REPUBLIC OF KENYA
IN THE TAX APPEALS TRIBUNAL
APPEAL N0.180 OF 2017

KENYA TOURISM BOARD...APPELLANT

VERSUS

COMMISSIONER OF DOMESTIC TAXES..RESPONDENT

JUDGEMENT

BACKGROUND

1. The Appellant, Kenya Tourism Board is a state corporation established in 1997 through Legal Notice No. 14 of 1997 under the State Corporations Act (CAP 446) of the Laws of Kenya.

2. Kenya Tourism Board, hereinafter referred to as KTB is mandated under the Tourism Act to develop and co-ordinate a national tourism marketing strategy to market Kenya at local, national, regional and international level as a preferred tourism destination.

3. The Respondent is the Commissioner of Domestic Taxes appointed under the Kenya Revenue Authority, Cap 469 Laws of Kenya and is responsible for the control and management of the Domestic Taxes Department and assessing, collection and accounting for all revenue on behalf of the Government.

4. The Respondent vide a letter dated 6th September, 2016 issued the Appellant with a notice of intention to audit VAT, PAYE and Withholding tax for the period July 2012 to August 2016 and withholding VAT for the period December 2014 to August 2016.

5. Vide a letter dated 4th August 2017 the Respondent communicated to the Appellant the audit findings and demanded a sum of Kshs 187,014,569/= being VAT, PAYE and Withholding Tax of Kshs 1,740,000/=, Kshs 2,706,559/= and Kshs 182,568,010/= respectively inclusive of penalties and interests.

6. The Appellant, vide a letter dated 24th August 2017, filed a notice of objection outlining grounds for the objection on the Withholding Tax assessment but conceded on VAT and PAYE assessment.

7. The Respondent, upon reviewing the notice of objection revised the initial demand for taxes vide a letter dated 23rd October, 2017 to Kshs 182,456,743/= inclusive of penalties and interest.

8. The Appellant still being aggrieved lodged a notice of appeal on 21st November 2017, citing dissatisfaction with the Respondent's decision of confirming the

Withholding Tax assessment of Kshs 182,456,743/= inclusive of penalties and interest and proceeded to file its Memorandum of Appeal together with the Statement of Facts on 4th December 2017.

APPELLANT'S CASE

9. The Appellant contended that the Respondent erred in law and fact by subjecting the payments made by KTB to both resident and non-resident suppliers to Withholding (WHT) for the period under review.

10. According to the Appellant, the Respondent failed to take into account Section 10(1) of the Income Tax Act (ITA) that provides that where a resident person or a person having permanent establishment in Kenya, makes a payment to any other person in respect of (a) management, professional and training fee, the amount thereof shall be deemed to be income which accrued in or was derived in Kenya.

11. Furthermore, it was the Appellant's argument that the Respondent erred in law and fact in not taking into account Section 16(1)(i) of the ITA which further provides that provisions of Section 10(1) thereof shall not apply unless the payment is incurred in the production of income accrued in or derived from or in connection with a business carried on, in whole or part, in Kenya.

12. The Appellant argued that the Respondent erred in application of the law by relying on Section 35 of the ITA in isolation and not reading it and applying together with Sections 3 and 10 of the said Act. To buttress its argument thereof, the Appellant cited the case of **Kenya Commercial Bank vs. KRA Civil Appeal No. 184 of 2009,** whereby the Court of Appeal relied on Sections 10, 34(2) and 35(1) to determine the liability to pay tax upon making payments on royalties so as to affirm that for correct interpretation of the provisions of the law, different provisions should not be read in isolation.

13. It was its assertion that the Respondent failed to understand KTB's operations and erroneously concluded that KTB trades on behalf of the GOK and that any payment made for marketing expenses is a commercial transaction designed to generate income for KTB not exchequer.

14. The Appellant contended that as a government agency, it does not have a profit motive and therefore any payments made to the MDR's are in no way incurred for the production of its income nor are they carried out in furtherance of business carried on by KTB to generate its taxable income.

15. According to the Appellant, the Respondent failed to delink the income generated from tourism sector and the activities carried out by KTB which did not accrue any commercial economic benefits from the marketing expenses which were incurred on behalf of GOK.

16. In conclusion of its arguments, the Appellant stated that the Respondent incorrectly assumed that the income earned by the exchequer can be taken to be income of KTB while in fact, KTB is a separate entity from the exchequer and is enshrined in the Tourism Act 2011.

RESPONDENT'S CASE

17. The Respondent asserted that the Appellant's main business is to market Kenya at local, national, regional and international levels as a premier tourist destination; to identify tourism market needs and trends, advise tourism stakeholders accordingly and to perform any other functions that are ancillary to the object and purpose for which the Board was formed. These functions are delegated to KTB by the government of Kenya through the Tourism Act 2011.

18. According to the Respondent the assertion by the Appellant that Withholding Tax assessment of Kshs.182,456,743/= was based on isolated law that is only Section 35 of the ITA is incorrect on the basis that the Withholding Tax assessment of Kshs 182,456,743/= was based on the full knowledge and consideration of all applicable provisions of ITA, inclusive of Sections 3, 10 and 35 of the same Act.

19. Furthermore, the Respondent submitted that the income which was subjected to Withholding Tax, pursuant to Section 10, of the ITA, is not KTB's income but, the resident and non-resident agent's and consultant's income, who are engaged to carry out the marketing mandate on behalf of KTB. The income earned by these agents is derived from Kenya and therefore qualifies to be income subject to tax as provided under Section 3(1) of the income Tax Act.

