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ARTICLE



EXEMPTION FROM TAXATION OR THE ENTITLEMENT TO PRIVILEGES AND IMMUNITIES AS SPECIFIED IN THE PRIVILEGES ACT IS NOT GUARANTEED FOR EMPLOYEES OF DIPLOMATIC ORGANIZATIONS:

UN employees found liable to pay income tax as specified in the Privileges and Immunities Act

The Privileges and Immunities Act CAP 179 of Kenya's Laws provides for exemption from taxes to certain organizations or persons.

Section 18 (b) Article V of the Convention on the Privileges and Immunities of the United Nations provides that officials of the United Nations ("UN") shall be exempt from taxation on the salaries and emoluments paid to them by the United Nations.

Notwithstanding the aforementioned exemptions, the Commissioner of Domestic Taxes proceeded to evaluate the income tax obligations of Kenyan citizens employed by the United Nations, asserting that the Appellants did not meet the criteria for tax exemption.

OPIYO V COMMISSIONER OF DOMESTIC TAXES (APPEAL 889 OF 2022) [2024] KETAT 607 (KLR) (19 APRIL 2024) (JUDGMENT)

Facts of the Case

The Appellant, a National Professional Officer employed under a fixed-term contract under the UN World Food Programme, was issued with income tax additional assessment for KES. 15,116,587.60 on 15th March, 2022 being principal tax, penalties and interest. The assessment was for the years of income 2016 to 2019.

Upon receipt of the Kenya Revenue Authority's ("KRA") demand, he objected to it and informed the Commissioner that he was an official of the United Nations and was exempted from income tax on salaries and emoluments paid to him with regard to his services with the World Food Programme.

The Appellant's arguments on his exemption from taxation on the salaries and emoluments paid to him by the United Nations.

The Appellant submitted that he was qualified to enjoy the privileges and immunities that came as a result of his status of a National Professional Officer employed under a fixed-term contract under the UN World Food Programme. He contended that the Convention on Privileges and Immunities of the United Nations (1940) to which the Republic of Kenya acceded to without reservations in 1965, and is now a party to, provides under section 18 that *United Nations officials are exempt from taxation on the salaries and emoluments paid to them by the United Nations*.

The Appellant further submitted that for purposes of Section 18 of the Convention, a definition of the term "officials" was established by the United Nations General Assembly ("GA") in Resolution 76 (1) of 7th December 1946 which approved the granting of the Privileges and Immunities referred to in Article V and VII of the convention *to all members of the staff of the United Nations, with the exemption of those who are recruited locally and are assigned to hourly rates*.

He therefore submitted that from the definition given above, the Appellant who is a locally recruited staff under a fixed term contract enjoys the status of an "official" as he is not assigned hourly rates. Hence, he is entitled to privileges and immunities inherent to his status which include exemption to taxation.

The Appellant further submitted that the Headquarters Agreement between United Nations and the Republic of Kenya (1975) provide for the exempts and the category of UN officials eligible under the following sections:

i. *Section 28 (d) (e) provides as follows: "...United Nations officials are exempt from taxation in respect of salaries, emoluments, indemnities and pension paid to them for services past or present or in connection with their services with the United Nations.*
ii. *Section 28 (o) "...locally recruited officials shall enjoy privileges and immunities provided in the Convention on Privileges and Immunities of the United Nations."*
iii. *Section 1 (6) defines official to include "All members of staff-except those who are locally recruited and assigned to hourly rates."*

The Appellant submitted further that the Basic Agreement signed between Republic of Kenya and World Food Programme on 15th January 2002 Article X Section 19 (a) states that: ".... officials of World Food Programme are exempted from taxation in respect to salaries, emoluments and indemnities paid them by World Food Programme with regard to their services with the World Food Programme."

In view of the above stated provisions, the Appellant asserted that he filed his returns with the Respondent from the year 2016 to 2022 as is required and holds valid clearance certificates for all of those years. The Appellant submitted and agreed that United Nations officials who are Kenyan officials are required to file their tax returns. However, as to salaries, emoluments indemnities and pension paid to them for services past or present or in connection with their services with the United Nations or income derived by them from sources outside the Republic of Kenya, *they are to declare nil returns*.

The Appellant asserted that he has demonstrated that he is an official of United Nations and provided the Respondent with his Employment Contract which indicates that he is a UN official who has been employed under a fixed term contract.

The Appellant therefore urged the Tribunal to enforce the intentions of the parties in the various contracts on the exemption of taxation on officials of World Food Programme in respect to salaries, emoluments and indemnities paid to them as a result of their services to World Food Programme.

The Commissioner's arguments on whether the Appellant was qualified for exemption from taxes and whether he adduced sufficient proof of exemption.

