SW (PVT) LTD
versus
ZIMBABWE REVENUE AUTHORITY

SPECIAL COURT FOR INCOME TAX APPEAL
KUDYA J
HARARE 20 September 2016 and 19 July 2019

Income Tax Appeal

D Tivadar, for the appellant
T Magwaliba, for the respondent

KUDYA J: The real question for determination in this appeal is whether liability for the payment of non-resident tax on fees NRTFs for the period January 2009 to September 2012 was subject to the provisions of s 11 (1) of the Exchange Control Regulations SI 109 of 1996.

Background

The appellant was initially formed and wholly owned by MO Ltd, a company incorporated in India together with its promoters and associates[1]. On 15 March 2005, MO Ltd executed a shareholders agreement with a local statutory company through which MO Ltd held 74% and the local statutory company 26% of the issued share capital of the appellant. In terms of clause 7.2, MO Ltd undertook to procure, ship, supply and install machinery for the proposed multi-seed processing plant and provide expert skills and training to operate the machinery. The local statutory company was in terms of clause 7.3 responsible for the construction of all civil works on site, steel fabrication and building sheds, obtaining all regulatory approvals and supervising the construction of the factory. The number of directors to be appointed by each shareholder and the issues of quorum were set out in clause 10. In terms of clause 15.1, the day to day management of the appellant was vested in the Managing Director who would report and be responsible to the board of directors.

[1] Preamble A and D on p 2 of the Shareholders Agreement on pp 13-32 of the Commissioner's case and 1-20 of r11 documents

On 26 July 2010 the appellant executed a Technical Management Agreement, TMA, with a company incorporated in India, MG (Pvt) Ltd, a wholly owned subsidiary of MO Ltd, retrospective to 1 July 2008[2]. MG (Pvt) Ltd professed ability to hold and impart resources, experience and technical expertise in the running of the oil expression and stock feed business. The duties and obligations of MG that were stipulated in clause 4 of the TMA coincided with the undertakings given by MO Ltd in the shareholders agreement. In terms of clause 5 of the TMA, MG would appoint the General Manager-Works and other technical staff who would be resident in Zimbabwe during the duration of their appointments. Their remuneration would be met by MG while that of the other expatriate senior managers would be met by the appellant. In terms of clause 9, the appellant would pay MG the technical fees monthly in arrears calculated at 2% of the gross sales upon satisfaction that the services had been rendered. The payment, subject to exchange control regulations, would not only be denominated in United States dollars and be exclusive of any withholding tax that was payable but would also be made within 30 days of each calendar month from the due date into an account nominated by MG from time to time. It was further stipulated that the appellant would pay interest on delayed payments, which were not occasioned by exchange control authorities.

In terms of clause 1 the implementation of the agreement was purportedly conditional upon exchange control approval in Zimbabwe and the execution of the shareholders agreement. In addition, the appointment and powers of MG were at all times subject to the terms and conditions of the agreement and the authority of the appellant's board of directors. In terms of clause 2, though signed on 26 March 2010, it carried an effective date of 1 July 2008 and a life span of 5 years. The life span could be extended yearly on three months' notice from MG before the expiry of the agreement. Again, clause 2 specifically stated that "the payments under this agreement shall only commence after exchange control approval and this agreement will be subject to any conditions set out by exchange control that are binding on the parties." However, despite these provisions, the agreement would have an indefinite existence as long as MG held a minimum shareholding of 40% in the appellant. Clause 14 provided that:

> "The parties agree that this agreement shall be subject to and conditional upon:
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> 14.1 the satisfactory approval being obtained from the respective exchange control authorities in India and Zimbabwe for the parties to enter into the Agreement as herein set out;

[2] A legible but unsigned copy on pp1-9 of appellant's bundle of documents while illegible but signed copies are Annexure B on pp 33-41, annex J2 PP72-80 annex K8 pp95-103 of Commissioner's case and pp 21-29, -67 and 83-90 of r 11 documents

> 14.2 the exchange control authorities of Zimbabwe indicating that they will permit remittance of the management fees and employee salaries, where applicable, to be transferred out of Zimbabwe."

