

**REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
TAX APPEAL NO.91 OF 2015**

CO-OPERAZIONE INTERNAZIONALE.....APPELLANT

VERSUS

THE COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

JUDGEMENT

BACKGROUND

1. Co-operazione International (COOPI) is an Italian Non-Governmental Organization founded in 1965 in Italy having its Head Office in Milan, Italy. The NGO promotes and carries out activities in the sphere of international development and solidarity by specific intervention, action and operations both in Italy and abroad. The NGO also maintained an office in Nairobi Peponi Road Plot 039, Westland Nairobi for liaison and coordinating its humanitarian activities in Somalia and South Sudan. The Regional Office in Nairobi was registered as an NGO in Kenya on 27th September 2001 and covers operations in Kenya, Somalia and South Sudan. It is registered for tax administration in Kenya. The projects in Sudan and Somalia are mainly funded by the European Commission (EU) and European Commission Humanitarian Office.
2. The Respondent is established under Section 3 of the Kenya Revenue Authority Act Cap 469 and is mandated under Section 5 thereof to act as an agent of the Government of Kenya for the assessment, collection and receipt of revenue.

3. During the assessment year under consideration, the Appellant engaged Kenyan citizens and expatriates of not Kenya or Italian origin to deliver programs undertaken in Somalia. These employees were based in Somalia reporting to the Program Co-ordinator based in Nairobi.
4. During the verification of the Appellant's Audited Returns 2008-2012 filed by M/s PKF, it was noted by the Respondent that the Appellant was not deducting tax from salary and emoluments paid to its employees based in Somalia and South Sudan.
5. The Respondent rejected all pleas raised by the Appellant and held it liable to deduct tax to the tune of Kshs.70,791,008/= for various financial years involved. The Respondent also held the Appellant liable to pay penalty for the additional tax. The findings of the Audit and the Assessment of the additional taxes payable was formally communicated to the Appellant vide the Respondent's letter dated 14th August, 2014 (Marked as the Respondent's Statement of Facts).
 - Late filing of monthly PAYE returns
 - Untaxed Housing Benefits for Kenyan employees
 - Untaxed emoluments paid to expatriates employees
 - Unfiled I.T. 2C returns.
6. The Appellant challenged the aforesaid additional assessment for Kshs.70, 791,008/= vide a letter dated 21st August, 2014 addressed to the Respondent by M/s PKF Taxation Services Limited. Objection by the Appellant was premised on the Ground that;
 - Staff accommodation provided to Kenyan employees on duty assignment in Somalia do not accrue as a staff benefit as the

engagement in Somalia is in the normal course of business and any expenses incurred are wholly and exclusively attributed to the business and therefore PAYE on their emoluments is not deductible and accountable for in Kenya.

- Taxation of non-Italian expatriate staff working outside Kenya is exempt as they do not accrue or derive any of their income from Kenya.

7. The Respondent vide a letter dated 16th December, 2014 confirmed the additional tax assessment thereby prompting the Appellant to file the present Appeal on 27th January, 2015.

THE APPEAL:-

8. The Appeal by the Appellant against the Respondent's Notice of Confirmation of the Additional Tax Assessment is set forth in the Memorandum of Appeal dated 27th January, 2015 as under:-

- i) The Assessment was made on wrongful inference that expatriates working outside Kenya derive or accrue their income in Kenya and therefore meet residency rule.
- ii) The Commissioner did not consider the fragile security situation and explanations provided and thereby failing to appreciate all the issues before him when arriving at the additional assessment in the Appellant's case.
- iii) The security situation in Somalia and the established safety guidelines on housing does not allow either the Appellant or the employees to freely choose where to live while in Somalia
- v) Insistence by the Commissioner for additional taxes from the Appellant is construed as misuse and abuse of the Respondent's

statutory powers to the detriment of the Appellant and its business and a fragile violation of the Constitution of Kenya.

