

# Tax Alert: 'Winnings' is payment made to the bettor less the amount staked



## Summary

This Alert brings to your attention the High Court's ruling in the case of **Commissioner of Domestic Taxes Department (KRA) vs Pevans East Africa Limited and Shop and Deliver Limited and 5 others (Betting Companies)** Case No HCCOMMITA/E003/2019.

The Betting Companies are limited liability companies engaged in the business of sport betting under licence from the Betting, Lotteries and Gaming Act (Chapter 131 of Laws of Kenya).

The KRA demanded payment of withholding (WHT) on winnings paid to bettors for the period 2018 and 2019. The Betting Companies objected to the demand, disputing the KRA's assessment and attempts to collect WHT from the companies.

The Tribunal rendered its decision on the consolidated appeals on 06 November 2019, setting aside KRA's demands for payment of WHT. KRA appealed against the Tribunal decision at the High Court. The High Court upheld the Tribunal's decision in the judgement dated 13 May 2022.

## Background

On diverse dates, KRA demanded WHT from the Betting Companies on winnings paid to bettors for the period



2018 and 2019. The Betting Companies objected to the demands and disputed the formula applied by KRA in determining the WHT payable on the basis that the KRA had incorrectly interpreted the term 'winnings.'

KRA disagreed and issued agency notices to the bankers and mobile service money providers of the companies to collect the tax. Aggrieved, the Betting Companies filed an appeal before the Tribunal.

The Tribunal determined that the Betting Companies had locus standi (capacity) to file the appeal. This was against the KRA's contention that it was the bettors and not the Betting companies had locus to file the appeal. Further, the Tribunal concluded that winnings under the Income Tax Act Cap.470 (ITA) did not include the amounts staked by the bettor.

On whether the KRA has a legal basis to demand the WHT from the Betting Companies during the period in question, the Tribunal held that KRA had no legal basis for the WHT tax demand. The Tribunal laid emphasis on section 35(6) of the ITA which was deleted in 2016 and reintroduced in 2019 to assert that KRA could not ask the 'withholder' to account for money they failed to withhold during the period 2018-2019.

Further, the Tribunal determined that although KRA had power to collect taxes without issuing an amended assessment in certain instances, in this case it concluded that the demand and notices were against the Respondents' procedural and constitutional rights and therefore the companies had the right to appeal to the Tribunal.

Dissatisfied with decision of the Tribunal, the KRA filed this appeal.

## KRA's grounds of appeal

The KRA challenged the Tribunal's decision on the following grounds:

- i. The Betting Companies' lacked locus standi to file the appeal because under Paragraph 7 of the Income Tax (Withholding Tax) Rules, 2001, it is the payee(bettor) that had the right of appeal;
- ii. The appeal was res judicata (already determined) and sub judice (subject of another pending suit);
- iii. 'Winnings' is what is received from the games of chance without any reference to stakes and it is the pay-out from any game of chance;

- iv. KRA was entitled to demand WHT from Betting Companies as payers or agents that ought to have withheld from amounts paid out to bettors. KRA relied on Rule 10 of the Income Tax (Withholding Tax) Rules which provides as follows:  
'For the purpose of recovery of tax which a person would have been liable to pay under rule 8 had he complied with the provisions of these rules, that person shall be deemed to have been appointed an agent of his payee under section 96 of the Act.';
- v. The Tribunal erred in finding that KRA failed to issue the Betting Companies with an amended assessment for which they could object. KRA opined that there was no procedural impropriety in demanding for short-levied taxes and issuing agency notices.

### The Betting Companies' arguments

In rebutting KRA's arguments, the Betting Companies contended that:

- i. It is the Betting Companies', the payers, who expressed grievance in respect of WHT and not the bettor in this case. They had the capacity to file the suit;
- ii. This case was not res judicata and sub judice. It was distinguishable from the former cases that neither defined nor resolved the issue of 'winnings'. Further, the instant case sought the formula for computation of 'winnings' which was not sought in the other cases;
- iii. 'Winnings' exclude the stake placed by the bettor and thus constitute only that which a bettor gained, over and above the bet placed; and
- iv. The KRA erred in issuing agency notices.