The parties clearly subordinated the TMA to the overarching reach of the local exchange control regulations. And in search of exchange control approval of the agreement, on 5 October 2009 the appellant submitted an unsigned draft to its bankers for onward submission to the Reserve Bank of Zimbabwe[3]. By e-mail of 26 March 2010, the bankers requested a signed technical agreement, which was duly signed on that date and despatched to the bankers on 29 March 2010.[4] On 13 April 2010 the bankers duly applied to the Exchange Control Department of the central bank for the authority to register the TMA which was granted on 16 April 2010. The letter from the bankers to the appellant of 10 May 2010[5] stated that:

> "Re: registration of Technical Management Agreement
> Reference is made to the captioned matter and advise that Reserve Bank of Zimbabwe, under their reference number GL 435 dated 16 April 2010, is agreeable to you entering into a Technical Management Agreement with MG (Pvt) Ltd under the following conditions:
> - The period is one year effective 1 April 2010 expiring 31 March 2011 after which it must be reviewed.
> - Payment of technical service fees under the agreement is pegged at 2% on gross sales and may be less tax in terms of the authority.
>
> Please be guided accordingly."

Notwithstanding that approval was granted for the limited period from 1 April 2010 to 31 March 2011, the appellant paid the technical management fees due from January 2009 with an estimate for 2010 in the sum of US$350 005.20 on 12 October 2010. The amount was invoiced by MG on 26 March 2010 and transferred from the appellant's bank account to MG on 12 October 2010[6]. In addition, according to appellant's 2009 and 2010 financial statements payables to MG (Pvt) Ltd were incurred in the sum of US$ 328 961 in 2009 and US$ 214 700 in 2010, respectively[7]. No such payables were recorded in both the 2011 and 2012 financial

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[3] Annex F2 p 58 of Commissioner's case and p46 of r 11 documents attached to first tax consultant's e-mail of 23 January 2013 on pp 56-57 of Commissioner's case and p 44-45 r 11 documents
[4] Annexure H4 p67 of Commissioner's case and p 54 of r11 documents
[5] Annexure H2 p65 of Commissioner's case and p54 of r11 documents attached to Annex H1 letter from bankers to Case Manager Zimra of 28 January 2013 on pp 64 and 51 of Commissioner's case and r 11 documents respectively
[6] Annex K6 pp 93-94 of Commissioner's case and pp 80-81 of r 11 documents per information supplied to case manager on 28 January 2014 by the appellant's second tax consultant.
[7] Note 19.3 to 2009 financial statements p 17 passed on 16 April 2010 and note 20.3 to 2010 financial statements at p 41 of the respondent's bundle of documents passed on 28 April 2011.

statements[8]. Again, in its management accounts for the period running from January 2009 to 30 September 2012, the appellant made monthly provisions for the fees due to MG (Pvt) Ltd[9].

On 14 October 2011[10], the appellant's board resolved that in view of poor performance of their company and the prevailing macroeconomic challenges, all available cash resources were to be channelled towards working capital. As a result management fees payable to shareholders would be suspended and not accrued for until such time as business performance and cash flows improved. Any management fees accrued and not paid were to be reversed from the books of account and would become null and void. The resolution was implemented in December 2011.

On 13 July 2012, the respondent commenced an investigation into the tax affairs of the appellant. These culminated in the 45 tax assessments that were issued on 25 February 2015[11]. In the interim the parties held several meetings and exchanged various letters and documents. The respondent abandoned its initial schedule of tax computations of 29 October 2012 for the final one issued on 25 February 2015. The appellant also abandoned the services of its first tax consultant for the second one on 28 August 2014. The second tax consultant filed objection to the assessments on 9 March 2015. On 5 June 2015 the parties held a meeting to discuss the objections[12]. On 2 September 2015, the respondent disallowed the objections in their entirety. The appellant filed its notice of appeal on 14 September 2015 and its case on 6 November 2015. Thereafter the respondent filed the Commissioner's case on 23 December 2015. A pre-trial hearing was held on 17 March 2016 at which three issues were referred on appeal.

The facts

On 29 October 2012 the respondent based its tax computations on the gross sales recorded in the management accounts of the appellant. It claimed an aggregate amount of US$ 675 196.63 comprised of the principal tax of US$315 664.22, a penalty of an equivalent amount and interest of US$43 868.19[13]. These were revised on 25 February 2015 after the intervention of the second tax consultant to an aggregate of US$ 432 056.99 comprised of the principal amount of US$232 407.94, penalty at 70% of US$ 162 685.56 and interest of US$36 963.49.

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[8] Note 19.3 to 2011 financial statements p 34 and note 20.3 to 2012 financial statements at p 58 of the appellant's bundle of documents passed on 11 July 2012 and 4 June 2013
[9] Annexure c pp42-48 of Commissioner's case and pp21-29 of r 11 documents.
[10] P 172 of CC and 159 of r 11 documents
[11] Annex N-N46 pp 114-162 of Commissioner's case and pp 101-149 of r 11 documents
[12] Pp173-180 of commissioner's case and 160-167 of r 11 documents
[13] P 53 of Commissioner's case and p 41 of r 11 documents

The respondent proceeded to offset VAT refunds due to the appellant of US$315 664.22 against the principal and part penalty and demanded the outstanding US$116 392.77[14].

