



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.372 OF 2014

BETWEEN

HELPAGE INTERNATIONAL.....PETITIONER

AND

THE COMMISSIONER OF DOMESTIC TAXES.....RESPONDENTS

JUDGMENT

Introduction

1. The Petition dated 21st July, 2014 raises the question whether the Petitioner, a non-profit making global network of non-governmental organisations dealing with matters of the contribution of older persons to their own well-being and that of their families, should have its expatriate staff exempted from paying income tax under the **Income Tax Act**.

2. It therefore prays for the following declarations and Orders:

i) A declaration that demand of taxes by Respondent constitutes an infringement of the Petitioner's rights under Article 47 of the Constitution 2010 and a threat to the infringement of the petitioner's right to under Article 40 of the Constitution of Kenya, 2010.

ii) A declaration that the demand for Kshs.17,151,150 is excessive and not properly due under the Income Tax Act as it incorporates amounts charged under Section 72D and 94 of the Income Tax Act which are not lawfully due.

iii) An order for judicial review by way of Certiorari to bring to this Court and quash the decision to demand and the demand contained in KRA's letter of 4th July 2014.

iv) In the alternative, an order for judicial review by way of Mandamus to compel the Respondent to avail the Petitioner reasons for his decision in declining the Petitioner's application for abandonment of the tax in question.

v) A declaration that the Petitioner is entitled under the Income Tax Act to appeal the decision of the Respondent to impose penalties under Section 37 of the Income Tax Act.

vi) Any other orders that t this Honourable Court may deem necessary to grant.

vii) An order for costs of this Application.

Petitioner's case

3. The Petitioner states that sometime in November, 2003, the Commissioner of Domestic Taxes commenced an audit on the Petitioner's books of account which was concluded in April, 2004. One of the actions the Commissioner thereafter took was to raise additional taxes in respect of three employees working in Kenya but whose remuneration had been paid by the Petitioner's head office in the United Kingdom and who were also expected to pay their own taxes. The said employees were also contracted to work in other Countries other than Kenya and in the Petitioner's understanding, these factors did not place any obligation on it to remit Pay as You Earn (PAYE) taxes in respect of the said employees.

4. It is also the Petitioner's contention that the uncertainty as to the question whether the income of the employees qualified as having been derived in Kenya for purposes of the **Income Tax Act** and that the sum of Kshs.17,151,150.00 demanded of it as the principal tax, penalties and interest was not chargeable, would only lead to the conclusion that the taxes are not done and payable as alleged by the Respondent.

5. In any event, it is also its case that once it received a demand for payment of the above sum, it requested the Minister of Finance to grant a waiver of the additional tax and also sought an exemption of payment of income tax by its expatriate staff. The Ministry of Gender, Sports, Culture and Social Services supported those actions and in July 2004, the Kenya Revenue Authority, through the office of the present Respondent, granted the Petitioner exemption status in respect of income tax.

6. According to the Petitioner, therefore upon the certificate of exemption being granted, it took the position that no income tax was payable and it had the legitimate expectation that the demand for payment of the sum of Kshs.17,151,150.00 had been waived. It was therefore surprised when in July 2006, a further demand was made for payment of the said sum and its response, clarification and follow up on the said demand elicited no response from the Respondent until the year 2013 when, upon another audit being conducted, the Respondent raised additional taxes amounting to Kshs.40,648,733.00 and although it commenced settlement of the principal sum of Kshs.19,011,847.00 and waiver on the penalties and interest, but by letter dated on 4th July, 2014, the Principal Secretary, National Treasury, informed it that the request for waiver of income tax had been declined and that the original sum of Kshs.17,151,150.00 plus penalties and interest was payable immediately.

7. It is its contention in the above context that its rights to expeditious, efficient, lawful, reasonable and procedurally fair administrative action under **Article 47** of the **Constitution** had been violated as have its rights to information under **Article 35**, right to property under **Article 40**, right to a fair hearing under **Article 50(1)**, as well as the rights of the elderly under **Article 47**.

8. In submissions, counsel for the Petitioner stated that following the Petitioner's request for tax exemption, the Respondent ought to have invoked **Section 23** of the **Income Tax Act** and taken the appropriate step thereby, and using the criteria that there was uncertainty in the applicable law and there was also the question of hardship and equity in the collection of the disputed sums.

9. Further, that following the decision in **Mwangi S. Kaimenyi v A-G & Another [2014]**, the delay in responding to the request for a waiver was inordinate and amounted to a violation of the right to fair administrative action. And that failure to furnish the Petitioner with written reasons for the decision not to

waive the disputed taxes also amounted to a violation of **Article 47(2)** of the **Constitution** as was the finding in **Justice Joseph Mutava v JSC & Another, Petition No. 337 of 2013**.

