

**REPUBLIC OF KENYA**  
**IN THE TAX APPEALS TRIBUNAL**  
**TAX APPEAL NO. 102 OF 2017**

**EAST AFRICAN DATA HANDLERS LIMITED.....APPELLANT**  
**VERSUS**  
**THE COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT**

**JUDGEMENT**

**BACKGROUND**

1. The Appellant is a private limited company incorporated under the Companies Act, CAP 486, Laws of Kenya. The Appellant engages in the information technology industry, specifically in data recovery and selling of computer accessories.
2. The Respondent is a Commissioner of the Kenya Revenue Authority as established under the Kenya Revenue Authority Act, Cap 469 Laws of Kenya, mandated with the assessment, collection and receipt of all revenue on behalf of the Government of Kenya.
3. The Respondent after analysing tax returns filed by the Appellant decided to carry out an audit on the operations of the Appellant's tax affairs. The audit carried out on the Appellant culminated into the audit findings dated 31st of July 2015.
3. The said Audit findings noted that there was under declaration of taxes by the Appellant for the period of January 2010 to March 2015 and demanded payment of additional taxes on the following tax heads:-

PAYE	-	Kshs. 16, 902,577 (10,114,697 excl. P&I)
WHT	-	Kshs. 58,614 (52,334 excl. P&I)
4. On 2nd February 2017, the Appellant made an application to the Respondent requesting for an extension of time to file its Notice of Objection pursuant to Section 51(6) of the Tax Procedures Act. The Respondent vide a letter dated 13 February 2017 approved the Appellant's application for extension allowing the Appellant to file its Notice of Objection within 30 days.

5. Vide a letter dated 10<sup>th</sup> March 2016 the Appellant issued its Notice of Objection to the said audit findings. We take this as a typographical error as the same ought to read 10<sup>th</sup> March 2017, which we accordingly amend.
6. On 8<sup>th</sup> May 2017 the Respondent issued an Objection Decision demanding for the following taxes:-
  - a) PAYE Kshs. 13,981,729
  - b) WHT Kshs. 726,943
7. Pursuant to the said Objection Decision, the Appellant filed a Notice of intention to Appeal on 7 June 2017 and subsequently filed its Memorandum of Appeal and Statement of Facts on 20<sup>th</sup> of June 2017.
8. The Tribunal will advise the parties that though we consolidated this Appeal with TAT NO. 101 of 2017, during the hearing on 2<sup>nd</sup> of October 2019, having been advised by the parties that the parties and the issues were similar, on further analysis we have noted that the issues are not similar. Consequently, we will analyse Appeal Numbers TAT 101 and TAT 102 separately.

## **APPELLANT'S CASE**

9. The Appellant, in its Memorandum of Appeal dated 20<sup>th</sup> of June 2017, contends as follows;
  - a. That the Respondent erred in law by applying monthly PAYE rates which are not only non-existent but also led to overstatement of taxes payable by employees of the Appellant.
  - b. The Respondent erred in law by applying methods, processes and other techniques not prescribed under any written law specifically the Income Tax Act, Cap 470, ITA.
10. Further the Appellant in its Statement of Facts avers as follows:-
  - a) THAT as far as PAYE was concerned, the Respondent alleged that the Appellant did not deduct the correct taxes from its employees in accordance with the provisions of the ITA and proceeded to determine the alleged correct PAYE and imposed it on the Appellant.
  - b) THAT the Appellant however avers that the PAYE as determined by the Respondent is not in accordance with the Income Tax Act provisions as it leads to the overstatement of taxes allegedly that the Appellant should have deducted from its employees.

- c) THAT according to the advice from its tax agents on record, PAYE is an annual tax imposed on the total emoluments of an employee earned by such employee during the year.
- d) THAT where an employee earns emoluments for only part of the year, then such emoluments would be deemed to have been earned in that year, so that the PAYE to be imposed for such year of income would be determined using the annual rates on such total emoluments earned by the employee.
- e) THAT the Respondent however has purported to determine the PAYE payable on a monthly basis, which is not in accordance with the laws and regulations guiding the taxation of emoluments earned by employees, leading to a gross overstatement of the PAYE payable by such employees.
- f) THAT the personal relief accorded to employees to reduce their taxes is applicable for a whole year irrespective of the number of months that an employee works in that year.
- g) THAT the Respondent has allocated the personal allowance to employees depending on the number of months the employee worked for the Appellant, thus leading to a gross overstatement of the taxes payable by such employees.
- h) THAT the Appellant has determined the correct taxes that are payable to the respondent in the years 2010 to 2014, which it has presented to the Respondent's consideration but the latter has refused and or ignored to consider the same in order to determine the correct taxes payable by the Appellant.

## **RESPONDENT'S CASE**

- 11. The Respondent avers that as an employer, the Appellant is only but a collecting agent for PAYE, it is not a tax on the Appellant and as such agent, the Appellant has an obligation to account for and remit PAYE monthly.
- 12. According to the Respondent, the audit it carried out revealed that the Appellant was deducting PAYE but not remitting the same to the Commissioner and in other occasions the same was remitted late hence attracting penalty.

13. The Respondent avers that computation of PAYE payable was done on monthly rate in accordance with the Third Schedule of the ITA, Cap 470 Laws of Kenya.
14. It was submitted by the Respondent that withholding tax on professional fees paid out by the Appellant was charged at the rate of 5% as per the provisions of the ITA Cap 470 Laws.
15. It was averred by the Respondent that its assessment of the Appellant's PAYE and WHT payable was proper and in accordance with the provisions of the ITA, Cap 470 and ought to be upheld.

