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M COMPANY (PRIVATE) LIMITED
v
ZIMBABWE REVENUE AUTHORITY

SUPREME COURT OF ZIMBABAWE

GOWORA JA, HLATSHWAYO JA & GUVAVA JA.

HARARE: 19 OCTOBER 19 2017 & 24 SEPTEMBER 2021

E. T. Matinenga, for the appellant

T. Magwaliba, for the respondent

HLATSHWAYO JA: This is an appeal against the whole judgment of the Fiscal Appeals Court handed down on 1 November 2016 under judgment number HH 661/16 of case number FA 08/14, in terms of which the court found in favour of the respondent.

The appellant seeks relief in the following terms:

WHEREFORE Appellant prays that the appeal be allowed with costs and that the order of the court *a quo* be set aside and substituted with the following:-

"The appeal be and is hereby allowed as prayed"

The material facts of this matter are as follows. The appellant is a locally registered company that operates as an exporter and seller of processed tobacco from Zimbabwe. On 1 April 2004 and 1 April 2011 respectively, the appellant entered into two successive "Sales and Marketing Commission Agreements" with two foreign companies domiciled in Bermuda and Switzerland respectively. The appellant was identified in both documents as the "principal" whilst foreign companies were specifically termed "agents" in the sale of the appellant's export tobacco to foreign markets. The initial sales commission agreed upon by the appellant and the agents was 8.5 per cent of the aggregate net export sales and Foreign Currency Account (FCA) Zimbabwe sales value of each export. The sales commission was subsequently reduced to 7.5 per cent in compliance with the Zimbabwe Exchange Control Regulations.

In 2007, the respondent undertook an audit of the affairs of the appellant. It was subsequently determined that the commission paid in respect of the Sales and Marketing Commission Agreements for the year 2005 qualified as fees for services of a technical and administrative nature, performed by an overseas agent, on behalf of the appellant. In light thereof, the respondent determined that the appellant was liable for withholding non-resident tax as provided for in the Seventeenth Schedule of the Income Tax Act [*Chapter 23:06*] (the Act).

On 5 April 2007, the respondent issued an assessment of withholding tax to the appellant, which assessment the appellant objected to. On 10 August 2007, the respondent disallowed the objections lodged by the appellant leading to an appeal being filed on 24 August 2007. The appeal subsequently lapsed having been filed outside of the prescribed time limits and the appellant continued to remit non-resident tax on fees to the respondent.

On 24 October 2013, the appellant indicated to the respondent that it would cease any further remittals of non-resident tax on fees pending a resolution of its 2007 appeal. The parties conducted a meeting on 5 December 2013, in terms of which the respondent produced a schedule of payable withholding tax on fees from the period of January 2009 to October 2013. In terms of the schedule, the principal amount of the non-resident's withholding tax on fees that was due was US$4 252 647.57. An equivalent amount was imposed as a penalty and a further US$795 988.62 was imposed as interest. The penalty fee was later reduced, leaving the appellant with a revised total liability of US$ 5 974 959.97.

The appellant objected to the revised schedule of non-resident's withholding tax by means of an objection letter dated 16 December 2013. The appellant disputed liability on the basis that commissions constituted fees as contemplated in s 30 as read with the Seventeenth Schedule of the Act. Eventually, the appellant undertook to pay the outstanding principal amount by way of four separate instalments over the period 13 December 2013 to 20 January 2014. As a result of the undertaking, the respondent elected to further waive the reduced penalty and interest through an e-mail sent on 19 December 2013. The appellant, all the same, managed to settle the entire principal amount by 20 December 2013.

On 13 December, a meeting was held between the appellant's tax advisors and the respondent. It appeared that in the course of the meeting, the parties agreed that the objections noted by the appellant had been improperly made. In any event however, the appellant proceeded to file its notice of appeal in the court *a quo* on 25 March 2014 and served the respondent with the same on the following day. The appeal was premised on the failure by the respondent to make a response to the appellant's objection letter within the prescribed three month time frame.

At the hearing, the respondent raised a preliminary objection to the appeal on the basis that it did not issue any written decision of the Commissioner to the appellant on 5 December 2013 or at any other date. Consequently, the objection of 10 December 2013 and subsequent notice of appeal issued on 25 March was invalid and of no force or effect. The appellant contended, *inter alia*, that the appeal was validated in terms of para (y) of the Eleventh Schedule of the Act which prescribes the decisions of the Commissioner that may be subjected to objection and appeal.