At the meeting of 7 February 2013[15] held at the respondent's offices, the appellant conceded that the agreed services were offered throughout the assessed period but disputed liability on the basis that payment could not be made without board and exchange control approvals. On 28 August 2014, the appellant's second tax consultant indicated that the sum of US$350 005.20, which was transferred to MG on 12 October 2010 after the exchange control approval of 16 April comprised of US$ 162 964.40 provided for in the year 2009 and US$ 219 633.68, being the estimated fees for 2010. The actual 2010 accrual in the financial statements and management accounts was in the US$ 516 207.48. The initial view that no provisions were made in 2011 due to heavy loans was recanted in the letter of 1 October 2014 after realising that the provisions made in that year were reversed in December 2011. Similarly, the 2012 provisions were written off by the board in November 2012. In item 4 of the letter of objection sub-headlined "your computations" and in the opening words under "our submission and request", the second tax consultant equated provisions with credits[16]. The second tax consultant accepted the grossing up of the fees that were payable, obviously in line with clause 9.2 of the TMA. It suggested grossing up management fees actually paid of US$350 005.20 to US$420 662.60. It computed the withholding fees at US$72 058.24, interest at US$ 39 22.29 and the resultant principal and interest at US$111 280.56[17]. However, with the set-off of the tax owing against VAT refunds of US$315 664.22, the appellant would be entitled to a refund of US$204 383.66[18].

On 25 February 2015, the respondent issued original monthly tax assessments number 4216 to 4260 against the appellant covering the period between February 2009 and November 2012 and claimed payment of US$116 392.77 after setting off the full claim against the VAT refunds due to the appellant. In the objection of 9 March 2015, the appellant conceded that it was liable to withhold and remit non-resident tax on fees for the period January 2009 to 31 March 2011 covered by the tax assessments 4216 to 4242. It further disclosed in para 10 thereof that the accrued fees for 2009 and 2010 were expensed in the computation of the appellant's

[14] P 162 of commissioner's case and 149 of r11 documents.
[15] P 68 and 56 of r 11 of CC and r11documents respectively
[16] Pp 83 and 84 of commissioner's case and pp 70 and 71 of r 11 documents
[17] P104 CC and 91 r 11
[18] Pp 104 and 92 of CC and r 11 documents respectively.

taxable income. And in para 20 subtitled "the effect of allocation of funds" the appellant indicated that:

> "We accept for the purposes of this objection letter that withholding tax is due on the amounts allocated internally to MG's account up until 31 March 2011 only. We therefore concede that the correct amounts of tax should have been: 1) principal amount US$123 173.71; 2) interest US$29 809.25 and 3) penalties US$ 86 221.25 giving a total liability of US$ 239 204.56."

The outstanding aggregate amounts covered in assessments 4243 to 4260 in the sum of US$192 852.43 made up of the principal of US$ 109 234.23, penalties at 70% of US$76 463.96 and interest of US$ 7 154.24 were disputed.

In the objection, the appellant raised the issue of unjust enrichment and demanded interest on the set-off amount, which were both disallowed in the determination of 2 September 2015. These two issues were not raised on appeal or in argument. I, accordingly, considered them to have been abandoned. It was, however, common cause that in the period between January 2009 and 31 March 2011 the appellant paid to or accrued in favour of MG technical management fees in respect of the technical management services rendered in the total sum of US$643 662.90. The appellant conceded that it was obligated in law to withhold non-resident tax on fees in respect of this amount but failed to do so. By the time it filed its case, it had paid the tax due in full to the respondent.

The appellant contended that it was not liable to withhold and remit tax on fees assessed for the period 1 April 2011 to 30 September 2012 as firstly the TMA was not approved by exchange control during that period and secondly, the fees neither accrued in favour of nor were they ever paid to the non-resident, MG. It further contended that the facts of this case negated the imposition of any form of penalty before 31 March 2011 or after that date. On the other hand, the respondent contended that the fees that triggered the withholding tax accrued to the foreign resident in terms of para 1 (2) (c) of the 17th Schedule to the Income Tax Act *[Chapter 23:06]* notwithstanding the absence of any exchange control approval and that the penalties imposed were most appropriate.

The issues

The three issue referred on appeal were:

1. Whether in respect of the period April 2011 to September 2012 the Appellant became liable to pay MG technical management service fees?
2. If the first answer above is in the affirmative, whether the appellant became liable to account for and pay to respondent withholding tax
3. Whether the penalty of 70% levied by the respondent on the appellant was justified?