10. Referring to **Section 72 (D)** of the **Income Tax Act**, Counsel stated that the amendment to that Section removed the requirement for payment of penalties as PAYE and therefore the sum of money demanded by the Respondent should not in any circumstance include penalties on the principal sum. And that so far as the interest charged also included interest on the penalties, then it too is unlawful.

On legitimate expectation, Counsel submitted that following the decision in **R. v Permanent Secretary, Ministry of Housing & Another [2014] eKLR**, a party to whom a decision adversely affecting it may be made, has the legitimate expectation that it must be heard before that decision is made.

11. Lastly, invoking **Article 57** of the **Constitution**, Counsel for the Petitioner intended that the funds for which the alleged taxes would be paid from, have been earmarked for the purpose of assisting the elderly thus violating the rights enshrined in that Article.

12. For all the reasons set out above, the Petitioner prays for the Orders elsewhere set out above.

Respondent's case

13. In response to the Petition, the Commissioner of Domestic Taxes filed a replying affidavit sworn on 31st December, 2014 by Beatrice Mkamburi, an officer in the Policy Technical Unit in the Commissioner's office.

14. It is the Respondent's case that when a tax audit was conducted at the Petitioner's office in 2003, it was found that while three members of its staff were expatriates, and worked on a regional basis in Africa, but based in Nairobi, they were enjoying non-cash benefits such as housing, electricity and water but were receiving their salaries from the London office of the Petitioner. It was her deposition in that regard that these benefits are treated as income earned in Kenya and are therefore taxable in Kenya.

15. In addition, that any exemption of the three expatriate employees from payment of tax was a matter squarely within the mandate of the Kenya Revenue Authority and the Cabinet Secretary in-charge of the Treasury and not by a decision of the Petitioner. That since no such exemption was ever made, the tax is payable as demanded by the Respondent. In any event, that an attempt by the Petitioner to seek abandonment of tax from the Cabinet Secretary was denied and even if a waiver of tax could be made under **Section 3(1)** of the **Income Tax Act**, only interest and penalties could be waived and not the principal sum.

16. In answer to the allegation that the Petitioner was tax exempt, it is the Respondent's case that the exemption granted to the Petitioner as an NGO is not extendable to PAYE due from the three expatriate employees as the former was only an exemption from corporation tax and not the tax liabilities of individual employees.

17. On the Petitioner's allegation that its constitutional rights have been violated, the Respondent's contention is that a demand for payment of tax cannot amount to a violation of the Constitution as payment of tax is a lawful obligation imposed on every income earning citizen and resident of Kenya.

18. In written submissions filed on 20th January 2016, Counsel for the Respondent added that under **Section 5(2)** of the **Income Tax Act**, the three expatriate employees "**do not qualify for allowable deductions of the benefits they were gaining from housing, water and electricity payments by**

their employer” Further, that the said employees were obligated to pay taxes on those benefits whether or not they were resident in Kenya as long as the income was generated for services rendered or benefits received while in Kenya.

19. It is also the Respondent's submission that under **Section 37(1)** of the **Income Tax Act**, it is the employer (in this case the Respondent) who is obligated to deduct taxes from its employees' emoluments hence the demand initially made to it to pay the principal sum due plus penalties and interest under **Section 37(2)** of the **Act**.

20. Turning back to the role of the Cabinet Secretary in-charge of the Treasury, it is the Respondent's submission that as long as the Cabinet Secretary did not grant any tax waiver to the employees, then the tax demanded was payable. In any event, that failure to enjoin the Cabinet Secretary aforesaid to the present Petition renders all allegations against him inadmissible. Furthermore, once the Petitioner applied for a tax waiver, then it could only be taken that it admitted that the taxes were due and it cannot now claim otherwise.

21. On the principles of legitimate expectation, it is the Respondent's submission that in the face of clear statutory provisions and obligations, legitimate expectation cannot be pleaded. Reliance in that regard was placed on **R v KRA ex parte Aberdare Freight Services Ltd [2004] 2 KLR 530** and **Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374**.

22. Lastly, the Respondent seeks orders that the Petition, being without merit, ought to be dismissed with costs.

Determination

23. At the heart of this Petition is the question whether the Respondent's demand for payment of the sum of Kshs.17,151,150 as income tax due from the Petitioner was lawful or not. While this ought to have been a simple commercial dispute to be handled as such by the Commercial, Tax and Admiralty Division of the High Court, the Petitioner crafted it as a constitutional question principally under **Article 47** of the **Constitution** and so I will start from there. I say so because as can be seen from the prayers set out above, prayers (ii) and (v) are matters of interpretation of the **Income Tax Act** in the instant context and no constitutional issues arise for determination. Prayers (iii) and (iv) are consequential orders should a violation of **Article 47** of the **Constitution** be proved.