9. The Appellant made submissions that the tax contention is on non-Italian, non-Kenya whose duty station is outside Kenya. The Appellant argues that the expatriate employees based in Somalia were non-Kenyans and non-Italians rendering services in Somalia and the contracts were drawn in the Head Office in Italy and there was therefore no liability on the part of the Appellant to deduct tax at the time of paying these salaries.
10. The Appellant submits that personal taxation rule on expatriates do not apply because these expatriates had no permanent homes in Kenya, and were not present in Kenya for a period or periods amounting to 183 days or more in the year of income under consideration. The Appellant submits that these expatriates do not meet the residency status because they only visit briefly on transit to their home countries or duty stations.
11. The Appellant pleaded that the projects are funded on grants from donors and any attempt by the Respondent to charge penalty is very provoking and can as well be interpreted as an attempt to disband of the organization.
12. The Appellant also refutes the allegation and claims made by the Respondent that accommodation offered to Kenyan employees on mission in Somalia is a benefit. It submits that Kenyan employees received salaries and allowances net of taxes in Kenya and the same is paid to the Respondent as required by Law. It was the Appellant's contention that these Kenyan employees cannot chose where to leave while in Somalia as accommodation arrangements

are prescribed by the National Security Plan of Somalia, the details and complexity which has been shared with the Respondent.

13. The Appellant reiterates that provision of accommodation to employees is actually not voluntary but rather the employer must abide with the security arrangements put in place in Somalia.

THE RESPONDENT SUBMISSION:-

14. The Respondent, subsequent to being served with the Memorandum of Appeal filed before the Tax Appeals Tribunal, the Respondent's Statement of Facts on 21st December, 2015.
15. The Respondent's learned Counsel Ann Njogu on the other hand submitted that accommodation offered by the Appellant to Kenyan employees in Somalia is a housing benefit and should be brought to charge under Section 3(2)(a)(ii) read together with Section 5(2)(e) and further argued that income earned by the expatriates in Somalia paid by the Appellant based in Kenya is taxable to PAYE under Section 5(1)(b) of the Income Tax Act, CAP 470 of the Laws of Kenya.
16. The Respondent maintained that claim by the Appellant that they provided employees with accommodation because of security situation is fully established but submits that as no exemption was granted under the law, the Appellant was under legal obligation to deduct tax and as it failed to deduct the same at source the Appellant was a defaulter and consequently liable.
17. The Respondent submits that the only issue which is not in dispute is whether or not accommodation is being provided to the employees by the Appellant. It also pointed out that the same is clearly captured in the contracts. It went on to submit that these

were benefits that were enjoyed by the Appellant's employees, which it admittedly, did not deduct tax.

18. In the case of income earned by the Appellant's expatriate employees working in Somalia, the Respondent referred to the relevant provisions of the Act. Section 5 which is the charging Act relates to non-resident. According to this section and subject to the provisions of the Act, a non-resident income includes all income from whatever source derived which;
- is received or is deemed to be received in Kenya in such year by or on behalf of such person ; or
 - accrues or arises or is deemed to accrue or arise to him in Kenya;
19. The Respondent submits that for the said section to apply, the non-resident need not be physically in Kenya and it does not require that the services must be physically exercised in Kenya, it only requires that the employer be resident in Kenya. The Respondent observed that so long as the employer is resident in Kenya, Section 2 of the income tax act is invoked. "employer" includes any resident person responsible for the payment of, or on account of, emolument to an employee, and an Agent, Manager or other representatives so responsible in Kenya on behalf of a non-resident employer.
20. The Respondent carefully analyzed that the non-Italian expatriate contracts were issued in Kenya, they reported to the Regional Administrator based in Kenya and the salaries received by the aforesaid employees were reported in the Appellant's Audited Accounts. It was therefore not in dispute that all the employees were in employment of the Appellant, that they had rendered

service and those services were rendered to an employer with physical establishment in Kenya, and that their salaries were actually paid by the Appellant in Kenya.

21. The Respondent avers that non-resident persons are taxed on any income that is resultant or deemed to be resultant from Kenya. Income tax is charged on all of a taxpayer's income which accrued in or was derived from Kenya, regardless of whether that person is resident or non-resident.