I proceed to deal with each issue in turn.

Whether in respect of the period April 2011 to September 2012 the Appellant became liable to pay MG technical management service fees?

Mr *Tivadar*, for the appellant, submitted that the appellant did not become liable to pay MG technical management fees because it was precluded by exchange control regulations from not only paying but also from even incurring the liability to pay such fees. On the other hand, Mr *Magwaliba*, for the respondent, submitted that the appellant became liable to pay the agreed fees by virtue of the agreement of 26 March 2010 and the subsequent conduct of the parties to the agreement.

In terms of the agreement, MG, an admitted foreign company, was to and did have the ability to provide technical and management services in the running of oil expression and stock-feed business for a period of 5 years commencing on 1 July 2008 and in perpetuity as long as it held 40% equity in the appellant. The due dates and amounts were clearly specified and in terms of clause 9.1 the amounts payable would be exclusive of withholding tax. The subsequent conduct of the two parties to the TMA showed that MG did render the contemplated technical and management services during the duration of the agreement and in particular from 1 July 2008 to 31 September 2012. The following evidence established that the services were indeed rendered. Firstly, the appellant's concessions to this effect made in the meetings with the respondent's investigation team of 7 February 2013, and in the pleadings filed of record such as the letter of objection and appellant's case. Secondly, the admission of liability for the period between January 2009 and March 2011 crystallised in paras 12 to 14 of the appellant's case demonstrated that the agreed services were rendered to the satisfaction of the appellant at least up to 31 March 2011.

In regards to the period between 1 April 2011 and 30 September 2012, the appellant did not deny that the agreed services were rendered. The appellant averred in para 15 of its case that:

> "Since March 2011, the appellant has not paid to nor accrued to nor place to the credit of MG any fees <u>in respect of technical services rendered to it by MG</u> (underlining my own).

The underlined words constitute an admission that the technical services were rendered after 31 March 2011. In fact, in reply to the oral submissions made by Mr *Magwaliba*, Mr *Tivadar* consistently conceded that the agreed services were rendered during the period in question. I agree with Mr *Magwaliba* that the making of provisions for such fees in the management accounts of the appellant for the period from 1 April 2011 to 30 September 2012 was a patent admission by management that such services were rendered. This finding is reinforced by the manner in which provisions are recognised and defined in the appellant's 2009 to 20012 financial statements. In the appellant's own words, "provisions are recognised when the company has a present legal or constructive obligation as a result of past events, (in which) it is more likely than not that an outflow of resources will be required to settle the obligation and the amount has been reliably estimated at the present value of expenditure expected to be required to settle the obligation"[19].

The contents of the agreement and the facts relied upon by Mr *Magwaliba* were not disputed by Mr *Tivadar* who pinned the colours of the appellant's case on the mast of s 11 (1) (a) and (b) of the Exchange Control Regulations SI 109/1996 and para 1 (2) (c) of the 17th Schedule to the Income Tax Act. It is appropriate, as far as is relevant, to set out those provisions. The charge for non-residents tax on fees is provided for in s 30 of the Income Tax Act in the following words:

> "**30 Non-residents' tax on fees**
> There shall be charged, levied and collected throughout Zimbabwe for the benefit of the Consolidated Revenue Fund a non-residents' tax on fees in accordance with the provisions of the Seventeenth Schedule at the rate of tax fixed from time to time in the charging Act."

And the 17th Schedule states:

Interpretation

1. (1) In this Schedule, subject to subparagraph (2)—

"fees" means <u>any amount from a source within Zimbabwe payable in respect of any services</u> of a technical, managerial, administrative or consultative nature,

"foreign company" means a body corporate that is incorporated in a state or territory other than Zimbabwe under the laws of that state or territory;

"non-resident person" means—

(*a*) a person, other than a company, who; or

(*b*) a partnership or foreign company which; is not ordinarily resident in Zimbabwe;

"payee" means a non-resident person to whom fees are payable or aid;

"payer" means any person who or partnership which pays or is responsible for the payment of fees, ….

(2) For the purposes of this Schedule—

(*a*) fees shall be deemed to be from a source within Zimbabwe if the payer is a person who or partnership which is ordinarily resident in Zimbabwe;

(*b*) In determining whether or not non-residents' tax on fees should be withheld, the question as to whether or not—

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[19] Note 2.14 and 2. 17 in the financial statements of 2009, 2010, 2011 and 2012

(i) the payer is a person or partnership ordinarily resident in Zimbabwe; or

(ii) the payee is a non-resident person;

shall be decided by reference to the date on which the fees are paid by the payer;

(*c*) fees shall be deemed to be paid to the payee if they are credited to his account or so dealt with that the conditions under which he is entitled to them are fulfilled, whichever occurs first;

And s 11 (1) a) and (b) of the Exchange Control Regulations reads:

11. Payments outside Zimbabwe

(1) Subject to subsection (2), unless otherwise authorised by an exchange control authority, no Zimbabwean resident shall—

(*a*) make any payment outside Zimbabwe; or

(*b*) incur any obligation to make a payment outside Zimbabwe.

