

THE REPUBLIC OF UGANDA
IN THE TAX APPEALS TRIBUNAL AT KAMPALA
TAX APPLICATION NO.59 OF 2023

INTERNATIONAL FOOD POLICY RESEARCH INSTITUTE..... APPLICANT

VERSUS

UGANDA REVENUE AUTHORITY..... RESPONDENT

BEFORE: MR. SIRAJ ALI, MS. KABAKUMBA MASIKO, MS. SAFI GRACE.

RULING

This ruling is in respect of an Application challenging an assessment by the Respondent on the ground that persons hired by the Applicant for the provision of certain services were not employees but independent contractors.

1. Background facts

The Applicant is a research-based organization. The Applicant provides research-based policy solutions for the alleviation of hunger and poverty in developing countries including Uganda. The Applicant entered into short-term field office service agreements with various individuals to collect data on various aspects of the Applicant's business. These individuals included contractors (Data collectors and enumerators). The Applicant treated these individuals as independent contractors and withheld tax at 6% on all payments made to them and remitted the same to the Respondent.

The Respondent conducted a tax audit upon the Applicant and established a tax liability of PAYE amounting to Shs. 171,983,080 and Withholding Tax of Shs. 19,349,080. The Applicant objected to the assessments as a whole on grounds that these individuals were independent contractors whose pay had been subjected to 6% withholding tax and WHT on suppliers had been wrongly computed. The Respondent partially allowed the objection by reducing the tax assessed (Withholding tax on payments to suppliers) from Shs. 19,349,082 to Shs. 12,282,628. The Respondent rejected the PAYE objection and maintained the assessment of Shs. 171,983,902.

Dissatisfied with the Respondent's objection decision, the Applicant filed this Application.

2. Representation

At the hearing of this application, Mr. Joseph Luswata and Mr. Winston Churchill Ruhayana appeared for the Applicant while Mr. Sam Kwerit and Ms. Charlotte Katuutu appeared for the Respondent.

3. The issues for determination

At scheduling the following issues were set down for hearing;

- i) Whether the Applicant is liable to pay the PAYE as assessed?
- ii) Whether the Applicant is liable to pay the Withholding tax as assessed?
- iii) Remedies available?

Before the hearing of the matter, the Applicant conceded that the assessment in respect of WHT on suppliers in the sum of Shs. 12,282,628 was due and payable. Accordingly the matter left for the tribunal's determination is whether the Applicant is liable to pay the PAYE as assessed.

4. Submissions of the Applicant

The Applicant led evidence through Mr. Edward Kato, its Senior Research Analyst. Mr. Kato testified about the work and the terms of service of the contractors. He stated that the Applicant and each enumerator signed a standard agreement stating the terms under which the service is to be granted, each research project is given a name to ensure that enumerators understand what to collect. Data collectors are given questionnaires, I- pads or tablets that are returned to the Applicant at the end of the project.

The Applicant submitted that Workers' compensation cover is only provided if the project fund is sufficient to cover the same but this is not provided all the time.

The Applicant's Counsel cited **Section 1 of the Employment Act Cap 226** which defines an employee as any person who has entered into a contract of service or an apprenticeship contract. The Applicant went ahead to cite Section 2(x) of the Income Tax Act which defines an employee as an individual engaged in employment.

In order to determine whether a contract for service or a contract of service exists, the Applicant submitted that common law tests have to be applied and these include the control test, integration test, multiple tests, and the parties' own characterization.

In its submissions, the Applicant defined the control test, as a test used to measure the level of control an employer has over an employee. The Applicant made reference to the case of **Ready Mixed Concrete V Minister of Pensions and National Insurance {1968} 2 QB 497**, where the court noted that control includes the power of deciding the things to be done, how it shall be done, the means to be employed in doing it, the time and place for it to be done.

Accordingly, the Applicant submitted that the individuals were engaged for a very short period which shows that the employers had no control over them as stated in the case of **Infectious Diseases Institute (IDI) V Uganda Revenue Authority TAT APP No. 15/2019**.

