

Victory for insurance industry in tax dispute

November 25, 2019

The High Court has given its decision in *Income Tax Appeal No. 22 of 2017 UAP Life Assurance Company Limited v. the Commissioner of Domestic Taxes*, upholding the appellant's position that Tied Insurance Agents are not salaried employees.

The Kenya Revenue Authority (**KRA**) conducted an audit of the appellant's business covering the period between January 2011 and December 2014. Following the conclusion of the audit, KRA issued the appellant with a Pay As You Earn (**PAYE**) assessment in respect of Tied Insurance Agents engaged by the appellant. Under the Insurance Act, an "agent" is defined as:

"A person not being a salaried employee of an insurer who, in consideration for a commission, solicits or procures insurance business for an insurer or broker."

In issuing the PAYE assessment, KRA took the position that Tied Insurance Agents were employees and that the appellant was therefore liable to pay and account for PAYE. KRA relied solely on the contractual agreements entered into between the appellant and the Tied Insurance Agents.

The appellant appealed KRA's decision to the Tax Appeals Tribunal (**Tribunal**), which dismissed the appeal and upheld the KRA assessment. In its decision, the Tribunal did not consider the provisions of the Employment Act, 2007 and the Insurance Act. The appellant, being aggrieved by the Tribunal's decision, appealed to the High Court.

The High Court has allowed the appeal, and in doing so made the following key findings:

- The Employment Act, 2007 is the substantive and primary legislation on employment matters.
- The provisions of the Income Tax (PAYE) Rules cannot override express statutory provisions on the definition of an "employee".
- KRA's attempts to apply an artificial definition to the term "employee" as opposed to a statutory meaning were not tenable.
- The term "employee" is not defined in any peculiar way for the purpose of assessing tax.
- The distinctive feature of an employee is payment of a salary or wage. In the appellant's circumstances, the Tied Insurance Agents were paid a subsidy per month in the form of an allowance and were not salaried employees.
- Despite the existence of some clauses in the agreements between the appellant and the Tied Insurance Agents which may have been construed as being consistent with contracts of employment, the Tied Insurance Agents still did not qualify to be employees of the appellant.
- The appellant, being in the business of insurance, is regulated by the Insurance Act.

- The understanding of an “agent” was material to the circumstances of this case and the Tribunal ought to have considered the nature of the business and the trade practices.

What this decision means for you

The decision brings much needed clarity to the taxation of Tied Insurance Agents and, as such, gives relief to the insurance industry as a whole. Tied Insurance Agents are not employees and their remuneration is not subject to PAYE.

In its decision, the High Court has shown a willingness to consider the specific nature of an industry and its trade practices in interpreting and applying tax statutes. While still upholding the principle of strict interpretation of tax statutes, the approach adopted by the High Court is more likely to reflect the realities of businesses.

The High Court also ordered the appellant to provide KRA with evidence of taxes paid on account of the Tied Insurance Agents to enable KRA to establish and prove that taxes were remitted. This shows a willingness by the High Court to grant orders that not only allow KRA to collect taxes, but also avoid any instances of double taxation.

Below is a link to the full decision of the High Court.

[Read more](#)

KRA has a right to appeal the decision to the Court of Appeal but, unless and until this decision is set aside, it is binding on all taxpayers and KRA.

Your Key Contacts



Kiragu Kimani

Partner, Nairobi

D +254 20 3258236

M +254 703 068000

kiragu.kimani@dentons.com



Andrew Warambo

Senior Associate, Nairobi

D +254 20 3258277

M +254 711 759918

andrew.warambo@dentons.com