(2) Subsection (1) shall not apply to—

(*a*) any act done by an individual with free funds which were available to him at the time of the act concerned; or

(*b*) any lawful transaction with money in a foreign currency account.

The meaning of para 1 (2) (c) of the 17th Schedule to the Income Tax Act was rendered by MAKONI J, as she then was, in *Barclays Bank of Zimbabwe v Zimra* 2004 (2) ZLR 151 (H) at 156 A-E:

> "The applicant contends that the phrase "conditions under which he is entitled to them are fulfilled…" relates to the granting of the exchange control authority for payment…if the first part of section 1(2) (c), whose meaning is not in dispute, is read in context with the second part, and the ordinary meaning of the words is ascribed it becomes clear that the section deals with two scenarios where the withholding tax becomes due. The first scenario is where fees are credited to the non-resident's account. The second scenario are instances where though the fees are not credited to the non-resident's account, they are dealt with by the payer in a manner which discharges the payer's obligation to the non-resident. These are instances were payments is deemed to have been made. The Legislature saw fit to make an omnibus reference to various other methods open to the payer to discharge his obligation to the non-resident other than direct payment to his or her account, because the list of indirect payments cannot be exhaustive.
> If the court were to accept the meaning ascribed by the applicant to the disputed part of the section the concluding phrase "whichever occurs first" would not make sense. This is so because in both scenarios referred to by the Court above, exchange control authority would be imperative. In this regard, the credit referred to would not occur first in the absence of exchange control authority. If the meaning ascribed by the applicant is accepted, this would mean that the legislature would, in in the first scenario, sanction an unlawful crediting of funds to the non-resident in the absence of exchange control authority."

It seems to me that the words "if they are credited to his account" refer to a direct payment into the banking account nominated by the appellant, as the payee, whether by way of a physical deposit or electronic or telegraphic transfer. The alternative mode of discharge contemplated by the words "or dealt with that the conditions under which he is entitled to them are fulfilled" refers to indirect payments of the amount due to the payee, which extinguish the liability such as set off, cancellation, forgiveness or reinvestment. The resolution of 14 October

2011 suspending the payment of management fees to shareholders until business performance and cash flow improved undermined Mr *Tivadar's* contention that the technical services were offered for free in four respects. Firstly, despite the concession made by the Commissioner in pleadings that MG was a majority shareholder in the appellant, the documents on record showed that MG's holding company, MO Ltd was the major shareholder in the appellant. Despite the fact that this was raised by the respondent in the minutes of 5 June 2015 and in argument by Mr *Magwaliba*, the appellant was unable to demonstrate the nature, scope and extent of MG's shareholding in the appellant. Secondly, the resolution showed that the appellant did not have an appetite to seek a review of the exchange control authority, which had been left open by the exchange control authorities in the expired approval. Thirdly, even if MG were considered a shareholder, the resolution erroneously sought to suspend recognisable and existing management fees, which accrued to it concomitant to the services rendered and were payable. Lastly, instead of crediting them to the payee's account, obviously because of the absence of exchange control authority, the appellant discharged the obligation to pay, whether with the consent of MG or unilaterally, by ploughing back the fees into the business.

I find myself in agreement with the submission made by Mr *Magwaliba* that the second limb of para 1 (2) (c) of the 17th Schedule was met in respect of the remaining 2011 fees and by parity of reasoning also in respect of the 2012 fees. I agree with Mr *Magwaliba* that the underlying *quid pro quo* for the supply of the technical services created by the TMA was the payment of the delineated fees. All things being equal, the agreement and the subsequent conduct of both MG and the appellant demonstrated that the appellant became liable to MG for the technical fees when such services were provided. That liability accrued was reinforced by the purported reversals undertaken by the directors of the appellant both on 14 October 2011 and November 2012.

Whether the liability was abrogated by the exchange control regulations

The effect of Mr *Tivadar* submissions was that the liability created by the parties was rendered inchoate liability by the exchange control regulations for two reasons. The first was that the technical and management fees could only be termed "fees" as defined in para 1 (1) of the 17th Schedule if they could legally be paid out to the non-resident. He contended that no such payment could be made and therefore the purported fees were not payable. The second, related to the first was that s 11 (1) (b) of the Regulations precluded the appellant from incurring the liability to pay by making the commitment to pay without exchange control approval illegal.

