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LEGAL ALERT



Judicial Clarity on Taxation of Tied-Up Agents in the Insurance Industry



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Introduction

The taxation of income earned by insurance tied-up agents has been a contentious subject over the years. At the heart of the dispute lies a fundamental question touching on the nature of the relationship between insurers and their tied-up agents. Are these agents employees or independent contractors?

The Appeal

Our very own Tax team successfully represented CIC Life Insurance Limited (“the **Company**”) in HCCOMMITA E218 of 2023 Kenya Revenue Authority v. CIC Life Insurance Limited. Being an appeal against a Judgment of the Tax Appeals Tribunal (the “**Tribunal**”) the Kenya Revenue Authority (“**KRA**”) challenged the Tribunal’s decision that tied-up agents licensed under the Insurance Act (Cap 487, Laws of Kenya) (the “**Insurance Act**”) are not employees and consequently, the income they earn from this relationship is not chargeable to Pay As You Earn (“**PAYE**”).

KRA argued that the relationship between the tied-up agents and the Company amounted to an employer-employee relationship. In support of this position, they relied on the control test i.e., that the tied-up agents are subject to the Company’s control; and that the benefits stipulated in the sample contracts were enjoyed by those in employment relationships.

In response, we demonstrated that a holistic reading of the Employment Act (Cap 226, Laws of Kenya) (the “**Employment Act**”), the Income Tax Act (Cap 470, Laws of Kenya) (the “**Income Tax Act**”), and the Insurance Act, together with the relevant regulations,

confirmed that in the insurance industry, tied-up agents are independent contractors and not employees. Therefore, KRA’s argument on the benefits offered to tied-up agents held no weight as these benefits are provided for under the Insurance Act and as such these benefits would not convert the relationship to that of an employer and employee.

The High Court’s Decision

At the outset, the Court considered the definitions of the terms “agent” and “employee” in line with the objectives of the Income Tax Act. More particularly, this definitional clarity was pivotal to the broader analysis of whether an agent’s remuneration constituted income arising from employment, thereby subject to PAYE or whether it was income derived from an independent contractual relationship which would instead fall under the scope of Withholding Tax (“**WHT**”).

Having ascertained these definitions, the Court proceeded to determine the nature of the contractual relationship between the Company and the tied-up agents. In doing so, it referred to the uncontested agreements between the parties as read alongside the definition of an agent under the Insurance Act. The Court subsequently concluded that the agents operating within the insurer’s business cannot, by definition, be employees.

In arriving at this conclusion, the Court affirmed the position in UAP Life Assurance Company Limited v. Commissioner of Domestic Taxes [2019] KEHC 412 (KLR) where the High Court placed emphasis on the harmonious reading of the Insurance Act, Income Tax Act and the Employment Act in order to

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arrive at the conclusion that tied-up agents do not qualify as employees.

Similarly, this position was upheld in *Commissioner of Domestic Taxes v. Liberty Life Assurance Limited* (Income Tax Appeal E108 of 2021) [2023] KEHC 1359 (KLR) (Commercial and Tax) (24 February 2023) (Judgment), where the High Court held that the agents in question were not salaried employees but were instead remunerated through commissions for services rendered. As such, they could not be classified as employees for the purposes of PAYE.

The Significance of This Judgment

The High Court in this decision having concurred with two (2) previous High Court determinations suggests that this matter is now settled, unless overturned by the Court of Appeal. As the question of employment status continues to gain relevance in today's evolving economy, this Judgment reaffirms that insurance agents, being remunerated through commissions and lacking the hallmarks of employment, are independent contractors. As such, the income they earn is not subject to PAYE.

DISCLAIMER

This alert is for informational purposes only and should not be considered or interpreted as legal advice. If you have any questions or require clarification, please feel free to contact the authors Renee Omondi, Partner (renee@oraro.co.ke) and Melanie Mwenda, Associate (melanie@oraro.co.ke) – or your usual contact at our firm for legal guidance.



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