It was established as common cause, that the appellant abandoned its 2007 appeal with the effect that the appellant accepted liability for the non-resident tax on fees which it had failed to withhold and remit to the respondent. Moreover, both parties accepted that the subsequent commissions paid by the appellant during the period prior to August 2007 constituted fees for services of a technical, administrative, managerial or consultative nature. Having established those facts, it was determined that the appellant was not precluded from objecting, as it did, to the respondent's assessment of liability for its failure to remit non-residents tax on fees for the period January 2009 to October 2013. In view thereof, the court *a quo* determined that the appeal was properly before it.

On the merits, it was held that it was not a term of agreement between the appellant and the foreign agents that they would deduct commission before remitting the balance to the appellant's FCA. However, it was evident that the agents invoiced customers, collected payments and retained their commissions before remittance of the balance to the appellant. It was the position of the court that the agents' main function was to establish and maintain foreign market customer relations and to facilitate the sale of export tobacco on behalf of the appellant.

The appellant argued that the commissions were not fees as defined in the Seventeenth Schedule of the Act and as a result, it had no obligation to withhold non-residents tax. Additionally, the appellant contended that the commissions were deducted by the agents from its gross foreign currency account value incurred outside of Zimbabwe therefore it could not withhold any non-residents tax nor could it be obliged to remit said tax to the respondent. Conversely, the respondent adopted the position that the commissions were fees as defined in the Seventeenth Schedule of the Act as read with s 30 of the same. Resultantly, the respondent contended that the appellant was liable, being the principal, to withhold and remit non-residents tax on fees to it.

On the question of whether or not the commissions constituted fees as contemplated in the Seventeenth Schedule as read with s 30 of the Act, the court *a quo* found in favour of the respondent. It was determined that the agents provided services of a technical, managerial, administrative or consultative nature to the appellant in the sale of its export tobacco. The finding was made on a consideration of the specific functions of the agents in facilitating and concluding the sales and their relationship with the appellant. It was determined that the true essence of a sale involved the technical, managerial, administrative and consultative competencies of the agent. Accordingly, the court adopted the view that there were hardly any activities undertaken by a taxpayer that could escape the wide ambit of the definition of "fees" as provided for in the Seventeenth Schedule of the Act. Resultantly, it was held that the commissions constituted fees as envisaged in s 30 as read with para 1 of the Seventeenth Schedule of the Act.

The court *a quo* proceeded to consider whether or not the appellant was liable for withholding and remittal of non-residents tax on fees arising from the deduction of

commissions retained outside Zimbabwe. It was found that the appellant was required by the Exchange Control Authority to pay the fees from its local foreign currency account having negotiated and executed the Sales and Marketing Commission Agreements in accordance with Zimbabwean law. Moreover, the court *a quo* held that the appellant was considered as a "payer of fees" as contemplated in the Seventeenth Schedule of the Act being the principal of the agents. Therefore, the appellant was obligated, by law, to withhold non-residents tax on fees and pay any amount so withheld to the respondent. In the light of these findings *a quo*, the appeal was dismissed.

Aggrieved by the decision of the court *a quo*, the appellant has filed the present appeal. The grounds of appeal, as amended by consent, are as follows:

1. The court *a quo* erred in not applying the amendment to the Seventeenth Schedule introduced by the Finance Act (N0. 3), 11/2014 as "legislatively interpreting" the concept of "fees" as defined in the said Schedule
2. The court *a quo* erred and misdirected itself at law in interpreting the commission paid by the Appellant to its agents respectively as falling within the concept of "fees" as defined in the Seventeenth Schedule.
3. The court *a quo* erred and misdirected itself at law in declining to follow the precedent in ***Sunfresh Enterprises (Pvt) Ltd t/a Rulembi Safaris v Zimbababwe Revenue Authority*** 2004 (1) ZLR 506 (H) in regards to the source of the funds from where the commission was paid.

The initial matter that presents itself for determination in this Court is whether in terms of s 30 of the Act as read with the Seventeenth Schedule, the appellant is liable to have

withheld non-residents tax on commissions paid to certain foreign companies providing sales and marketing services to it for the sale of its export tobacco in overseas markets.

The argument of the appellant turns on the applicability of the amendment introduced to para 1 (1) of the Seventeenth Schedule of the Act in terms of the Finance (No. 3) Act, 2014 which came into effect on 1 January 2015. It is accepted, as submitted by both parties, that there is a general presumption against retrospectivity of statute law, especially tax legislation. The principle is well articulated in the case of *S v Mzanywa* 2006 (1) ZLR 179 (H) at 179D wherein it is stated:

> "It is a fundamental rule of law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in terms of the Act or arises by necessary and distinct implication."