## **ISSUES FOR DETERMINATION**

16. The Tribunal has considered the parties pleadings together with their Submissions and is of the respectful view that the issues that call for its determination are as hereunder:
  - a) Whether the Respondent correctly applied the provisions of the Income Tax Act in assessing the Appellant's PAYE obligation.
  - b) Whether Withholding Tax was properly brought to charge by the Respondent.

## **ANALYSIS AND FINDINGS**

- a) **Whether the Respondent correctly applied the provisions of the Income Tax Act in assessing the Appellant's PAYE obligation.**
17. The Appellant submitted that the Respondent has purported to determine PAYE payable on a monthly basis which is not in accordance with the legislation guiding taxation of emoluments earned. However, the Tribunal notes that the Appellant has failed to support the same by way of any evidence other than merely stating the same. The Tribunal will treat the same as such, a mere allegation.
18. The Tribunal notes that Pay As You Earn, hereinafter referred to as PAYE, is a system whereby the employer subtracts the necessary deductions before paying the net wages and pensions and then forwards it to the Respondent. Consequently it makes a finding that it is not a tax on the Appellant but a remittance to the Respondent after deductions by the Appellant from its employees' wages.
19. It is the finding of the Tribunal that in the circumstances herein, the Appellant is a collecting agent for PAYE, Consequently it has an obligation to account for and remit PAYE monthly, pursuant to the Third Schedule of ITA, Cap 470.

20. The Appellant in support of its case sought to rely on Section 3(1) of the ITA. Section 3 (1) of the ITA provides as follows **“that income tax is charged for each year of income upon all the income of a person whether resident or non-resident which has been accrued or derived in Kenya”**. The Tribunal disagrees with the Appellant’s argument on the basis that, as in this case, the Appellant is a collecting agent and PAYE is accountable on a monthly basis and not on an annual basis as asserted.
21. Furthermore, it is worth noting that the Appellant, in accounting for PAYE ought to also take into account Relief on a monthly basis.
22. In the absence of any documentary proof by the Appellant, the Tribunal is left with no option but to agree with the Respondent’s tax assessment. Therefore the Tribunal finds that the Respondent correctly applied the provisions of the ITA in assessing the Appellant’s PAYE obligation.

**b) Whether Withholding Tax was properly brought to charge by the Respondent.**

23. We note that Withholding tax paid out on professional fees paid by the Appellant was charged at the rate of 5% as per the provisions of the ITA Cap 470. There were no related invoices or documents provided by the Appellant to show that these payments should have been treated otherwise. The Appellant therefore failed to demonstrate to the satisfaction of the Tribunal that the said persons were consultants and or service providers.
24. It has been adequately demonstrated by the Respondent that the Appellant had time to furnish requisite documents to the Respondent as provided for under Section 59 of the TPA. The Section provides as follows:

**“Production of records (1) For the purposes of obtaining full information in respect of the tax liability of any person or class of persons, or for any other purposes relating to a tax law, the Commissioner or an authorised officer may require any person, by notice in writing, to— (a) produce for examination, at such time and place as may be specified in the notice, any documents (including in electronic format) that are in the person's custody or under the person's control relating to the tax liability of any person; (b) furnish information relating to the tax liability of any person in the manner and by the time as specified in the notice; or (c) attend, at the time and place specified in the notice, for the purpose of giving evidence in respect of any matter or transaction appearing to be relevant to the tax liability of any person.**

25. The TPA further provides in Section 15 that the burden of proof with regard to tax decision being incorrect lies on the Appellant. The same states as follows;

**“(1) In any proceedings under this Part, the burden shall be on the taxpayer to prove that a tax decision is incorrect”.**

26. Furthermore Section 30 of Tax Appeals Tribunal Act No. 40 of 2013, places the burden of proof on the Appellant in respect to taxation matters. The same provides as follows;

***“In a proceeding before the Tribunal, the Appellant has the burden of proving —***

***i. where an Appeal relates to an assessment, that the assessment is excessive; or***

***ii. in any other case, that the tax decision should not have been made or should have been made differently”***

27. Having considered the facts herein together with the relevant legislation, the Tribunal finds that withholding tax was properly brought to charge by the Respondent.

28. The upshot of the foregoing is that the appeal lacks merit and the same is hereby dismissed.

29. The Tribunal has carefully studied the pleadings and documentation filed and notes that there are discrepancies in the Respondent’s tax assessment. The demand refers to a PAYE obligation of **Kshs 16,902,577** and Withholding Tax of **Kshs 58,614**, which is the same as the Appellants figures in its Objection whereas the Objection Decision, which was not attached to either the Appellants or Respondent’s documentation, other than the parties stating so, stated figures of PAYE of **Kshs 13,981,729** and Withholding Tax **Kshs 726,943**. In the circumstances the Tribunal hereby directs that the Respondent relooks into the said figures and correct them accordingly so as to show the correct tax computation due to it.

31. In view of the above the Tribunal makes the following orders:

a) The appeal is hereby dismissed.

b) The Respondent’s Tax Assessment dated 31<sup>st</sup> July 2015 for PAYE of Kshs. 16,902,577 and WHT of Kshs. 58,614 is hereby upheld **subject** to the Respondent rechecking and reworking its tax computation as held hereinabove in paragraph 30 in respect of both PAYE and WHT so as to arrive at a correct tax computation.

c) Each party to bear its own costs.

DATED and DELIVERED at NAIROBI this 27<sup>th</sup> day of March, 2020



.....  
JOSEPHINE K. MAANGI  
CHAIRPERSON



.....  
DELILAH K. NGALA  
MEMBER



.....  
GEOFFREY KARUU  
MEMBER



.....  
TANVIR ALI  
MEMBER