The Applicant also made reference to the integration test as one that is used to determine if the person is integrated in the Applicant's business so as to be regarded as an employee. The Applicant relied on the book **Managing Taxation in Uganda, 2nd Edition by Christine Mugume on Page 8/6** wherein the learned author stated that, in determining that one is an employee or independent contractor, the question will be whether the person hired is engaged on a continuous basis, the services are performed particularly at the hirer's business, the hirer provided the working tools, plant and other relevant facilities for the person hired to do his or her work and the hirer controls the timing and scheduling of work.

The Applicant submitted that the courts have used the Multiple test because they have recognized that not a single infallible test can be used to determine whether one is an employee or not. In the case of **Workmen of Nilgiri Cooperative Marketing Society Ltd V Tamil Nadu, (2004) 3 SCC 514** court stated that, "No single test- be it control, be it organization or any other test has to be the determinative factor for determining the jural relationship of employer and employee".

The Applicant submitted on the third test, namely, the parties' own characterization which means that the label the parties have given their relationship will be respected unless the terms of the contract are inconsistent with that label.

The Applicant submitted that in order for the Tribunal to determine the nature of service, the facts of the case should be applied to the statutory definition of employee and employment along with the common law tests.

5. Submissions of the Respondent

The Respondent submitted that the burden of proof lies upon the Applicant to prove that the assessment is incorrect or erroneous as provided for under **Section 26 of the Tax Procedures Code Act 2014** and was reechoed in the Tanzanian case of **Williamson Diamonds LTD V Commissioner General (2008) 4 TTLR 67** where the Tax Revenue Appeals Tribunal of Tanzania held that;

“..... burden of proving that the assessment issued by the Respondent is excessive or erroneous lies on the tax payer and in no way it be shifted to the Respondent...”

The Counsel for the Respondent submitted that the Applicant is liable to pay the PAYE assessment issued against it and that in determining liability, the Tribunal ought to examine the character of the data collectors/enumerators to determine whether they are employees or independent contractors.

In relation to the above, Counsel for the Respondent made reference to the testimony by its witness Ms. Priscilla Nambuba, an officer in the Objections Unit of Domestic Taxes Department. The witness testified that the data collectors/enumerators were classified as employees because the roles performed by them formed an integral part of the business of the Applicant. In this regard, the Respondent added that the Applicant provided them with tools of trade in the form of tablets used for data collection. The Respondent noted that this particular statement was uncontroverted during the hearing of this case.

The Respondent also cited the **Ready Mixed Concrete case** (supra), where the court while elaborating on the above test stated that: *“There must be a wage or other remuneration. Otherwise there will be no consideration, and without consideration no contract of any kind. The servant must be obliged to provide his own work and skill. Freedom to do a job either by one’s own hands or by another’s is inconsistent with a contract of service”*.

6. The Applicant's submissions in rejoinder

In response to the Respondent's submissions, that evidence of its witness Ms. Priscilla Nambuba on characterization of Data Collectors/Enumerators, as employees was uncontroverted, the Applicant submitted that the same had been submitted by the Respondent in error. The Applicant stated that the testimony of Mr. Edward Kato extensively demonstrated that the Data Collectors were not employees but independent contractors.

7. Resolution of the application by the Tribunal

Having studied the evidence and submissions made by the parties, the following is the ruling of the Tribunal.

PAYE is a form of withholding tax which employers are required to deduct and remit to the Respondent from payments due to employees. This requirement is provided for under **S. 126 of the Income Tax Act.**

The Applicant submitted that the enumerators or data collectors constituted more than 80% of the contractors and that the rest were exhibitors, a consultant, field extension workers and vine inspectors. The Applicant submitted that in the case of the exhibitors, consultant, field extension workers and the vine inspectors, there was no reason to interfere with the characterization which the parties` had themselves given to their relationship. The Respondent on the other hand submitted that the exhibitors, consultant, field extension workers and vine inspectors, formed neither part of the objection nor the objection review process. The Respondent submitted further that the Application is based primarily on the issue of PAYE on the data collectors/enumerators and WHT on payments made to suppliers. This the Respondent submitted amounted to the introduction by the Applicant of a new cause of action.