ISSUES FOR DETERMINATION:-

22. The issues for determination on the basis of both the oral and written submissions on record before the Tribunal are whether;
- PAYE is payable on emoluments paid to non-Italian expatriates working for the Appellant outside Kenya;
 - Taxation is due on housing benefit in respect of Kenyan employees who are on foreign assignment.
23. The Respondent in giving effect to the provisions of Section 3(2)(a)(ii) of the Income Tax Act, CAP 470 of the Laws of Kenya also stipulates the provisions of Section 5(2)(e) of Income Tax Act, CAP 470 the Laws of Kenya that provides that gains or profits include the value of premises provided by an employer for occupation by its employee for residential purposes.
25. Section 3(2)(a)(ii) reads;
- “Subject to this Act, income upon which tax is chargeable under this Act is income in respect of –
- (a) gains or profits from –
 - (i) a business, for whatever period of time carried on;
 - (ii) employment or services rendered

- (iii) a right granted to another person for use or occupation of property;
 - (b) dividends or interest;.....
26. Section 5(2)(e) reads;
- “For the purposes of Section 3(2)(a)(ii), "gains or profits" includes –
- (a) wages, salary, leave pay, sick pay, payment in lieu of leave, fees, commission, bonus, gratuity, or subsistence, travelling, entertainment or other allowance received in respect of employment or services rendered and any amount so received in respect of employment or
 - (b)
 - (c)
 - (d)
 - (e) the value of premises provided by an employer for occupation by its employee for residential purposes;
27. The Sections of the Income Tax Act, CAP 470 of the Laws of Kenya cited by the Appellant can obviously not be interpreted in isolation but rather within the entire context and the complete text of the statute.

FINDINGS AND ANALYSIS:-

29. We have carefully considered the pleadings by the parties, submissions and oral highlights. The Tribunal comes to the conclusion that it was incumbent upon the Appellant to exercise its statutory mandate in making deduction on the employees salaries and allowances. The Appellant’s perceived ignorance of the law is not a defense, which is the line that the Appellant has attempted to employ in its submissions.

In the case quoted **Cape Brandy Syndicate v Inland Revenue Commissioners; CA 1921 (1 KB 64,71)** it was held that:-

“In a taxing statute one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can look fairly at the language used.”

30. Under the Income Tax Act, Cap 470 of the Laws of Kenya, and with regard particularly to Section 37 of the said Act, it is the responsibility of the employer to deduct and remit taxes from the salaries, emoluments and allowances of its employees. Section 37 sub-section (1) reads;

“37(1). An employer paying emolument to an employee shall deduct therefrom, and account for tax thereon, to such extent and in such manner as may be prescribed.”

The Section goes further to impose a penalty or sanction on an employer who does not remit taxes on behalf of its employees as prescribed. Section 37 sub-section (2) provides;

“37. (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 per cent 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 that 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).”

29. Under the provisions of the Employment Act, 2007, it is the duty and responsibility of the employer to ensure that all deductions, statutory or otherwise, are made without undue delay and submitted to the relevant bodies or authorities. Section 19 sub-section (1)(f) as read together with sub-section (4) of that Act details that all deductions made shall be remitted timely and in accordance with any written laws, in this instance, being the provisions of the Income Tax Act. Section 19 sub-section (1)(f).

30. In the mind of the Tribunal there has to be a good reason why the Appellant ignored its statutory obligation to make deductions on tax on all salaries, benefits and allowances enjoyed by its employees. There was never any suggestion raised by the Appellant that it was not aware that these benefits and salaries are taxable.

In the case cited to court of **Bernard & Shaw Ltd v Shaw (Rubin Third Party) [1951] 2 All E.R 267 K.B.D** at page 267, **Lynskey, J** held as follows;

P268: “In respect of the collection of tax a statutory duty is, therefore, imposed on the employer, and if it fails to deduct tax, it is in breach of that duty and is liable to pay the tax to the revenue authorities whether it has deducted it or not.”

FOR THIS REASON THE APPEAL ACCORDINGLY FAILS.

DATED and DELIVERED at NAIROBI this...^{8TH}...day of December 2016

In the presence of:-

.....HARRIAL OKETCHA.....for the Appellant

.....MAFFAKT ODUAI.....for the Respondent

.....MOSES OBONYO
CHAIRMAN

.....JOLAWI OKELLO OBONDO
MEMBER

.....PHILOMENA KIROKEN
MEMBER

.....JOSEPH WACHIURI
MEMBER