



REPUBLIC OF KENYA



**Commissioner of Domestic Taxes v Thaara Limited (Income Tax Appeal E133 of 2023)  
[2024] KEHC 16188 (KLR) (Commercial and Tax) (19 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16188 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
INCOME TAX APPEAL E133 OF 2023  
JWW MONG'ARE, J  
DECEMBER 19, 2024**

**BETWEEN**

**COMMISSIONER OF DOMESTIC TAXES ..... APPELLANT**

**AND**

**THAARA LIMITED ..... RESPONDENT**

*(An appeal against part of the Judgment of the Tax Appeals Tribunal  
dated 29th June 2023 in Tax Appeals Tribunal Appeals No. 1111 of 2022)*

**JUDGMENT**

1. Thaara Limited (the “Respondent”) is a limited liability company incorporated in Kenya that owns and manages the Rosslyn Riviera Shopping Mall in Nairobi. In 2018, it received a term loan from a private equity fund, Vantage Mezzanine III Pan African Sub Fund Partnership. According to the Principal Loan Agreement, the loan ought to have been paid in full, including interest, within 7 years of the date of signing the loan Agreement. Interest was chargeable at the rate of Libor (London Inter Bank Offer Rate) – which fluctuates monthly and is a global benchmark used to make adjustments to variable-rate loans) plus 11.5%.
2. The Principal Loan Agreement was amended on 20<sup>th</sup> October 2020 by both parties by an Addendum to the effect that interest payment, as well as accrual of the expense and interest, would be deferred, with effect from 1<sup>st</sup> January 2019. This was due to the financial constraints faced by the Respondent. The loan term expires in 2025, the initial amount of USD 8,000,000 having been disbursed on or about 25<sup>th</sup> April 2018.
3. Following a VAT refund application for the sum of Kshs. 1,925,666/- by the Respondent, the Appellant undertook a tax verification for January 2017 to December 2021. On 24<sup>th</sup> May 2022, the Appellant issued a tax assessment demanding the sum of Kshs. 18,011,425/- from the Respondent in



respect of withholding taxes on deemed interest for the years of income 2019 and 2020. The Appellant alleged that the Addendum to the Principal Loan Agreement altered the loan terms to an interest-free loan and, as a consequence, withholding tax on deemed income was applicable on the loan under section 2 of the [Income Tax Act](#).

4. The Appellant also issued an assessment on the iTax web portal demanding the slightly higher additional tax amount of Kshs. 18,689,679/- consisting of Kshs. 18,296,550/- in additional withholding tax and Kshs. 393,129/- in additional corporate income tax.
5. In response, the Respondent filed a Notice of Objection dated 23<sup>rd</sup> June 2022 against the entire assessment. The Appellant issued the objection decision dated 22<sup>nd</sup> August 2022 confirming the initial withholding tax assessment of Kshs.18,296,541/- and revised the corporate income tax assessment downwards to Kshs.8,477/-.
6. Dissatisfied, the Respondent appealed to the Tax Appeals Tribunal. Aggrieved by the Tribunal's decision, the Appellant filed this appeal through the Memorandum of Appeal dated 30<sup>th</sup> August 2023 on the grounds:-
  1. That the Tribunal erred in law and fact by setting aside the Withholding tax Assessment amounting to Kshs. 18,296,541.00/-.
  2. That the Tribunal erred in law and fact in finding that the funds borrowed by the Respondent As per the Mezzanine Facility Agreement do not constitute an interest free loan and therefore do not attract Withholding tax pursuant to Section 2 of the [Income Tax Act](#).
  3. That the Tribunal erred in law and fact in finding that the loan facility obtained by the Appellant should not be subjected to deemed interest provisions as per Section 2 of the [Income Tax Act](#).
  4. That the Tribunal erred in law in its interpretation of the word "paid" in Section 2 of The [Income Tax Act](#) as read with Section 35 of the [Income Tax Act](#) hence arriving at an erroneous Decision.
7. The Appellant subsequently filed a record of appeal dated 29<sup>th</sup> September 2023 and a supplementary record of appeal dated 9<sup>th</sup> May 2024. It also filed written submissions dated 20<sup>th</sup> September 2024.
8. The Appellant seeks that this Appeal be allowed; that part of the judgment of the Tribunal dated 29<sup>th</sup> June 2023 be and is hereby set aside; that the Appellant's Withholding tax assessment amounting to Kshs. 18,296,541.00/- be upheld in its entirety and costs be awarded to it.