The Commissioner submitted that the Income Tax Act Cap 470 ("ITA") allows the Minister to exempt and give relief to such a person employed on missions on behalf of the organization from paying taxes.

The Commissioner averred that in this case it requested the Appellant for the Host Country Agreement between the United Nations Development Programme ("UNDP") and Kenya, together with the annexures which showed the staff and officials who were exempt from taxes, or the Gazette Notice by the Minister specifying the persons exempt from

paying the taxes. However, the Appellant failed to provide the requested documents and as such did not prove that he was given relief from paying taxes by the Minister.

The Commissioner submitted that it was the duty of the Appellant to provide sufficient documentation to prove that he was exempt from paying taxes as an employee of the United Nations as the contract of employment was not sufficient evidence. It therefore submitted that in the absence of supporting documentation, it used the available information which included the Appellant's bank statements to assess the Appellant on the undeclared income.

The Commissioner reiterated and asserted that pursuant to the Privileges Act, exemption from taxes applies to certain organizations or persons who relate to diplomatic and consular relations. It asserted further that the Appellant failed to provide sufficient evidence indicating his status and qualification to enjoy the said privilege.

The Tribunal's determination on whether the Appellant qualified for tax exemption.

The Tribunal held that whereas Section 18 (b) Article V of the Convention on the Privileges and Immunities of the United Nations provides that officials of the United Nations shall be exempt from taxation on the salaries and emoluments paid to them by the United Nations, Section 17 Article V specifies the names of officials who will be provided from time to time. The Section provides that the Secretary-General will specify the categories of officials to which the provisions of this Article and Article VII shall apply. He shall submit these categories to the General Assembly. Thereafter these categories shall be communicated to the Governments of all members. The names of the officials included in these categories shall from time to time be made known to the Governments of members.

The Tribunal held that it had neither sighted documentary evidence to indeed confirm whether the Appellant is among the named officers who are exempted from tax nor had it had the benefit of reviewing the Appellant's employment contract to confirm the Appellant's averment that he is an official of the United Nations.

Section 56(1) of the Tax Procedures Act places the onus of proof on the taxpayer to prove that the Commissioner's decision is incorrect and therefore the Appellant failed to satisfy the burden of proof placed upon him.

The Tribunal noted that while it was the responsibility of the employer to deduct tax from the Appellant's salaries, its failure to do so still means that the Appellant benefited from funds he was not entitled to. The Tribunal concluded that the Appellant did not qualify for tax exemption because he was unable to prove that he met the conditions set out in the Privileges Act and the ITA that enabled him to enjoy entitlement to immunity from taxation of his emoluments. Accordingly, the Appellant did not qualify for tax exemption and therefore that the tax demanded were due and payable.

SERGON V. COMMISSIONER OF DOMESTIC TAXES (TAX APPEAL E248 OF 2024) [2025] KETAT 19 (KLR) (24 JANUARY 2025)

Facts of the Case

The Commissioner, in a bid to establish whether taxes were paid on the funds utilized by the Appellant, a male Kenyan citizen and an employee of the World Health Organization, in acquiring property carried out a verification process of the records of the Appellant for accuracy of income declarations for the periods between January 2018 to December 2021.

The Appellant was then issued with assessments in respect of income tax for the 2018, 2019 and 2020 years of income for the sums of KES. 7,549,123.00; KES. 14,088,298.00, and KES. 18,161,759.00, respectively. On 15th June 2023, the Commissioner issued an additional assessment of KES. 39,799,180.00 in respect of the 2018, 2019 and 2020 years of income.

The Appellant objected to the assessments on the grounds that his salary and emoluments from the WHO were legally exempted from taxes. On 11th September 2023, the Commissioner, confirmed the assessment of KES. 35,909,292.00. Aggrieved by the Commissioner's decision, the Appellant lodged his Notice of Appeal against the Commissioner's decision.

The Appellant's arguments on his exemption from taxation on the salaries and emoluments paid to him by WHO.

The Appellant submitted that it was not in dispute that he was employed by WHO during the assessed periods. The Appellant noted that WHO is a United Nations Agency and that therefore it is subject to the provisions of Article V Section 18 (b) of the International Convention on the Privileges and Immunities of the United Nations, 1946 on the immunity of the United Nations.

The Appellant averred that Section 35 of the International Convention provides that the convention shall continue in force as between the United Nations and every member which has deposited an instrument of accession for so long as that Member remains a Member of the United Nations, or until a revised general convention has been approved by the General Assembly and that Member has become a party to this revised convention.

The Appellant averred that in light of the above legal provisions, the Commissioner had no legal justification to impose taxes on the Appellant's income. That without prejudice to the above, the obligation to remit Pay as You Earn tax on salary, the provisions of Section 37 (1) of the ITA fall squarely on the Appellant's employer as it provides that 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.