20. The Respondent contended that the retainer and other agency fees paid to Marketing Development Representatives (MDR) in various foreign jurisdiction and payments made to local consultants by KTB are subject to Withholding Tax under Section 35 of the ITA which provides..... *"Where a person makes payment of an amount to a resident person not having a permanent establishment in Kenya or a resident person in respect of management fees or training fee which is chargeable to tax, shall deduct there from tax at the appropriate non-resident and resident rate accordingly".*

ISSUE FOR DETERMINATION

21. The Tribunal having carefully analyzed the parties' pleadings and submissions is of the respectful view that the only issue that calls for its determination is as follows; **Whether payments made by the Appellant to Marketing Development Representatives (MDR) should be subjected to Withholding Tax.**

ANALYSIS AND FINDINGS

22. The Tribunal notes that following the in-depth audit the Respondent issued an assessment of Kshs 187,014,569/=through its letter dated 4th August 2017, being WHT, PAYE and VAT. Through its objection letter dated 24th August 2017 the

Appellant conceded to the principal PAYE and VAT assessment, being the undisputed assessments. Consequently, the Tribunal will not delve into the same save for the disputed tax in respect to WHT in the sum of Kshs 182,456,743/=

23. The Tribunal notes that in its financial statements annexed by the Respondent as KRA 6 in its filed Statement of Facts, the Appellant has recognized payments made to the marketing agents as "marketing expenses" against its income from the exchequer. The Tribunal finds that the income that the Respondent subjected to WHT pursuant to section 10 of the ITA is not the Appellant's income but rather, income from the resident and non-resident agents and consultants who are engaged by the Appellant to carry out the marketing mandate on its behalf.

24. A careful perusal of a copy of an agreement between the Appellant and M/S Hills Balfour Limited dated 12th August, 2013 states in paragraph 6.3 that... **"All payment of fees and/or costs made to MDR under the terms of this Agreement shall be subject to all applicable taxes as may be provided for under relevant Kenyan Laws".** This is proof that indeed the Appellant provided for the tax clause with the intention of subjecting the payments of the MDR's to tax.

25. We note further that the income earned by the said agents is derived from Kenya and therefore qualifies to be subjected to tax as provided for in Section 3(1) of the ITA which provides as follows;

"subject to and in accordance with this Act, a tax to be known as income Tax shall be charged for each year of income upon all the income of a person, whether resident or non-resident, which accrued or was derived in "Kenya".

26. Moreover, it is undisputed that the Appellant acts on behalf of the Government of Kenya where the exchequer funds the Appellant to market Kenya and in return the exchequer earns foreign exchange income Therefore the payments made to the Appellant's foreign marketing representatives and local consultants fall within Section 10(1)(i) of ITA provides as follows;
"This section shall not apply unless the payment is incurred in the production of income accrued in or derived from Kenya or in connection with a business carried on, in whole or in part, in Kenya"

27. Furthermore, the Tribunal finds that the retainer and other agency fees paid by the Appellant top the MDRs in various foreign jurisdictions together with the payments made to the local consultants are subject to WHT under Section 35 of the ITA.The same provides as follows;

"Where a person makes payment of an amount to a resident person not having a permanent establishment in Kenya or a resident person in respect of management fees or training fee which is chargeable to tax, shall deduct therefrom tax at the appropriate non-resident and resident rate accordingly."

28. It is worth noting that in a letter dated 13th April 2011, the then Minister for Tourism wrote to the then Minister for Finance seeking Tax exemption on behalf of the Appellant. However, the Appellant failed to demonstrate to the Tribunal by way of any evidence as to whether the said exemption was ever granted. The implication thereof is that the Appellant is obligated to withhold tax as provided under the relevant legislation.

29. The Tribunal however disagrees with the Respondent's argument that the income from that the Marketing activity of the Appellant is attributed to the Appellant though received by the Government.

FINAL DECISION

30. The upshot of the foregoing is that the tribunal finds that the Appeal has no merit and makes the following orders;
   a) The Appeal is hereby dismissed.
   b) The Respondent's demand in respect of WHT vide its Objection Decision dated 23rd October, 2017 in the sum of Kshs.182,456,743/= is hereby upheld.
   c) Each party to bear its costs.

DATED and DELIVERED at NAIROBI this 18th day of December 2019.

In the presence of:-

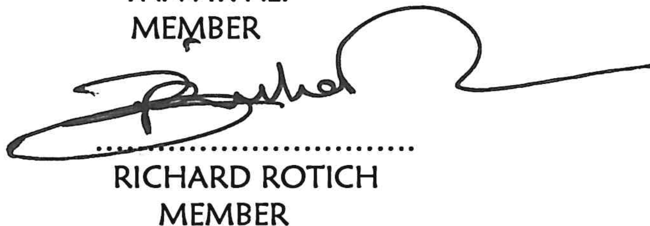
Robert Waruiru ....for the Appellant

Ibrahim Said Mutua ....for the Respondent

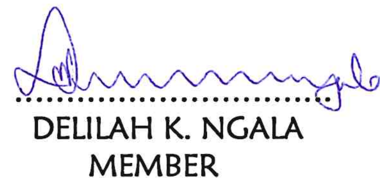
JOSEPHINE K. MAANGI
CHAIRPERSON

TANVIR ALI
MEMBER

GEOFFREY KARUU
MEMBER



RICHARD ROTICH
MEMBER



DELILAH K. NGALA
MEMBER