## **Response**

9. In opposing the Appeal, the Respondent filed a statement of facts dated 1<sup>st</sup> November 2023 and written submissions dated 30<sup>th</sup> September 2024 seeking dismissal of the appeal and upholding of the Tribunal's judgment.

## **Analysis and Determination**

10. I have carefully considered the memorandum of appeal, the entire record, the statement of facts and the parties' respective submissions. The mandate of this Court in such an appeal is circumscribed to questions of law only under Section 56 of the [Tax Procedures Act](#), which provides that:-

“ 56.



- (1) In any proceedings under this Part, the burden shall be on the taxpayer to prove that a tax decision is incorrect.
- (2) An appeal to the High Court or to the Court of Appeal shall be on a question of law only.
- (3) In an appeal by a taxpayer to the Tribunal, High Court or Court of Appeal in relation to an appealable decision, the taxpayer shall rely on the grounds stated in the objection to which the decision relates unless the Tribunal or Court allows the person to add new grounds.”

11. The Court has in numerous cases pronounced that in such an appeal, the engagement with facts is limited to getting the context of the case and considering whether the findings of fact were based on evidence. The Court would be entitled to interfere with factual findings based on evidence. This was aptly captured in *Commissioner of Domestic Taxes v Better Globe Forestry Limited (Tax Appeal E003 of 2022)* [2023] KEHC 3645 (KLR) (Commercial and Tax) (28 April 2023) (Judgment), cited in the Respondent’s submissions, where the Court also observed that:-

“Whether the amount received by the local entity is a loan that attracts interest or deemed interest is a question of fact. Given the jurisdiction of the court, the duty of this court is to examine the record and satisfy itself that the determination of the Tribunal comports with the evidence.”

12. In the present appeal, the issue for determination is whether the loan facility obtained by the Appellant is subject to deemed interest as per Section 2 of the *Income Tax Act* due to the deferral of interest for 2019 to 2020. Guided by the above, this Court has to ascertain that the Tribunal’s findings are supported by evidence.
13. The Appellant’s assessment of WHT was premised on the 2019 addendums to the loan agreements which it argued changed the terms of the loan to an interest-free loan. The Appellant pointed out that the Respondent adopted the accrual system of accounting for both its income and expenses and that from 2019 onwards, the Respondent has not accrued or credited this interest in favour of the lender in its profit and loss account.
14. The Appellant also highlighted that the Respondent did not reduce the amount of profit chargeable to tax and in effect has not enjoyed the interest expense as a benefit while tabulating its taxable position. It therefore argued that withholding tax assessed is due and payable because the Respondent has neither been paying interest on the loan, nor accruing the interest in its books of account, the loan is an interest-free loan as per section 2 of the ITA.
15. On the other hand, the Respondent submitted that the Addendum did not change the nature of the loan to be interest-free as it did not alter the terms of the principal loan agreement. It also submitted that the Addendum only deferred interest payment to a future date before the expiry of the term of the loan in 2025. It again contended that deemed interest cannot arise when the loan is not interest free.
16. The issue for determination is whether the loan facility obtained by the Appellant is subject to deemed interest as per Section 2 of the *Income Tax Act* due to the deferral of interest for 2019 to 2020.



17. Section 2 of the ITA defines deemed interest as follows:-

“deemed interest” means an amount of interest equal to the average ninety-one day Treasury Bill rate, deemed to be payable by a resident person in respect of any outstanding loan provided or secured by the non-resident, where such loan is provided free of interest;”

18. Section 35 (1) of the ITA provides:-

35.

(1) A person shall, upon payment of an amount to a non-resident person not having a permanent establishment in Kenya in respect of –

...

(e) interest and deemed interest, including interest and deemed interest arising from a discount upon final redemption of a bond, loan, claim, obligation or other evidence of indebtedness measured as the original issue discount;”

19. In the impugned judgment, the Tribunal noted that the Mezzanine Facility Agreement executed on 21<sup>st</sup> March 2018 provided that the agreed interest rate was the LIBOR rate plus the margin, accruing and compounding quarterly in arrears. It also noted that in the Third Addendum to the Mezzanine Facility Agreement, the parties agreed to further amend the facility agreement to increase the capital amount and deferral of the accrual of interest and payment thereof.