A perusal of the Application filed on 18th April 2023, makes no mention of exhibitors, consultant, field extension workers or vine inspectors. It is trite that parties ought not to depart from their pleadings. The tribunal will accordingly disregard the distinction made by the Applicant between data collectors/enumerators on the one hand and exhibitors, consultant, field extension workers and vine inspectors, on the other.

In resolving the issue as to whether the Applicant is liable to pay PAYE as assessed, we must determine whether the individuals in question were employees or independent contractors.

S.2 of the Employment Act, defines an employee as: -

“Any person who has entered a contract of service or an apprenticeship contract including, without limitation, any person who is employed by the Government of Uganda, including the Uganda Public Service, a local authority or a parastatal organization but excludes a member of the Uganda Peoples Defence Forces.”

An employee is defined in **Black’s Law Dictionary 8th Edition p.564** as a *“person who works in the service of another person (the employer) under an express or implied contract of hire, under which the employer has the right to control the details of work performance.”*

An independent contractor on the other hand is defined in **The Black’s Law Dictionary 8th Edition page 888** as: *“One who is entrusted to undertake a specific project but who is left free to do the assigned work and to choose the method for accomplishing it.”*

The above authorities disclose a distinction between a contract of service and a contract for service. Employees are deemed to enter a contract of service while independent contractors are deemed to have entered a contract for service. In **Ready Mixed Concrete (South East Ltd) v Minister of Pensions and National Insurance [1968] 2 QB 496** it was stated that:

“A contract of service exists if these three conditions are fulfilled.

- (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his own master.
- (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other’s control in a sufficient degree to make that other master.
- (iii) The other provisions of the contract are consistent with its being a contract of service.”

From the above, it is not difficult to discern that the element of control is important in determining whether a person is an employee or an independent contractor.

The term `control` has been defined in **Black's Law Dictionary 8th Edition p. 403** as:
"The direct or indirect power to govern the management and policies of a person or entity, whether through ownership of voting securities, by contract or otherwise, the power or authority to manage, direct, or oversee."

In **Ready Mixed Concrete v Minister of Pensions & National Insurance (supra)** the court noted that: *"Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done"*. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant.

"In Meera Investments Ltd v Andreas Wipfler t/a Wipfler Designers and Co. Ltd. MA 163 of 2009 the Court cited the following definition of an `independent contractor` in **Black's Law Dictionary 9th Edition**.

"One who is entrusted to undertake a specific project but who is left free to do the assigned work and to choose the method for accomplishing it."

The Court cited with approval the following test laid down in **Market Investigations vs. Minister of Social Security [1969] 2 GB 173**.

"... the fundamental test to be applied is this: "Is the person who has engaged himself to perform these services performing them as a person in business on his own account?" If the answer to that question is "yes", then the contract is a contract for services." "No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of considerations that are relevant in determining that question, nor can strict rules be laid down as to the relevant weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors, which may be of importance, are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk (he) takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task."

The tests and definitions enumerated under the Common law above, have been codified in the Income Tax Act, under the definitions of the terms “employee” and “employment”. **S.2 of the Income Tax Act**, defines an employee as an individual engaged in employment while employment is defined under the same section as follows;

“(i) the position of an individual in the employment of another person.

(ii) A directorship of a company.

(iii) A position entitling the holder to a fixed or ascertainable remuneration; or

(iv) The holding or acting in any public office;”

We will look at each of the above definitions of “employment” to determine whether the enumerators were employees of the Applicant or independent contractors. The first definition, namely, the position of an individual in the employment of another person envisages a situation where it is acknowledged that a person is an employee of another, whether under a formal contract of service or otherwise. However in the instant case there is no such acknowledgement from the evidence before us.

