

# Sagamore Hill. TAX NEWSLETTER.



Maximizing Compliance and Minimizing Risk: Your Tax Audit Newsletter

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Tax Audit Triggers

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In our monthly newsletter, we aim to provide an analysis of the most downloaded tax case law from our [database](#) of tax appeal tribunal tax judgements. We seek to expound on issues of determination in the case and as well, give more insight on other issues discussed therein.

In this month's issue, we look into the case of *Gulsan Insaat Sanayi Turizm Nakliyat Ve Ticaret A.S Vs Commissioner Of Domestic Taxes Tat No.525 Of 2019*

The appellant is a Turkish institution that won a contract to construct a road in Kenya. The point of contention was that of computation of corporate tax income, whereby, there was a variance in what the tax payer declared and what KRA assessed as the correct income. The contributing factors in the cause of variances resulted from two main factors. That of declaration relating to Rail Way Development levy and Exchange gains that resulted in the differences between the filled returns and submitted books for invoices purposes to KENHA



On the issue of the Rail way development Levy, the appellant argued that part of the contributing factors in the variances was the reimbursement of previously paid levy fees. They argued that the project being an aid funded project, it was exempt from being levied fees such as RDL introduced by the finance bill of 2013. The amounts that the appellant had submitted to the respective authority were reimbursed and KRA erroneously factored this as income of the business. The commissioner conducted an audit and there were variances of the invoices submitted to

KeNHA and those it declared in its self-assessment. True to this the appellant could not give explanation as to why there were differences. The appellant stated that the contributing factor in the differences in the submitted returns was caused by omission of declarations of the **realised exchange gains** and **interest on late payment**. We will later, for the sake of this newsletter give more details about this. The respondent felt that this should be factored in the declaration of income by the appellant and as such, fill in the forms provided by the commissioner in the described manner while filing their return in the self-assessment regime. In the computation of the income charged to tax, the realized and interest on late payment were computed separately from business income.

The respondent cited Section 24(1) of the Tax Procedure Act *A person required to submit a tax return under a tax law shall submit the return in the approved form and in the manner prescribed by the Commissioner.*

It further stated section 73 of the Income Tax Act, Where a person has delivered a return of income, the Commissioner may -

*(a) (i) accept the return and deem the amount that person has declared as his self-assessment in which case no further notification need be given; or*

*(ii) where the return is in respect of a year of income prior to 1992, accept that return and assess him on the basis thereof;*

*(b) if he has reasonable cause to believe that the return is not true and correct, determine, according to the best of his judgement, the amount of the income of that person and assess him*

*(3) Where a person has not delivered a return of income for a year of income, whether or not he has been required by the Commissioner so to do, the Commissioner considers that the person has income chargeable to tax for that year, he may, according to the best of his judgement, determine the amount of the income of that person and assess him accordingly; but the assessment shall*

*not affect any liability otherwise incurred by that person under this Act in consequence of his failure to deliver the return.*



After numerous correspondent, the respondent opined that they had provisions in the law to issue additional assessments if they had grounds to believe that the tax payer **had under declared their income**.

The respondent stated too that The Tax Appeal Procedure empowers them to execute their mandate. TPA Sec 31 states,

*(1) Subject to this section, the Commissioner may amend an assessment (referred to in this section as the "original assessment") by making alterations or additions, from the available information and to the best of the Commissioner's judgement, to the original assessment of a taxpayer for a reporting period to ensure that—*  
*(a) in the case of a deficit carried forward under the Income Tax Act (Cap.470), the taxpayer is assessed in respect of the correct amount of the deficit carried forward for the reporting period;*  
*(b) in the case of an excess amount of input tax under the Value Added Tax Act, 2013 (No. 35 of 2013), the taxpayer is assessed in respect of the correct amount of the excess input tax carried forward for the reporting period; or*  
*(c) in any other case, the taxpayer is liable for the correct amount of tax payable in respect of the reporting period to which the original assessment relates*

Further, the Income Tax Act sec 3(1) and (2) states.

3. (1) 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 in or was derived from Kenya.

(2) Subject to this Act, income upon which tax is chargeable under this Act is income in respect of -

(a) gains or profits from –

(i) a business, for whatever period of time carried on;

(ii) employment or services rendered

(iii) a right granted to another person for use or occupation of property;

(b) dividends or interest;

(c) (i) a pension, charge or annuity; and

(ii) any withdrawal from, or payments out of, a registered pension fund, or a registered provident fund or a registered individual retirement fund; and

(iii) any withdrawals from registered home ownership savings plan.

(ca) income accruing from a business carried out over the internet or an electronic network including through a digital marketplace;

(d) Deleted by Act No. 14 of 1982, s.17

(e) an amount deemed to be the income of a person under this Act or by rules made under this Act;

(f) gains accruing in the circumstances prescribed in, and computed in accordance with, the Eighth Schedule.

(g) subject to section 15(5A), the net gain derived on the disposal of an interest in a person, if the interest derives twenty per cent or more of its value, directly or indirectly, from immovable property in Kenya; and

(h) a natural resource income;

After several correspondents, it was established that the main issue of contention was the variance between the declared income for tax purposes and the financials submitted to KENHA for invoicing for the projects done under the period of investigation.

Even though the appellant tried to explain that the differences came from other sources such as realized exchange gains which were not proved into their entirety during the trial and objection yet the tax payer has the burden of proof as envisaged in the Tax Procedure Act 56(1)

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

The tribunal decided that the onus was with the tax payer to prove that a tax decision is incorrect and in this case not being to, it was ruled the correspondent's assessment of corporate tax was correct.



In the recent past, Kenya Revenue Authority has been applying data analytics tools to catch up with tax payers who are not paying their fair share of revenue owed to the authority.

Some of the instances that can lead to the authority noting the differences include;

1. Instances where the tax payer has engaged in type of transactions that are subject to withholding tax for example for a management consultant and the other party declares withholds and submits the tax. It is beyond reasonable doubt that in such an instance, the tax payer will declare income not less than the gross income subjected to tax worked backwards.
2. Instances where the VAT control account doesn't tie with the VAT declared in the iTax portal. It is obvious that the sales

declared in the final annual income, should tie with the total sales declared monthly for the year in question.

3. On the same not, VAT withheld by a third party, can be worked backwards to determine if the tax payer declares all the sales.
4. Claims of input VAT by customers yet the business is not declaring any vatiable sales.
5. Being in a consisted VAT refund position.
6. Consistent lateness in filling of VAT.
7. Where a business has hit the 5 Millions sales per annum yet it is not registered for VAT.
8. Amended returns every so often times.
9. An application to claim a refund for VAT. This is especially a very sensitive area as we have seen with the current administration that is very dedicated to seal tax losses out of refunds.

In closing, it is important for taxpayers to reconcile their accounts to ensure that their files returns match with their audited books of accounts and many other issues that may trigger tax audits. Get access to this case law and many other such case laws from our database at [www.sagamorehill.co.ke/blog](http://www.sagamorehill.co.ke/blog) where we have arranged the case laws in categories to simplify your work. In addition, we do have a search bar where you can search for a specific case law.

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