



ANALYSIS OF THE RECENT  
CONTRASTING FINDINGS OF THE  
TAX APPEALS TRIBUNAL AND  
HIGH COURT ON THE  
OBLIGATION TO WITHHOLD TAX  
ON DEMURRAGE - MAERSK CASE

As continuation of our series on the analysis of the taxation of the demurrage charges in Kenya, for this article we shall be analyzing the **April 2021** decision of the Tax Appeal Tribunal (Hereinafter the "Tribunal") in the case of [Maersk Kenya Limited Vs Commissioner of Investigation & Enforcement, TAT Appeal No. 269 of 2018 \(Maersk Case\)](#).

We note that this decision contrasts with the High Court judgment of **February 2020** judgment in the [Ocean-freight \(E.A\) Limited Vs Commissioner of Domestic Taxes, High Court Income Tax Appeal No. 13 of 2017 \(Ocean Freight Case\)](#).

Considering the binding effect of the High Court on the Tribunals in Kenya, the contrasting findings in the **Maersk Case** and the **Ocean Freight Case** allows for the stakeholders in the shipping industry to have a leeway to argue as to who bears the obligation to withhold tax on demurrage on containers in Kenya.

In the **Maersk Case**, the Tribunal held in favor of the Taxpayer (that is "**the Shipping Agent**" or "**Maersk**") to the effect that whereas demurrage charges were considered as rent hence subject to WHT, the obligation to account for the same was on the importer and not the Shipping Agent. However, this was contrast to the holding of the High Court in the **Ocean Freight Case** which had earlier concluded that the Shipping Agent had an obligation to account for Withholding Tax (WHT).

For purposes of this article thus, we shall analyze the key arguments and determination of the Tribunal in the **Maersk Case** leading to the holding that the obligation to Withhold Tax is on **the importer** and not on the Shipping Agent.

## A. ISSUES IN THE MAERSK CASE

In the *Maersk Case*, the main issues relating to demurrage were as follows: -

**(a) Whether Demurrage and Detention charges were chargeable to Withholding Tax prior to the enactment of the Finance Act, 2018?**

**b) Who is responsible for the withholding the tax on Demurrage and Detention charges?**

## B. WHETHER DEMURRAGE AND DETENTION CHARGES WERE CHARGEABLE TO WITHHOLDING TAX PRIOR TO THE ENACTMENT OF THE FINANCE ACT, 2018

As relates to this issue, the Appellants argued that prior to 2018, the demurrage charges were not subject to Withholding Tax. To demonstrate this, they argued that Section 35(1) of the Income Tax Act (ITA) had been amended by the Finance Act 2018 to include “**Demurrage**” at Section 35(1)(m). Consequently, demurrage was not subject to Income Tax until 1<sup>st</sup> July 2018 when the Finance Act 2018 came into effect. As such, for the periods 2013-2015 the subject of the Appeal, the Appellant was not liable to tax as relates to demurrage charges on containers.

On the other hand, it was the contention of the Commissioner of Domestic Taxes that the Finance Act 2018, did not introduce a new tax but rather simplified the mode in which Demurrage and Detention (DND) was being taxed. That prior to the amendments in the Finance Act 2018, the DND charges still attracted withholding tax under Sections 6, 10(1)(d) and 35(1) of the ITA as DND was a charge for use or occupation of movable property.

In its analysis, the Tribunal noted that based on the definitions of demurrage, DND was a payment for use of a container beyond the free period allowed. Consequently, the use of the

container in transit was part of freight and should be charged as such. However, once the freight had come to an end, the contract of carriage provided a timeline within which the goods should be offloaded, and the container returned to the shipping line. That if this did not happen, the importer would incur extra charges for use of the container outside the agreed timelines hence the demurrage charges.

Based on the above interpretation, it was the Tribunal’s finding that prior to the Finance Act 2018 amendments, demurrage was chargeable to WHT under Sections 3(2)(a)(iii), Section 6, Section 10(1)(d) and Section 35 (1)(c) of the ITA.

