by decision by TAT one may appeal to High Court

Tax Appeals Tribunal

If still aggrieved by Commissioner's decision may appeal to TAT

Court of Appeal

After High Court TPA provides this as highest court

Appealable decision

Section 3 of the Tax Procedures Act
“appealable decision” means an objection decision and any other decision made
under a tax law other than –

- (a) a tax decision; or
- (b) a decision made in the course of making a tax decision;

“tax decision” means—

- (a) an assessment;
- (b) a determination under section 17(2) of the amount of tax payable or that will become payable by a taxpayer;
- (c) a determination of the amount that a tax representative, appointed person, director or controlling member is liable for under sections 15, 17, and 18;
- (d) a decision on an application by a self-assessment taxpayer under section 31(2);
- (e) a refund decision;
- (f) a decision under section 49 requiring repayment of a refund; or
- (g) a demand for a penalty

R v KRA Ex parte Mkopa

Facts

- Mkopa imported TV sets powered by solar
- Specialized equip that exclusively use or store solar power
- Denied exemption on shipment in May 2017
- Private ruling plus demo
- JR as PR not appealable decision
- Seeking refund of 35M

Ruling

- JR to review decision making process and not merits of the case
- EACMA was amended but VAT Act hadn't been amended
- Mkopa had a legitimate expectation
- Grant the refund



Provisional collection of taxes Act

Okiyah Omtatah v CS NT and 3otrs

As is customary after reading of the Budget Speech the CS provisional collection of taxes Act enabling the CDT to collect taxes proposed in the BS through Finance Bill

Omtatah filed a petition seeking to term the Provisional Collection of Taxes and Duties Act unconstitutional.
The Budget Speech is only first reading of the Finance Bill

Omtatah filed a petition seeking....

Okiyah Omtatah v CS NT and 3otrs

Ruling

Okwany J

Determined that the application had merit and partially succeeds making orders that:

- Finance Bill presented late
- Provisional Collection of taxes and Duties Act unconstitutional
- Finance Bill cannot be applied before being assented to by the President

Consultant vs Employee

Everret vs KRA:

Helicopter charter services using freelance pilots



Facts

- Pilots not integrated to business
- Pilots would procure license independently
- Everret could not dismiss them or force them to fly
- Did not carry out management duties
- Hired for special skills
- Employed for a few hours or a few weeks

Ruling

- Contract of service not contract for service.
- No regard to duration of employment
- Income derived from Kenya
- Guided on how to work
- Liable to pay PAYE

Duty to deduct PAYE

Coop Bank vs Erastus Mureithi :

EM was CEO & MD received benefits and not taxed. Co-op applied for refund and deducted 11M.



Facts

- Car valued KES 2.9m
- Insurance premiums 10M
- KES 4M school fees for children
- Air tickets for children 400K
- Monthly ent allowance KES 8K
- MD 1998 to 2001
- Decided to receive net of taxes

Ruling

- Employer's duty to withhold taxes
- Where employer fails the directors will be held culpable
- Ignorance is no defence
- Decision swayed by defendants role as MD
- Refund the tax
- Can recover even after employment has seized.

Barclays Bank of Kenya vs Commissioner of Domestic Taxes

Facts

- BBK gets services from VISA mastercard who charge them interchange fees claiming they are exempt as fin services
- KRA claimed this is an imported service as it was a royalty
- VAT on imported services
- Demand KES 761M

Ruling

- It was indeed a royalty as the fee was a right to use.
- In the absence of the trademark license the bank would not be able to access the global payment systems offered by the providers
- Granted KRA's demand on KES 761

Legitimate Expectation

Ecobank v CDT

On Feb 1979 KRA issued a letter exempting financial institutions, insurance companies, oil cos, NSE listed and large manufacturers from preparing separate sub accounts

Section 15(7)(e)(v) of the ITA provides for separate sourcing of income. Business, rent, dividends and interest, agriculture, salaries, pension

Ecobank had rental properties across the country including Fedha Towers. The banking business was in losses and they were knocking this off against the rental income.

In 2002 KRA issued another letter “Interest as a Separate Source of Income” and referred to the separate sources of income as per S15

Legitimate Expectation

Ecobank v CDT

KRA raised a demand claiming Ecobank should separate source and applied penalties and interest.

Ecobank in defence claimed legitimate expectation

KRA claimed letter in 2002 clarified

Ruling

2002 letter clarified in regard to Interest income. It did not withdraw the Private ruling given in the first letter. KRA has always been aware of Section 15(7) and cannot suddenly demand immediate compliance

Withholding tax

R v KRA Ex parte Kenya Nut Co

Kenya Nut Co was in the business of producing and selling nuts which it did so through agents. The agents would take the nuts sell and remit the proceeds to Kenya Nut co having deducted their commissions.

KRA was of the opinion that withholding tax was deductible on the commissions. And assessed tax of KES 33M

S 35 of ITA - A person shall, upon payment of an amount to a non-resident person a management or professional fee which is chargeable to tax, deduct therefrom tax at the appropriate non-resident withholding tax rate

R v KRA Ex parte Kenya Nut Co

Case of applicant

Since Commissions were deducted by its agents outside the country, it was unreasonable to compel it to withhold taxes due as it could only withhold taxes which were in its hands.

