

Recent Updates on Tax Case Law

Presentation by:

Mbiki Kamanjiri

Tax Consulting Manager
RSM East Africa

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

On a question of law

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
Public importance

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;
- (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

Appealable decision



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
- The withdrawal of a private ruling cannot be done by mere implication
- Grant the refund



Constitutionality of TPA



Petition No.412 of 2016 Dr. Robert Ayisi Vs KRA and Nairobi City County Government

Issue:

The taxpayers challenged constitutionality of the TPA with regard to seizure of property.

The Ruling:

Sections 44(1) and (2), 60 (1) and (3) and 59 (4) of the Tax Procedures Act are unconstitutional.

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

Consultant vs Employee



Test to Apply

whether the person's duties are an integral part of the employer's business

M

The greater the direct control of the employee by the employer, the stronger the grounds for holding it to be an employment contract

I

The way in which the parties themselves treat the contract and the way in which they describe and operate it;

Sufficient mutuality of obligations to justify a finding that there was a contract of employment;

C

Control i.e. In the contract for service the master can order or require what is to be done, while in the contract of service he cannot only order or require what is to be done but how it shall be done;

E

Reverse VAT



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

VAT on Sale of Land



David Mwangi Ndegwa vs KRA:

David bought land in Kiambu with buildings on it and forced to pay VAT.



Facts

- Land purchased had commercial buildings
- “Supply by way of sale, renting, leasing, hiring, letting of land or residential premises;”
- Can one sell land without selling the building
- Surface of the earth and airspace above
- KRA’s argument VAT Act exempts residential property only. Defines commercial property as “Land or building not occupied or not capable of being occupied as residential premises.

Ruling

- Both Plaintiff and defendant agree on definition of land
- Para 8 ambiguous as it introduces the possibility that land can be distinct
- Which part to levy VAT
- Not time barred
- Purchaser has the right to claim

Agents Action



Republic v KRA Ex-parte Total Kenya Limited

Issue

- Whether the principal is laible for the agent's default.
- Can KRA demand tax from a taxpayer who made payment to the agent

Ruling

- though a clearing agent is licensed by the Commissioner, the agent remains the agent for the tax payer and the tax payer cannot evade his liability on the basis of fraudulent acts of the clearing agent

Customs Value



Application No. TAT 05 of 2015: Bata Shoe Co. (U) LTD Vs. Uganda Revenue Authority

Case: Whether the Royalty payments by the Applicant to Bata Brands S.a.r.l Luxembourg should have formed part of the customs value of the **imported** goods.

The Ruling:

Payment of the royalties was not a condition of sale of the goods imported hence not subject to Customs duty.

VAT on Salvage disposal



Appeal No. 47 of 2016: Mayfair Insurance Company Ltd Vs Commissioner of Domestic Taxes

Issue:

Whether salvage disposals constitute a supply of taxable goods.

The Ruling:

VAT is not applicable on salvage disposals on the basis that such disposal is incidental to the main supply of insurance services which is exempt from VAT

VAT on Exported Services



Income Tax Appeal No. 17 of 2013: Commissioner of Domestic Taxes Vs. Total Touch Cargo Holland

Appellant is based in Netherlands whose main business is the provision of transport and handling services for its customers who import flowers and other horticultural products from Kenya to Europe.

The Appellant incorporated a subsidiary, Total Touch Cargo Kenya Limited (“TTC-K”) whose purpose was to block airspace in aircraft and to provide cooling services to the Parent company in Holland.

TTC-K later contracted these services to Kenya Airfreight Handling Limited (“KAHL”) who raised invoices to TTC-K instead of raising the same to the Respondent.

The KRA contended that the services rendered to the Respondent were local supplies

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.

Withholding tax on interest



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 2 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.

Term Paid



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.

Term Paid



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.

Term Paid



KRA v R (Ex Parte) Fintel

Court of Appeal overturned the case to KRA's favour

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.

Connect with us

Mbiki Kamanjiri

Tax Consulting Manager
RSM East Africa

E: mkamanjiri@ke.rsm-ea.com
T: **+254 721 449 468**

NAIROBI

Tel: +254 20 3614000/4451747/8/9
Mobile: +254 706 347950/772 786111
Email: info@ke.rsm-ea.com
Website: www.rsm.global/kenya

DAR ES SALAAM

Tel: +255 22 2137314/15
Email: info@tz.rsm-ea.com
Website: www.rsm.global/tanzania

MOMBASA

Tel: +254 41 2311778/2312640
Mobile: +254 707 613329
Email: infomsa@ke.rsm-ea.com
Website: www.rsm.global/kenya

KAMPALA

Tel: +256 414 342780
Email: info@ug.rsm-ea.com
Website: www.rsm.global/uganda



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Company: **RSM Eastern Africa**



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