The appellant relied on the exposition rendered to s 11 (1) (a) and (b) by SANDURA JA in *Barker* v *African Homestead* 2003 (2) ZLR 6 (S) where a local company sought to enforce an agreement of sale of immovable property situated in Zimbabwe with the foreign owner, where payment was to be partly in local currency and partly in foreign currency. It was held that the agreement was illegal and unenforceable because the purchaser had incurred an obligation to pay a portion of the purchase price in foreign currency without the prior authorisation from the exchange control authority. The learned judge of appeal stated at 9B that:

> "In my view, there is no doubt that in terms of the alleged oral agreement African Homestead incurred an obligation to pay to Barker, a foreign resident, the sum of ZW$15m in Zimbabwe and the sum of US$32 500 in Australia. Whilst the agreement to pay Z$15m to or for the credit of Barker in Zimbabwe would not be unlawful, the actual payment would be unlawful unless authorised by the exchange control authority. This is because of the wording of s 10 (1) (a) of the Regulations which reads as follows:
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> > "unless otherwise authorised by an exchange control authority, no person shall in Zimbabwe-
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> > **(a)** make payment to or for the credit of a foreign resident**."**
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> However, payments and agreements to make payment outside Zimbabwe stand on a different footing. That is so because in terms of s 11 (1) (a) and (b) of the Regulations as read with s 11 (2), both the actual payment and the agreement to make payment outside Zimbabwe require the authorisation by the exchange control authority, except where the act is done by an individual (as opposed to a company, for example) with free funds available to him at the time of the act concerned. The difference between s 10 (1) and s 11 (1) of the Regulations was stated by this court in *Macape (Pvt) Ltd* v *Executrix, Estate Forrester* 1991 (1) ZLR 315 (S) at 320B-D where McNally JA said:
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> > "The essential point to be noted is that there is a clear difference between ss 7 [now s 10] and 8 [now s 11]. The former proscribes only the actual payment. The latter proscribes both the payment and the underlying agreement to pay. In other words, when one is concerned with payments inside Zimbabwe it is perfectly lawful to enter into the agreement to pay. But, without authority from the Reserve Bank, the actual payment may not be made. By contrast, when dealing with payments outside Zimbabwe, it is unlawful even to enter into the agreement to pay, without first obtaining the authority of the Minister, whose powers have been delegated to the Reserve Bank."
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> He concluded the matter at 10D by stating that:
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> > "In the present case, as the alleged agreement to pay the sum of US$ 32 500 to Barker in Australia had not been authorised by the exchange control authority, *cadit quaestio.* That is the end of the matter."

It seems to me that what is proscribed by s 11 (1) (a) is the actual payment while what is proscribed by 11 (1) (b) is incurring the obligation to make payment. In my view, the latter subparagraph does not proscribe the supply of technical services and the concomitant creation of a liability to pay for those services. In *Commissioner for Inland Revenue* v *Delagoa Bay Cigarette Co. Ltd* 32 SATC 47 (T) at 49, 1918 TPD 391, where the Commissioner sought an interdict against respondent against distributing its assets to the prejudice of his claim, one of the defences raised in opposition was that the respondent's business was illegal and precluded the State from collecting tax on the profits of illegal transactions. At 49 BRISTOWE J said:

> "I do not think it is material for the purposes of this case whether the business carried on by the company is legal or illegal. Excess profit duty, like income tax, is leviable on all incomes exceeding the specified minimum, and after making the prescribed calculations and deducting the exemptions, abatements and deductions enumerated in the statute. The source of the income is immaterial. This was so held in *Partridge* v *Mallandaine* (18 QBD 276), where the profits of a betting business was held to be taxable to income tax; Denman J saying that 'even the fact of a vocation being unlawful could not be set up against the demand for income tax'. If the income itself is taxable it follows I think that if the prizes would have been a legitimate deduction, had the business been legal, they would equally be a legitimate deduction if the business is illegal. The deductions permitted by our statute are not made to depend on any question of legality or illegality; and in *Partridge* v *Mallandaine* it was not suggested that betting losses could not be deducted. Indeed it seems common cause that if illegal profits are taxable they must be subject to the same deductions as if they were legal."

To the same effect but in different lexicon, GREGOROWSKI J said at 53:

> "But the legality or illegality of the business of the company is not a matter now to be considered. As Denman J points out in *Partridge* v *Mallandaine* (56 LJ QB 251), if a man makes £2 000 a year by trafficking in stolen goods knowing them to have been stolen he would nevertheless have to pay duty on his income."