Ruling Odunga J

Granted an order of Certiorari and prohibition of KRA from enforcing or recovery of KES 35M

Withholding Tax on interest



Primarosa vs Commissioner of Income Tax

Facts

Primarosa is a flower grower and exporter registered in Kenya. The company's parent registered in the BVI extended a loan of USD 15M attracting interest of 8%. As at the point of the KRA audit the company hadn't paid any interest to the parent

KRA invoked S23 of ITA and wished to deem interest and thereby attract WHT assessing tax of KES 127M.

Legislative Provisions

Section 2 of ITA Defines Paid to include “*distributed, credited, dealt with or deemed to have been paid in the interest or on behalf of a person*”

Section 35(1)(e) of ITA *A person shall, upon payment of an amount to a non-resident person Interest and deemed interest which is chargeable to tax, deduct therefrom tax at the appropriate non-resident withholding tax rate*

Section 16(3) of the ITA defines deemed interest to mean *an amount of interest equal to the average ninety-one day Treasury Bill rate, deemed to be payable by a resident person in respect of any outstanding loan provided or secured by the non-resident, where such loans have been provided free of interest*

Withholding Tax on interest

Primarosa vs Commissioner of Income Tax

Ruling

Deemed interest provisions were not in force at the time of the audit. Hence there was no legal premise to deem interest.

And since no interest was paid there s no premise to withhold tax.

Withholding tax on “payment”

R v KRA Ex Parte Cimbria

Facts

The KRA wrote to Cimbria demanding payment of KES 10.6M in regard to WHT on management fees and interest. The investigation was done to establish how Cimbria was able to obtain high external borrowing while in perpetual losses

Cimbria’s tax agents wrote back saying there was no tax to be paid as these fees and interest hadn’t been paid. They then demanded an interpretation of S35(1) read together with S2.

KRA issued agency notices freezing Cimbria’s accounts until settlement of the said taxes. Cimbria then applied for Judicial Review to determine the case

Withholding tax on “payment”



R v KRA Ex Parte Cimbria

Ruling

The judge observed that Cimbria had claimed the expense in its P&L thereby gaining the benefit of reducing the taxable income

The judge also noted that Cimbria being a fully owned subsidiary, not paying the interest benefits the group as the monies are used for group business.

Found that the respondent were well in their right to demand the withholding tax

Withholding tax on “payment”

R v KRA Ex Parte Fintel

Facts

KRA was demanding KES 4.7M from the applicant arising from withholding tax in interest not paid.

Fintel entered into a contract with a Chinese company for construction of rentals. The contract provided for interest on payments not honoured as they fell due. Fintel encountered cash flow difficulties and hence could not honour the terms

Following accounting principles they accrued the interest in their books.

Their argument was accrual does not amount to payment and hence not tax to be withheld.

Withholding tax on “payment”



R v KRA Ex Parte Fintel

Ruling

Justice Majanja in his ruling decided that the term “Paid” as per the ITA takes on the ordinary meaning of pay to mean delivery of money or some other valuable thing .

He also referred to S35 which requires a person making payment to “**deduct**” tax at the appropriate rate. This point strengthens the ordinary meaning of pay where one deducts. One cannot deduct from a mere provision in the accounts.

Majanja J then differentiated this case from Cimbria on point of related parties. If indeed Cimbria’s parent was credited then the WHT would be payable. As a benefit has already been passed.

CDT vs Mt Kenya Safari Club

Facts

Hotel made renovations and extend the hotel by 16 rooms and claimed ID on the expenses.

KRA disallowed these on the basis that the building was new it was mere renovations

Legal provisions

Para 24 of 2 Schedule

On construction of a hotel building... and grant allowance in year of first use.

Where an existing building is extended the extension shall be treated as a new building

CDT vs Mt Kenya Safari Club

Ruling

J Tuiyott

A later amendment provided that

construction of an Industrial Buildings includes the expansion or substantial renovation or rehabilitation of an industrial building, but does not include routine maintenance or repair

Other Notable Mentions

Coca Cola Case

Export of service. Marketing services of coca cola brand.

Demand KES 500M

KRA won tribunal Coca cola has appealed to High Court

Kengen case.

Duty to withhold tax is on ultimate payer

Kenya Muslim Charitable Trust

Court of appeal seeking extension to file appeal

KRA held rice worth 98M for 6 months

Can a court review its own decision



Victrociset SPA v CDT

Facts

- The applicant had been granted a stay of execution that required that they deposit 50M and frozen account
- Taxpayer objected that the frozen account was their operating account, salaries`

Ruling

- An investor is like a cow which gives us milk. We must not slaughter it. KRA must be facilitative of taxpayers. It must be incentive based not execution based. If you kill the cow you get meat for one day.
- The collector should not endeavour to strangle investors and taxpayers or treat them with disdain.

5th Floor,
Avocado Towers,
Muthithi Road, Westlands,
Nairobi
Kenya

T +254 20 3752830 | 3747681 | 2402975
F +254 20 3749839

www.grantthornton.co.ke

Mbiki Kamanjiri
Manager – Tax Consulting Services
Cell +254 721 449 468
E ; mbiki.kamanjiri@ke.gt.com