The Commissioner's arguments

The Commissioner demanded evidence that the properties were purchased using the Appellant's tax-exempt salary. The Appellant failed to provide his bank statements which led the KRA to classify the source of funds for purchasing the property as underdeclared income and through its Objection Decision, the KRA confirmed the assessment of income tax amounting to KES. 35,909,292.00.

The Commissioner stated that it was the Appellant's claim that the income used to acquire the property referenced in the assessments were funds earned from employment as a UN staff member, previous earnings accrued over the last three decades, and that the funds were thus exempt from taxation.

The Commissioner averred that the issue at hand was not focused on whether the Appellant is an official employee of the UN or whether his income is tax exempt, but rather to verify that indeed the income source that was used to purchase the parcels of land was from the employer WHO.

The Commissioner further disputed the Appellant's claim for tax exemption under Paragraph 27 of the First Schedule of the ITA stating that the Appellant did not demonstrate that his work qualifies for this exemption. The Commissioner also stated that the Appellant did not provide evidence of any status under the Privileges and Immunities Act that would exempt him from taxes. Therefore, the Respondent maintained that the Appellant's income is taxable and the tax obligations were not met.

The Tax Appeal Tribunal's decision

Dr. Sergon had filed his appeal to the Tax Appeals Tribunal (TAT) but missed the 30-day deadline for filing appeals under Kenyan tax law. Instead, he filed 90 days late without seeking an extension. The Tribunal narrowed the appeal to only one issue of determination as below.

Issue: whether the Appeal was properly before the Tribunal.

The Tax Appeal Tribunal ruled that procedural compliance—not the substance of the Appellant's appeal—was the deciding factor in this case. The failure to meet the 30-days deadline for filing the appeal ultimately resulted in the loss of the chance to challenge the tax assessments, regardless of the merit of the Appeal.

The Tribunal cited the opinion of J. Mativo [as he then was] in ***Equity Holdings Ltd vs Commissioner of Domestic Taxes Civil Appeal E069 and E025 of 2020 (2021) KEHC 25 (KLR)*** that expressed that statutory edicts are not procedural technicalities and that further, Article 159 (2) (d) of the *Constitution* was not meant to oust express statutory provisions and to open a window for disregard of statutory requirements.

The tribunal remarkably reiterated:

> *"The Tribunal will down its tools since it is without jurisdiction in this matter on the basis that the Appeal was filed out of time without its leave. Accordingly, the Tribunal finds that this Appeal is not properly before it and is available for striking out."*

Key Takeaways

These cases serve as a reminder of several key lessons:

- Exemption from taxation or the entitlement to privileges and immunities as specified in the Privileges and Immunities Act is not guaranteed for employees of Diplomatic Organizations: although the Appellants were employed by tax-exempt organizations, KRA still found their income taxable.

- Individuals covered by the Privileges and Immunities Act, who benefit from tax exemptions and are interested

in investing or starting a business, should consult with tax professionals for guidance.

- Timeliness is crucial and meeting deadlines is essential: Dr. Sergon's case was dismissed simply because he missed the filing deadline.

- Seek Professional Help: When in doubt, seek advice from tax professionals to avoid costly mistakes and navigate complex tax procedures.

CONCLUSION

These cases are a crucial reminder for professionals employed by diplomatic organizations that the immunity from taxation is not absolute and can be challenged by the KRA. The case of Dr. Sergon further emphasizes the severe consequences that can arise from procedural errors, particularly missing key deadlines. While his argument on tax exemption because of his WHO employment was valid, his failure to file an appeal within the required 30-day period led to a devastating financial outcome — leaving him with a KES. 35.9 million tax liability.

The above cases highlight the importance of not only understanding the substance of tax laws but also adhering strictly to the procedural requirements. Whether dealing with complex tax matters or international exemptions, it's vital to seek professional guidance and ensure all deadlines are met to avoid costly mistakes that could have long-term financial repercussions.

HOW WE CAN HELP

At CM Advocates LLP, we specialize in tax procedures, compliance, and dispute resolution. Our team of experts is here to guide you through the complexities of tax law, whether you need help filing objections, understanding critical deadlines, or navigating a tax dispute. We ensure that you are fully informed about your obligations, helping you avoid costly mistakes while staying compliant with the law.

If you're facing a tax dispute or need assistance with any tax-related matter, our professionals are ready to support you every step of the way. We offer strategic advice and personalized solutions to ensure the best possible outcome for your case. Reach out to us at ***law@cmadvocates.com*** or contact our Contributors for expert assistance in resolving your tax issues efficiently and effectively.

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