20. From my reading, I concur with the Tribunal’s finding that the loan facility is not interest-free and is therefore not subject to deemed interest.

21. However, I do not agree with the Tribunal’s finding that the funds borrowed by the Appellant as per the Mezzanine Facility Agreement do not attract Withholding tax.

22. The correct position is that the funds borrowed by the Appellant as per the Mezzanine Facility Agreement attract withholding tax upon payment or accrual of interest. The position of the law is that if there is an indebtedness to a non-resident entity, withholding tax would apply whether there was interest payable or not. This is supported by this Court’s decision in *Commissioner of Domestic Taxes v Socabelec East Africa Limited (Income Tax Appeal E001 of 2021)* [2024] KEHC 3319 (KLR) (Commercial and Tax) (19 March 2024) (Judgment), where it was noted that:-

“16. From the above, it is clear that if there is an indebtedness to a non-resident entity, withholding tax would apply whether there was interest payable or not. The only difference is that where there was no interest, deemed interest would apply at the 91 Treasury bill rate. Therefore, I find and hold that the Tribunal erred in by failing to appreciate that deemed interest only applies to loans that are provided free of interest and in concluding that for any form of indebtedness to qualify as a loan, there must be a fixed charge, interest, discount or premium.”



23. Similarly, in *Commissioner of Domestic Taxes v Dominion Petroleum Dkenya Limited (Tax Appeal E093 of 2020)* [2021] KEHC 283 (KLR) (Commercial and Tax) (19 November 2021) (Judgment), the Court held that:-
34. ... the main factor of consideration is whether there was any interest provided for in the financing agreements amounted to a loan; if there was no interest, then WHT on ‘Deemed Interest’ would apply at the 91-day Treasury Bill rate; if there was interest, WHT would still apply at the rate provided for in the Third Schedule of the ITA. What should be noted is that whichever the case, WHT would still apply.”
24. From Section 35(1) cited above, read together with Section 35(3) of the ITA, withholding tax is deducted upon payment of the interest which is chargeable to tax or accrued (recorded as a liability). The question then is whether the interest has been paid to warrant the payment of withholding tax or put differently whether withholding tax is due.
25. In this respect, the Appellant argued that by finding that withholding tax was not due, the Tribunal erred in its interpretation of paid under Section 2 of ITA. To this, the Respondent countered that withholding tax is not due as the interest has been deferred to 2025 and it is yet to accrue. However, the Appellant faulted the Respondent for failure to accrue the interest in the books of account.
26. It is not disputed that the interest payments have been deferred. The contest is about the accrual of interest.
27. Under Section 2 of the ITA, “paid” means:-
- “paid” includes distributed, credited, dealt with or deemed to have been paid in the interest or on behalf of a person”
28. In *Kenya Revenue Authority v Republic (Experte Fintel Ltd)* [2019] eKLR, the Court of Appeal observed that:-
- “in its profit and loss account recognized and included the interest payable. It credited that amount in favour of the contractor. The strict application of the definition of the word “paid” will of necessity include any amount credited in the interest or on behalf of a person, in this case, the contractor.”
29. The Court of Appeal clarified in the foregoing case that the word paid includes amounts accrued as stipulated under sections 3 and 10 of the ITA, noting that our income tax regime is based on an accrual system. However, the case is distinguishable from the present scenario where the Respondent explicitly agreed to defer interest accrual through the Addendum. The Respondent therefore has not benefited from the deduction of interest expense from its taxable profit.
30. The contention that the Tribunal erred in law in its interpretation of the word “paid” in Section 2 of The *Income Tax Act* as read with Section 35 of the *Income Tax Act* therefore fails. Accordingly, I concur with the Tribunal’s finding that the withholding tax is not due yet and with its decision to set aside the Appellant’s withholding tax assessment.
31. The upshot is that the Appeal is dismissed for want of merit. The court orders and directs each party to bear its own costs of the Appeal.



**DATED, SIGNED AND DELIVERED VIRTUALLY at NAIROBI this 19<sup>TH</sup> DAY OF DECEMBER 2024.**

.....

**J.W.W. MONG'ARE**

**JUDGE**

In the Presence of:-

1. Ms. Renee Omondi and Mr. William Ochieng for the Respondent.
2. Ms. Lydia Nganga for the Respondent.
3. Amos- Court Assistant