*We note that this finding is similar to the finding of the High Court in the Ocean Freight Case as earlier discussed in our shipping cases series.*

## C. WHO IS RESPONSIBLE FOR THE WITHHOLDING THE TAX ON DEMURRAGE AND DETENTION CHARGES?

Having determined that demurrage charges were subject to Withholding Tax, the Tribunal was tasked with determining who had the obligation to account for the same, that is, whether the Shipping Agent or the importer.

According to the Appellant, based on Section 35 of the ITA, the person making the demurrage payment to a non-resident should be the one withholding the tax.

The argument put forth by the Appellant was that the shipping contract that gave rise to the DND was between Maersk Line A/S, the Shipping line, and the shipper/importer. Accordingly, any demurrage charges were incurred by, and the payments made by the importer to Shipping Line. Consequently, this this meant that any WHT on DND should be withheld by the importer.

On the other hand, the Commissioner of Domestic Taxes argued that from the information

gathered, the non-resident shipping line had appointed the Appellant as its shipping agent in Kenya. That the Agent was responsible for among other things, receiving collections from merchants in respect of demurrage charges on behalf of the Shipping Line. Thereafter, the Shipping Agent will then remit the moneys collected to its principal by bank transfer.

To this end thus, it was the Commissioner's argument that the Appellant was identified as the resident person making the payments to the non-resident person in respect of sums subject to withholding tax. Consequently, the Shipping Agent had an obligation to withhold the taxes.

In arriving at its decision, the Tribunal made reliance to the provisions of Section 4(1) of the Income Tax (Withholding Tax) Rules 2001 which stipulates as follows: -

***A person who makes a payment of, or on account of, any income which is subject to Withholding Tax shall deduct tax therefrom in the amount specified-***

***(a) Under Paragraphs 3 and 5 of Head B of the Third Schedule; and***

***(b) Where the Government of Kenya has double taxation agreement with the Government of another country in the terms of that agreement:***

***Provided that the rates of tax under this sub-rule shall not exceed the rates specified under Paragraph (a)***

Based on the above provisions, the Tribunal affirmed that the person who made the payments or rather the person who distributes, credits, or deals with a payment, shall be responsible for withholding tax at the appropriate rate of tax under Paragraphs 3 of Head B of the Third Schedule of the ITA.

That for such payment to be made, a service needed to have been provided. The service

provided attracted a certain charge which upon payment was subject to a tax deduction under Section 35 (1) of the ITA.

As per the Tribunal's analysis, the service in this case was the use of containers outside the agreed free time. This service was provided by the Shipping Line to the local importer and the local importer paid for this service.

As relates to the works undertaken by the Appellant, the Tribunal noted that the Appellant's work was purely administrative and had no profit or loss consequences on the Appellant. As such the payment for the demurrage charges was made from the importer to the non-resident shipping line.

To this end, the Tribunal concluded that the importer being the payer should pay these monies to the Shipping Agent net of any taxes. As such, the Commissioner could not demand for Withholding Taxes from the Shipping Agents as the obligation to withhold was on the importers.

#### D. OUR COMMENTS

We note that this holding contrasts with the determination of the High Court in the **Ocean Freight Case** which held that the Shipping Agent had the obligation to account for the Withholding Tax on demurrage charges.

Considering that the **Maersk Case** was recently determined by the Tribunal and in contrast to the findings of the High Court in the **Ocean Freight Case**, the same now gives the Shipping Agents an opportunity to push further for the obligation of

the WHT on demurrage charges to be on importers rather than on Shipping Agent.

The shipping agents in the **Ocean Freight Case**, have lodged an appeal in the Court Of Appeal.

Furthermore, we understand that the KRA have lodged an appeal in the **Maersk Case**.

In our third series under shipping industry taxation in Kenya, we shall review the taxation under other tax heads.

#### Let's talk

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