The second and fourth definitions do not apply to the instant case, as they are specific to persons holding the office of a director in a company or persons holding or acting in any public office. The evidence before us shows that none of the enumerators were either directors in the Applicant, or were holders of public office in any capacity.

The third definition is in respect of a position entitling the holder to a fixed or ascertainable remuneration. This definition formed the basis of the decision of the tribunal in **Infectious Diseases Institute (IDI) V Uganda Revenue Authority TAT APP No. 15/2019**. Excerpts from the above decision are reproduced below;

“Any person who receives a fixed or ascertainable remuneration is considered as an employee under the Income Tax Act, but this may not be the case under the Employment Act. ...The word `ascertainable` would refer to income that is certain. Therefore, if an individual receives income that is constant and certain, he or she is deemed an employee for purposes of taxation. The tribunal uses the word “or” to imply that either “constant” or “certain” may do”.

“It is debatable whether a person who receives remuneration for a short period may be considered as one who obtains fixed or ascertainable income. For the avoidance of doubt

the Tribunal will hold that a person who receives remuneration for less than two months cannot be considered as receiving fixed or ascertainable income. A taxpayer is entitled to the benefit of doubt”.

The Applicant`s witness Edward Kato testified that the working period for each contract for the enumerators or data collectors ranged between five (5) and thirty-four (34) days at the very maximum.

This evidence was uncontroverted. The period ranging between five to thirty five days is too short to form the basis of a determination that a person obtained a fixed or ascertainable income. Applying the decision of the tribunal in the **Infectious Diseases Institute** case, we find that owing to the very short period of their engagement, the data collectors cannot be considered as having received a fixed or ascertainable income. Accordingly they cannot be considered as employees of the Applicant. This being the case, the Applicant is not liable to pay the PAYE as assessed in respect of the enumerators.

As part of the remedies sought the Applicant prayed that the Respondent be ordered to refund to the Applicant the sum of Shs. 51,595,164 paid by the Applicant as 30% of the tax in dispute with interest at 2% from the date of payment until the date of refund.

S.22(6) of the **Tax Appeals Tribunals Act** provides that the tribunal may make an order as to damages, interest or any other remedy against any party, and the order shall be enforceable in the same manner as an order of the High Court.

The use of the word `may` above shows that discretion is granted to the tribunal to award damages, interest or other remedies. It is settled law that discretion must be exercised judiciously. In **Kiriisa vs. Attorney General & Another (1990-1994) 1 EA 258 (SCU)**, **Manyindo DCJ**, stated as follows;

“In my opinion discretion simply means the faculty of deciding or determining in accordance with circumstances and what seems just, fair, right, equitable and reasonable in those circumstances”.

In the instant case the Applicant paid Shs.51, 595,164/- as 30% of the tax in dispute as required under **S.15 (1) of the Tax Appeals Tribunals Act**. Having found that the Applicant is not liable to pay the tax as assessed. It is only fair and just that the money paid by the Applicant in order to access the tribunal be refunded to it. It is also fair and just that this money be paid with interest of 2% per month from the date of payment until the date of refund, as the Applicant has been deprived of the use of this money from the time it was paid.

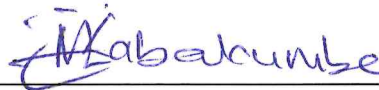
We accordingly order as follows;

1. The Application is allowed with costs to the Applicant.
2. The Respondent is ordered to refund to the Applicant the sum of Shs. 51,595,164/- paid by the Applicant as 30% of the tax in dispute with interest at 2% per month from the date of payment until the date of refund.

Dated at Kampala this ...^{6th}... day of September 2024.



MR. SIRAJ ALI
CHAIRPERSON



MS. KABAKUMBA MASIKO
MEMBER



MS. SAFI GRACE
MEMBER