### Issues for determination

The Court settled on the following issues for determination:

- i. Whether the Betting Companies have locus standi;
- ii. Whether the matter is res judicata and/ or sub judice;
- iii. Definition of winnings in respect of betting, lotteries, and gaming;
- iv. Whether KRA was right in demanding WHT from the Betting Companies; and
- v. Whether KRA erred in issuing agency notices without issuing amended assessments to the Betting Companies.

### The High Court's findings

The High Court determined the matter in favour of the Betting Companies as follows:

Whether the Betting Companies have locus standi

The Court relied on the position laid by Mativo J. in **Krystalline Salt Limited v Kenya Revenue Authority NRB HC JR No. 359 of 2018 [2019] eKLR** to assert that a decision made under any other law including the exercise of powers under section 42 of the TPA is an appealable decision. Thus, the Respondents were entitled to appeal against the decision leading to issuing of agency notices in accordance with section 52 (1) of the Tax Procedures Act, 2015.

### Whether the matter is res judicata and/or sub judice

The Court observed that the Betting Companies were exercising their statutory right of appeal against the KRA's decision as opposed to the other instances where they were seeking declarations hence the facts and subject matter were different and the issue of res judicata or sub judice did not apply.

### Definition of 'winnings'

The court noted the ambiguity in the definition of the term 'winnings' and ruled that 'winnings' as stipulated in the ITA refer to pay-outs by the licensee but do not include amounts staked by the bettor. As of 18 July 2018, 'winnings' meant the amount gained by the bettor over and above the amount staked. However, the amendment to the definition on 21 September 2018 limited and generalized the definition leaving it open for interpretation by either party. The Court, taking note of the ambiguity opted to interpret the term in favour of the taxpayer, concluding that the taxable amount excludes the amount staked.



## Whether KRA was right in demanding WHT from Betting Companies

The Court agreed with the Tribunal that prior to 2016, section 35(6) of the ITA provided that KRA could claim taxes from a payer who fails to deduct as though taxes were due from them. However, the Finance Act, 2016 deleted the said provision and this position remained until it was reintroduced by the Finance Act 2019 which came into force on 7 November 2019.

Consequently, the Court found that during the period under review, 2018-2019, KRA could not collect WHT from the Betting Companies, where they had not deducted the tax from the bettors.

## Whether KRA erred in issuing agency notices

The Court observed that KRA did not err in issuing the agency notices before issuing amended assessments to the Betting Companies. Further, the Court ruled that the agency notices constituted an appealable decision which the Betting Companies rightfully appealed to the Tribunal. According to the Court, the agency notices were not a tax decision which the Betting Companies could object to. Their only remedy was to appeal to the Tribunal.

## Our opinion

The decision has brought to focus the definition of 'winnings' which has been a contentious issue between Betting Companies and KRA. This decision has provided clarity on the 'winnings' subject to WHT and the party from whom WHT from 'winnings' should have been collected from during the period in question.

The decision has also settled the contention on the implication of the changes to section 35(6) of the ITA. KRA can only collect WHT from withholders such as Betting Companies on or after 7 November 2019. WHT deductible between 2016 to the effective date in 2019 cannot be collected from the withholder if they did not withhold the amount when making payment.

The High Court also settled the issue of appeals against KRA decisions that are not tax decisions, confirming that appeals against such decisions should be made directly to the Tribunal and not the KRA through objections.

KPMG is happy to assist on any issues arising from this decision.

## Contacts

### Clive Akora

Partner/Director  
Tax & Regulatory Services  
KPMG Kenya  
E: cakora@kpmg.co.ke

[home.kpmg/ke/en/home](https://home.kpmg/ke/en/home)



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