In our jurisdiction, MAKONI J in the *Barclays Bank* v *Zimra* case, *supra* implicitly suggested that the absence of exchange control approval would not undermine the Commissioner's claim for tax due under the Income Tax Act. She said at page 156G:

> "In any event on the facts of this matter the applicant would not have succeeded on the aspect of consequential remedy. The applicant does not dispute that he claimed the expenses incurred, on fees, in his books of account, notwithstanding that exchange control approval had not been granted by the Reserve Bank."

It seems to me that the agreements referred to in both *Barker's* case, *supra* and *International Who's Who Ltd* v *Bernstein Clothing (Pvt) Ltd* SC 28/1999 referred to in *Barker's* case, are distinguishable from the present matter. These cases were concerned with construing the effect of s 11 (1) of the Exchange Control Regulations against the parties to those agreements. In the present matter we are not concerned with the effect of the agreement as between the contracting parties but with the effect of the agreement on the tax obligations of the parties to the TMA. In my view, the powers of the taxman to collect the correct tax from a taxpayer is not trammelled by the requirements of any other law to which he is not subjected by the relevant taxing statute. Secondly, those cases where not concerned with the interpretation of a taxing statute. Thirdly, unlike those agreements, the present agreement recognised that payment was conditional upon exchange control approval.

It seems to me that incurring a liability conditional upon approval by exchange control did not render the TMA illegal. The actions of the parties confirm this position. Notwithstanding the absence of exchange control approval they treated the agreement as valid as long as no fees were paid to the non-resident. The appellant and MG were more concerned with fulfilling para 9.1 and 9.2 of the TMA, which underscored the payment without deduction or set off into the account nominated by MG within 30 days of each calendar month but subject to exchange control approval. And once they received the exchange control approval for a limited period, they did not consider the agreement invalid with respect to the periods overlapping the approved period.

The tenor of the averments, contentions and submissions of the appellant was premised on the validity of the agreement. At worst, the audacity exhibited by the appellant's conduct belied the commission of a deliberate illegality. Despite the expressed conditions preceding the consummation of the TMA, which were premised on exchange control approvals of both the agreement and remission of the fees, the parties nonetheless effectuated the agreement. In recognition of this accomplishment, the appellant paid and accrued to MG the fees due for the period preceding 1 April 2011. The averment in para 11 of its case that the agreement came to an end on 31 March 2011, was contradicted by an earlier statement in the objection to the effect that the agreement was only cancelled by the resolution of the appellant's directors of 15 February 2014 retrospectively to 1 January 2011[20]. In my considered view, such a retrospective resolution was an exercise in futility or a mere closure of the stable door after the horses had bolted, which could not undo the incurred liability nor reverse the accrued fees. The only effect the resolution had was to stop the direct payment of the accrued fees to MG. In line with the force of reasoning expounded in the *Delegoa Cigarette* case, *supra,* the question of legality or illegality does not affect a taxpayer's liability for the payment of tax which is due from his or her or its activities. The Commissioner and on appeal the Court must be satisfied that the conduct of the taxpayer meets the requirements of the taxing statutes and applies them regardless of any illegalities that may have been perpetrated by the taxpayer.

[20] Para 15 of "the facts"

The answer to the real question for determination in this appeal is that the provisions of s 11(1) of the Exchange Control Regulations do not override the provisions of para 1 (2) (c) of the 17th Schedule to the Income Tax Act. Accordingly, I am satisfied that the appellant became liable to pay MG technical and management fees and would answer the first issue in the affirmative.

Whether the appellant became liable to account for and pay to respondent withholding tax

Mr T*ivadar* conceded in both his written heads and oral submissions that an affirmative resolution of the first issue would naturally lead to an affirmative answer to the second issue. The basis for liability is found in para 2 (1) of the 17th Schedule to the Income Tax Act. It reads:

> ***"Payers to withhold tax***
> 2. (1) Every payer of fees to a non-resident person shall withhold non-residents' tax on fees from those fees and shall pay the amount withheld to the Commissioner within ten days of the date of payment or within such further time as the Commissioner may for good cause allow.

Accordingly, I find that the appellant had a statutory duty to withhold the non-resident tax on fees and remit it to the respondent within 10 days of the date of payment. It seems to me that the ten days would have to be computed from the dates on which the resolutions to reinvest were made on 14 October 2011 and in November 2012 and not on the dates the provisions were posted in the management accounts. The mere making of book entries in the management account would not have and did not discharge the payment of the fees.