Right to Fair Administrative Action under Article 47 of the Constitution be proved.

24. **Article 47(1)** and **(2)** of the **Constitution** provide as follows:

“(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”

25. Pursuant to **Article 47(3)**, the National Assembly enacted the **Fair Administrative Action Act** which in **Section 4** provides as follows

1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.

2) Every person has the right to be given written reasons for any administrative action that is taken against him.

3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

a) Prior and adequate notice of the nature and reasons for the proposed administrative action;

b) an opportunity to be heard and to make representations in that regard;

c) notice of a right to a review or internal appeal against an administrative decision, where applicable;

d) a statement of reasons pursuant to Section 6;

e) notice of the right to legal representation, where applicable;

f) Notice of the right to cross-examine or where applicable; or

g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

26. In that context, what is the Petitioner's complaint" I gather that upon the demand for taxes being made, it considered the matter, and applied for a waiver of the additional taxes on 14th April 2006 and that a response was only received eight years later. Further, that it is indeed entitled to a tax waiver for reasons set out above and that the Cabinet Secretary in-charge of the Treasury was obligated to give reasons for refusal to do so. If that be so, the first question to ask is, if the Petitioner took the view that the right approach to addressing its problem was to seek a waiver of taxes, to whom was the request for waiver of taxes directed"

27. I have seen the letter dated 14th April 2006 and it was addressed to "**Hon. Maina Kamanda, Minister for Gender, Sports, Culture and Social Services**". It was not copied to the present Respondent although it was headed "**Application for Exemption of Income Tax for Expatriate Staff.**"

28. In an earlier letter dated 7th April 2004 however, the Petitioner wrote to Mr. Benson L. Korongo, Senior Assistant Commissioner of the Kenya Revenue Authority and indicated that it would take up "*the issue of waiver and exemption of income tax ... at the level of the Ministry of Foreign Affairs, Finance and Gender, Culture, Sports, Culture and Social Services*" but by a letter dated 4/6/2011 the Permanent Secretary, Treasury who wrote to the Respondent with a copy to the Petitioner directing the Petitioner "**to follow up the case with the Kenya Revenue Authority.**" The letter was titled "**Request for waiver of income Tax Bill – M/s Help age International (Kenya)**". A similar letter dated 26th June 2006 was addressed to the Petitioner by the Permanent Secretary, Treasury and indicated that the letter of 14th April 2006 had been directed to it by the Ministry of Gender, Sports, Culture and Social Services.

29. A specific letter dated 11th July 2006 was then addressed to the Respondent by the Petitioner seeking an "**exemption of income tax on expatriate staff**" and by a letter dated 19th July 2006, the Respondent maintained that the tax demanded was "**legally collectible**" and sought to know what section of the **Income Tax Act**, the Petitioner was relying on while seeking exemption. The Petitioner responded by a letter dated 1st August 2006 and stated that under **Section 13** of the **Income Tax Act** as

read with **First Schedule Part 1** thereof, the Minister (in-charge of Finance) could grant exemption and under **Section 41** thereof, expatriate staff are subject to taxation only in their Country of nationality.

30. The issue seems to have rested for about eight years until a letter dated 4th June 2014 was issued to the Petitioner's auditors, M/s Erastus & Co, by the Respondent demanding Kshs.33,052,4251.00 as outstanding taxes and by letter dated 4th June 2014, the Principal Secretary, National Treasury stated that the request for abandonment of tax by the Petitioner had been rejected and that all the **"outstanding tax of Kshs.17,151,150 owed by M/s Help age International is due and payable"**. A further letter by the Respondent dated 4th July 2014 to the Petitioner went answered.

31. With that background in mind, two issues ought to be separated; the tax exemption granted to the Petitioner and the tax waiver/abandonment in respect of the three expatriate staff. The letter of 20th July 2004 from the Respondent only granted the Petitioner **"exemption status"** as an organisation and the Income Tax-Exemption Certificate on the record was clear in that regard.