The appellant contends, however, that the amendment had retrospective effect to the extent that it referred to the legislative interpretation of the word "fees". The amendment to para 1 (1) of the Seventeenth Schedule as introduced by the Finance (No. 3) Act, 2014 reads as follows:

> ""export services" means services rendered wholly or exclusively for the purpose of seeking and exploiting opportunities for the export of goods from Zimbabwe or of creating, sustaining or increasing the demand for such exports and, without derogation from the generality of the foregoing, includes any of the following services-
>
> a) research into, or the obtaining of information relating to, markets outside Zimbabwe;
> b) research into the packaging or presentation of goods for sale outside Zimbabwe;
> c) advertising goods outside Zimbabwe or otherwise securing publicity outside of Zimbabwe for goods;
> d) soliciting business outside Zimbabwe;
> e) investigating or preparing information designs, estimates or other material for the purpose of submitting tenders for the sale or supply of goods outside Zimbabwe;
> f) bringing prospective buyers to Zimbabwe from outside Zimbabwe;
> g) providing samples of goods to persons outside Zimbabwe;";

(b) in the definition of "fees" by the insertion of the following paragraph after paragraph (g)-

"(h) export market services rendered by an agent of a company that exports goods from Zimbabwe;"

The wording of the Seventeenth Schedule of the Act prior to the aforementioned amendment read as follows:

"(1) In this Schedule, subject to subparagraph (2)—
…
"fees" means any amount from a source within Zimbabwe payable in respect of any services of a technical, managerial, administrative or consultative nature, but does not include any such amount payable in respect of—
…"

The appellant seeks to persuade the Court that the definition of fees was not well crafted in the Seventeenth Schedule, prior to the enactment of the amendment. As a result, the appellant contends that the subsequent amendment justifies a retrospective legislative interpretation of the term. The Southern Rhodesian case of *Clan Transport Co. (Pvt) Ltd & Ors v Road Services Board & Ors* 1956 (4) SA 26 (SR) at 34 persuasively considers the principle of legislative interpretation wherein it is stated:

"I find it difficult to appreciate the appropriateness of the invocation of the later Act of 1956 as a means of construing Act /1953. In the first place, if the wording of proviso (1) is clear and unambiguous in referring to all vehicles intended to be substituted, there is no justification for the invocation. Apart from this, and apart from the consideration that this legislative interpretation, if such it be, is contained in a statute not in operation at the time the board was called upon to construe the earlier statute, this later statute is not either expressly or by implication interpreting the earlier statute or attempting to clarify it. It was, as its title says, an Act to amend Act 50/1953. It introduced a number of entirely new alterations to various sections, alterations to introduce new features of legislation."(Emphasis added)

In the circumstances, the amending Act did not purport to interpret the earlier definition of fees as contained in the Seventeenth Schedule, neither can any such inference be drawn. The definition of "export market services" constitutes a distinctly new concept altogether. The definition of fees prior to the amendment, specifically relates to any amount

incurred in respect of services of a "technical, managerial, administrative or consultative nature". The nature of the fees contemplated therein are, in my view, clear and unambiguous. The amending Act cannot therefore be applied retrospectively on the basis of legislative interpretation. The argument proffered by the appellant thereon is devoid of merit.

Additionally, the appellant has challenged the determination *a quo* that the commission it paid to its agents fell within the concept of "fees" as defined in the Seventeenth Schedule of the Act as read with s 30 of the Act. Having established the applicable provision of the Seventeenth Schedule, the provisions of s 30 of the Act must be stated. It provides as follows:

> "**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."

The matter of *Z (Pvt) Ltd v Commissioner General, ZIMRA* 2016 (1) ZLR 1 (FAC) considers the definition of fees in the following terms:

> "In my view, the respondent was correct in its interpretation of the words "any amount" to include commission. From the above definition, it is clear that the legislature intended "fees" to cover any sum of money, by whatever name called, paid for services rendered of a technical, managerial, administrative or consultative nature save for those that are expressly excluded."

The term "amount" is defined in s 2 of the Act as:

> "'"amount", for the purposes of the provisions of this Act relating to the determination of the gross income, income or taxable income, as defined in subsection (1) of section *eight*, of a person, means—
> (*a*) money; or
> (*b*) any other property, corporeal or incorporeal, having an ascertainable money value;"

Guided by the foregoing considerations, it is my view that there is no magic in the use of the word "fees". The term connotes any payment made for services of a specified nature. So, were the fees incurred by the appellant in favour of its agents constitute payment for services of a technical, managerial, administrative or a consultative nature? The golden rule of interpretation, so well canvassed in the case of *Endeavour Foundation and Anor* v *Commissioner of Taxes* 1995 (1) ZLR 339 (S) at 356F-G in the following terms, applies here:

> "The general principle of interpretation is that the ordinary, plain, literal meaning of the word or expression, that is, as popularly understood, is to be adopted, unless that meaning is at variance with the intention of the Legislature as shown by the context or such other indicia as the court is justified in taking into account, or creates an anomaly or otherwise produces an irrational result."