Mr *Magwaliba* indicated that the result of my finding would precipitate the appellant and respondent by mutual consent to make the necessary correct adjustments to the appellant's taxable income for the tax years covered by the period 1 April 2011 to 30 September 2012. That is an administrative issue between the parties that will not form part of my order.

Whether the penalty of 70% levied by the respondent on the appellant was justified?

The factors that must be considered by the Commissioner or the Special Court on appeal in determining the appropriate penalty were set out in full in *PL Mines (Pvt) Ltd* v *Zimbabwe Revenue Authority* 2015 (1) ZLR 798 (H). It is trite that on appeal against penalty, the Special Court is called upon to exercise its own original discretion unaffected by the Commissioner's discretion. The exercise of my discretion will be guided by the triad of the offender, the offence and the interests of society.

The pleadings and documents filed of record showed that the appellant was a first offender who was generally a law abiding responsible corporate citizen and compliant with all tax obligations other than withholding tax. It brought foreign direct investment into the country and contributed its fair share to the development of the oil expressing and stock feed business and to the general well-being of the economy.

There were however some disquieting features in its conduct which raised it moral turpitude. It initially denied the existence of the TMA and continued to do so in the face of an unsigned copy procured by the respondent's officials from third parties. Again, when the executed copy was secured from its bankers, the appellant falsely maintained that it had not remitted any fees to the non-resident. It did not cooperate with the investigators but adopted the dishonest attitude so aptly described by the respondent of "catch me if you can". It only admitted liability up to 31 March 2011 after the production by its bankers of the invoice from the non-resident of 26 March 2010 and bank statement of the appellant of 10 October 2010 for the transfer of the sum of US$350 005.20.

It is in the interest of society that all taxpayers pay their fair share of taxes on time. After all, the purpose for the penalty is not only to punish the errant taxpayers and to deter prospective wrongdoers but to encourage the rendering of honest and accurate returns and avoid loss of revenue to the fiscus. By failing to withhold and remit the tax on fees within the prescribed period of 10 days after payment was made, the appellant caused potential loss of revenue to the fiscus which was only curtailed in December 2012 by set off with the VAT refunds due to the appellant. The respondent preserved the time value of the principal amounts of tax due by imposing the appropriate interest rates promulgated by the Minister of Finance for that purpose

In regards to the period between January 2009 and 31 March 2011, the appellant averred that the penalty imposed by the Commissioner did not take into account the honest failure to withhold and remit the tax due on fees by one of its employees who subsequently left employment. In view of the dishonest conduct exhibited by the appellant between 23 October 2012 when it denied the existence of the TMA and 9 March 2015 when it conceded liability in the letter of objection, I find the attempt to blame the undisclosed employee disingenuous and therefore unworthy of belief. In the absence of a credible explanation of why the tax on fees was not withheld and remitted, the only reasonable finding that presents itself is that the failure was deliberate. This finding is reinforced by the concession made by the appellant in para 10 of its facts in the letter of objection to the effect that the fee amounts paid or accrued for 2009 and 2010 were claimed as expenses in the computation of its taxable income in those years. I am not satisfied that the failure to pay the non-residents' tax on fees was not due to any intent to evade the provisions of the 17th Schedule. In view of this finding, para 6 (b) as read with para 6 (2) of the 17th Schedule to the Income Tax Act requires that the penalty be imposed at the rate of 100%. I find that the Commissioner was wrong to impose a lower penalty. Accordingly, I will impose a penalty of 100% for the period January 2009 to 31 March 2011.

The appellant did not object to the penalty imposed in tax assessments 4243 to 4260 for the period between 1 April 2011 and 30 September 2012. In terms of s 65 (4) of the Income Tax Act, the failure to do so is fatal to its appeal on the point. I am therefore unable to determine the appropriate penalty for the period in question. In essence, therefore, the penalty imposed by the Commissioner remains.

Costs

In accordance with the provisions of s 65 (12) of the Income Tax Act, I do not find the claim of the Commissioner unreasonable or the grounds of appeal by the appellant frivolous. The appellant has failed to establish the need to invoke the provisions of s 15 (2) (aa) of the Income Tax Act. Accordingly each party will bear its own costs.

Disposition

IT IS ORDERED THAT:

1. The appeal against the tax assessments number 4243 to 4260 in respect of the principal amounts, penalties and interest be and is hereby dismissed.
2. The penalties of 70% imposed by the respondent against the appellant in respect of tax assessments 4216 to 4242 be and are hereby set aside and substituted by penalties of 100%.
3. The assessments 4216 to 4242 are set aside and the respondent is directed to issue amended assessments with a penalty of 100%.
4. Each party shall bear its own costs.

Gill Godlonton & Gerrans, the appellant's legal practitioner.