32. As for the tax allegedly due and owing from the Petitioner on account of the three expatriates, since the audit that triggered the dispute, not once had the Respondent nor the Minister for Finance indicated that they had waived the same nor that the Respondent even had power to waive it. In any event, **Section 13(1)** of the **Income Tax Act** grants the Minister (now Cabinet Secretary) in-charge of the Treasury, the mandate to exempt any income derived from Kenya from taxation. Nowhere has the Petitioner indicated what law grants the Respondent that mandate and indeed the Petitioner appreciated that fact by writing to the Minister, Gender, Sports, Culture and Social Services who forwarded the said letter to the Minister then in-charge of the Treasury who later declined to grant the waiver or abandonment of tax.

33. But that is not the end of the matter because there is the question of delay in resolving the matter and also the issue of alleged legitimate expectation on the part of the Respondent that the matter had been resolved in its favour.

34. In that regard, I have shown above that the dispute started in 2004 but the Petitioner only sought assistance from the Treasury two years later. The correspondence between the Petitioner, the Treasury and the Respondent seemed to have stopped in 2006 and was revived seven years later in 2014.

35. No party explained the reason for that hiatus but in its letter of 4th June 2014, the Kenya Revenue Authority stated partly as follows:

"Reference is made to your letter dated 22nd April, 2014 and your client's letter from their head office dated 14th May, 2014.

Your tax computation and PAYE assessment for the year 2006 to 2008 has now been reviewed after establishing that the expatriates were not entitled to tax free remuneration.

The total tax resulting from the depth Audit is Kshs.40,835,283.00 as shown in the enclosed revised tax computation and the amended assessment.

You have only paid Kshs.2,400,00.00 and Kshs.5,382,858.00 totalling to Kshs.7,782,858.00 in respect of the in depth audit.

Please advise your client to settle the balance of outstanding taxes amounting to Kshs.33,052,425.00 immediately or otherwise we shall reinstate our earlier agency notice to the

client's bank account without further reference to yourselves."

36. In the revised tax computation, it is apparently the figure of Kshs.17,151,150.00 first assessed in 2003 that had accumulated to Kshs.33,052,425.00 less payments made by the Petitioner. I can only reasonably surmise therefore that the silence on the part of the parties was because the Petitioner had accepted that the taxes were due and payable and had also made part payment thereof. As I indicated earlier, the Respondent never relented on its quest for payment of the taxes so far as I can see and the Cabinet Secretary not being a party to the Petition cannot have its conduct interrogated as no orders can be issued against a non-party.

37. In the circumstances, I am unable to state that the Respondent can solely bear any blame for delay in resolving the present dispute one way or the other neither can its decision in that regard be regarded as having been made with inordinate delay. I am also unable to find any violation of Article 47 of the Constitution as alleged.

38. As for legitimate expectation, if the Respondent never once gave the Petitioner any indication that the taxes were not payable, on what basis did it develop any such expectation" I agree with Counsel for the Respondent therefore that there is absolutely no basis for the claim on legitimate expectation.

39. Having so held, the Petitioner also made reference to **Sections 37, 72D and 94** of the **Income Tax Act** as being relevant to its case.

40. For avoidance of doubt, they provide as follows:

"37

(1) An employer paying emoluments to an employee shall deduct therefrom, and account for tax thereon, to such extent and in such manner as may be prescribed.

(2) If an employer paying emoluments to an employee fails-

(a) To deduct tax thereon;

(b) To account for tax deducted thereon; or

(c) To supply the Commissioner with a certificate provided by rules prescribing the certificate, the Commissioner may impose a penalty equal to twenty-five percent of the amount of tax involved or ten thousand shillings whichever is greater and the provisions of this Act relating to the collection and recovery of tax shall also apply to the collection and recovery of the penalty as if it were tax due from the employer; provided that, instead of the Commissioner imposing a penalty under this subsection, a prosecution may be instituted for an offence under section 109(1)(j).

(3) The Commissioner may remit the whole or part of any penalty imposed under this section up to a maximum of five hundred thousand shillings per employer per annum: provided that –

(a) The Commissioner may remit any amount of penalty in excess of five hundred thousand shillings per employer per annum with the prior written approval of the Minister; and

(b) The Commissioner shall make a quarterly report of the Minister of all penalties remitted

during the quarter.

(4) Tax deducted under this Section from the emoluments of an employee shall be deemed to have been paid by that employee and shall be set off for the purposes of collection against tax charged on that employee in respect of those emoluments in an assessment for the year of income in which those emoluments are received.

(5) Where a person who is required under this Section to deduct tax fails to remit the amount of any deduction to such person as the Commissioner may direct within the time limit specified in rules made under Section 130, the provisions of this Act relating to the collection and recovery of tax, and the payment of interest thereon, shall apply to the collection and recovery of that amount as if it were tax due and payable by that person, the due date for the payment of which is the date specified in rules made under Section 130 by which that amount should have been remitted to the payee.