It is established that the findings of the court *a quo* in relation to the nature of services extended to the appellant employed the *Oxford Advanced Learner's Dictionary* and the *Shorter Oxford English Dictionary* respectively to construe the meaning of the terms "technical," "managerial," "administrative" and "consultative".

In brief, the term "technical" was defined as "connected with the skills needed for a particular job"; "an adjective relating to a particular subject, art or craft or its techniques" and "of a person; skilled in or practically conversant with some particular art or subject, belonging to or relating to an art or arts, appropriate or peculiar to or characteristic of a particular art, science profession or occupation; also pertaining to the mechanical arts and applied sciences generally." In light of the above definition, the court *a quo* proceeded to determine that the function of the agents in providing practical knowledge of the climatic and soil conditions, the style and smoking characteristics of the export leaf necessary for the determination of the appropriate blend required by the customers constituted services of a technical nature. The finding was further supported by documentary evidence provided in the form of a bill of lading, EUR 1 certificates, fumigation certificates, detailed weight lists, container packing lists and

invoices attended to by the agents on behalf of the appellant. The court *a quo* went on to find that in any event, the appellant had failed to establish on a balance of probabilities, that the agents' did not require knowledge of the type of export blending leaf required in the manufacture of cigarettes in order to make a sale. On the evidence on record, there is no patent misdirection discernible in the finding *a quo* that the agents had indeed provided services of a technical nature.

The term "managerial" was further determined to be synonymous with the directing of activities whilst the term "administrative" was held to mean "relating to the running of a business, organisation e.t.c". The two concepts were found to be interlinked to the extent that they could be deemed as inseparable. It was held that the agents' were responsible for "price negotiations and other marketing logistics" on behalf of the appellant and a range of other services for its activities abroad. Due regard being had to the foregoing definitions, the finding that the practical activities of the agents fell within the ambit of "managerial and administrative services" is not outrageous or defiant of logic to the extent that it would warrant the interference of this Court.

Similarly, the applied definition of "consultative" was "pertaining to consultation, deliberative, advisory, take counsel, deliberate, confer, to plan, advise, have recourse to professional advice". The court *a quo* considered the nature of the agreement between the parties and held that even the preamble of the agreements between them specifically stated that the agents were recruited for their ability to promote, supply, safeguard and maintain personnel and materials required to make a sale. In view of the adopted definition, there is no absurdity in the finding that the agents offered services of a consultative nature to the appellant.

In the absence of a patent misdirection on the part of the court *a quo*, I find that the second ground of appeal is without merit.

The penultimate matter for consideration need not detain the Court much longer. The appellant contends that the court *a quo* ought to have been guided by the case of *Sunfresh Enterprises (Pvt) Ltd t/a Rulembi Safaris v Zimbababwe Revenue Authority* 2004 (1) ZLR 506 (H) in determining the proper interpretation of the term "fees" with particular regard to the amending Act of the Seventh Schedule of the Act. In the light of the finding on the first ground of appeal, it stands to reason that the premise of the third ground of appeal falls away. At any rate, the correctness of the *Sunfresh Enterprises* judgment has been placed in serious doubt by two independent decisions of the High Court. In *G Bank Zim Limited v Zimbabwe Revenue Authority* 2015 (1) ZLR 348 (H)at 379, KUDYA J, as he then was, declined to follow the *Sunfresh* jugement. Similarly in *Zimasco (Pvt)Ltd v Zimra Commissioner General* HH 149/16 the court was not persuaded that the *Sunfresh* judgement was correct, in addition to being distinguishable from the facts before it.

Finally, *Mr. Matinenga*, for the appellant, referred this Court to the Indian case of *Dishnet Wireless Limited*, [TS-409-ITAT-2015(CHNY)] discussed in the Publication *EY Tax Alert* of 27 July 2015. However, the judgement is clearly not applicable to the present matter as, in relation to technical services, it merely states that human involvement in *technology* driven services, which is not the case here, is to be ascertained at the time of availing services and that merely because there is human involvement for initial configuration of the system and/or maintenance/repairs of the system does not render technology-driven services as “technical services”.

DISPOSITION

The determination *a quo* was properly arrived at rendering unnecessary any interference by this Court. Thus, the appeal lacks merit and is accordingly dismissed, with costs following the cause.

GOWORA JA : I agree

GUVAVA JA : I agree

Gill, Godlonton & Gerrans, applicants' legal practitioners

Zimbabwe Revenue Authority, respondent