(6) An employer aggrieved by the imposition by the Commissioner of a penalty under this Section may appeal against such imposition to the local committee within thirty days after the date of service of the notice of the imposition; provided that-

(i) The employer shall, prior to making the appeal, pay all the tax due and the penalty imposed under this Section; and

(ii) The appeal shall be limited to the determination of the question as to whether the employer has complied with the provisions of this Act and any regulations made thereunder relating to the deduction of tax from the emoluments of employees.

(7) Subject to subsection (6) the provisions of this Act relating to appeals to local committees shall apply mutatis mutandis to appeals under this Section.”

72D

Where any amount of tax remains unpaid after the due date a penalty of twenty percent shall immediately become due and payable. Provided that, in the case where the instalment penalty under Section 72C applies, the penalty under this Section shall not apply except to the extent that any such instalment penalty has not been paid by the due date for the self-assessment of tax under Section 52B.”

94

(1) In addition to the penalty payable under Section 72D, a late payment interest of two per cent per month or part thereof shall be charged on the amount, including the penalty remaining unpaid for more than one month after the due date until the full amount is recovered.

(2) The penalty under Section 72, 72B, 72C and 72D and late payment interest charged under this Section shall, for the purpose of the provisions of this Act relating to the collection and recovery of tax, be deemed to be tax.

(3) For purpose of computing interest on unpaid tax, with respect to tax due and owing for the year of income commencing on or after the 1st January, 1992, the due date for the tax charged in an assessment shall be the last date as provided in Sections 52B, 92 and 92A irrespective of the

fact that such an assessment may be stood over on account of an objection or an appeal.

(4) The Commissioner may remit the whole or part of any penalty or late payment interest or both such penalty or and interest charged under Section 72D up to maximum of five hundred thousand shillings each per person per annum: provided that-

(a) The Commissioner may remit any amount of penalty or late payment interest in excess of five hundred thousand shillings with the prior written approval of the Minister; and

(b) The Commissioner shall make a quarterly report to the Minister of all penalties and late payment interest remitted during that quarter.”

41. **Sections, 72D and 94** as can be seen above have since been repealed, but they previously provided for penalties and interest payable on late remittances of taxes due while **Section 37** presently relates to relief because of doubt or difficulty in recovery of tax but with respect to the Petitioner, I see no merit in any of the submissions lamely made with regard to the above Sections. The invocation of the above Sections are an afterthought and for the last 13 years, the only issues that it raised were that:

- i) The tax in issue was not payable as it was based on income or a benefit that was not taxable and;
- ii) Even if it was taxable, it ought to be waived as the Petitioner deals with the welfare of other persons and may not have the money to pay it.

42. The tax due was never in doubt and there was certainly no difficulty on the part of the Respondent in recovering it because as can be seen, the Petitioner even made part payment of the same.

43. As regards penalties and interest on the tax, that is a matter of computation and there are enough safeguards in the **Income Tax Act** including appeals to manage any dispute thereon. Save for an attempt at tax waiver/abandonment, the Petitioner has not in any way attempted to channel its grievances that way.

44. Lastly, while **Article 35** (on right to access information), **40** (on right to property) and **Article 50** (right to a fair hearing) were all pleaded, I did not find sufficient material evidence to enable me delve into those issues. Suffice it to say however that only the right to property remotely relates to this matter but even then payment of taxes lawfully done cannot be a violation of that right under **Article 40** of the **Constitution**.

45. Further to the above, the Petitioner invoked **Article 57** of the **Constitution** on the rights of the elderly as having been breached. However, the fact that it deals with matters affecting the elderly does not oust its obligation to pay relevant taxes. It has already benefited from tax exemption because of the work that it does but PAYE tax has nothing to do with its institutional status.

Conclusion

46. While the work that the Petitioner is doing is certainly commendable, the obligation to pay taxes in relevant circumstances cannot be wished away. In this case, I decline the invitation to determine whether the initial tax assessment was lawful or not. I say so because the Petitioner by letter and conduct accepted liability for those taxes and the fact that its prayer for a waiver or abandonment was rejected, is no ground to argue that the taxes were not due. To the contrary, that is a ground for admission of liability. It even paid the same partly and its inability to pay now is no excuse to approach

this Court in the manner that it has done.

Disposition

47. For the above reasons, the Petition dated 21st July, 2014 is dismissed. Let each party bear its own costs.

48. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 3RD DAY OF MAY, 2017

ISAAC LENAOLA

JUDGE

DELIVERED AND SIGNED AT NAIROBI THIS 4TH DAY OF MAY, 2017

E. CHACHA MWITA

JUDGE



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