M COMPANY (PVT) LTD
versus
ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
KUDYA J
HARARE, 11 May 2015 and 1 November 2016

Income Tax Appeal

AP de Bourbon, for the appellant
T Magwaliba, for the respondent

KUDYA J: This is an income tax appeal filed in the High Court in terms of s 65 of the Income Tax Act [*Chapter 23:06*]. The two questions for determination are whether the appeal is valid and whether the commission paid to two foreign agents for facilitating the sale of tobacco constituted fees for services of a technical, managerial, administrative or consultative nature as contemplated by s 30 and the Seventeenth Schedule to the Income Tax Act.

THE BACKGROUND

The appellant, an exporter and seller of processed tobacco from Zimbabwe, is a locally registered company. It entered into two successive sales and marketing agreements with two foreign companies on 1 April 2004[1] and 1 April 2011[2], respectively, for the sale of export tobacco in foreign markets. The sales were on commission of 7.5% of the aggregate net export sales and FCA Zimbabwe sales value of each export, respectively.

In 2007 the respondent audited the affairs of the appellant. It decided that the commission paid for the period to 2005 constituted fees for services of a technical and administrative nature performed by the overseas agent on behalf of the appellant for which appellant was liable for withholding non-resident tax in terms of the Seventeenth Schedule to the Income Tax Act.

On 5 April 2007 the respondent submitted schedules showing the appellant's withholding tax liability on the tobacco sales commissions payable to the overseas agent. The

[1] Annexure 1 of respondent's case and p1-2 of appellant's bundle
[2] Annexure 2 of respondent's case and p3-4 of appellant's bundle

tax adviser of the appellant objected to the schedules and imposition of withholding tax on the sales commissions. On 10 August 2007 the respondent disallowed the objection. A notice of appeal was filed on 24 August 2007. The appellant's case was not filed within 60 days of the service of the notice of appeal or at all. In accordance with the provisions of s 65 (3) of the Income Tax Act the appeal lapsed. The appellant continued to remit non-residents withholding tax to the respondent until the advent of the multicurrency era.

On 24 October 2013, officials of the respondent conducted a routine audit visit at the premises of the appellant during which the finance director of the appellant indicated that further remittals had stopped in consequence of the unresolved 2007 appeal. In a further meeting of 5 December 2013 the appellant requested and was provided with a schedule of the non-residents' tax on fees payable from January 2009 to October 2013. The schedules consisted of 11 columns showing the period covered, the amount of commission paid, the withholding tax rate, the withholding tax due, the penalty charged at 100%, the period covered in respect of interest computation, the period of delay in paying, the interest rate and the amount of tax due. The principal amount of the non-residents' tax on fees due was in the sum of US$ 4 252 647.57. An equivalent amount was imposed as penalty and a further US$795 988.62 was imposed as interest. The penalties were later reduced by half leaving the revised total liability of US$5 974 959.97.

The appellant responded to the schedule by way of the objection letter dated 10 December 2013, which was served on the respondent on the same day. It disputed that the commissions constituted the fees contemplated in s 30 and the Seventeenth Schedule of the Income Tax Act. It undertook to pay the outstanding principal amount in four instalments between 13 December 2013 and 20 January 2014. In consequence of the undertaking, the respondent further waived the reduced penalty and interest by e-mail of 19 December 2013. The appellant, however, paid the principal amount by 20 December 2013[3].

A meeting was held between the appellant's tax advisers and the respondent on 13 December 2013[4]. The parties appeared to have agreed in that meeting that the objection had been improperly made. However, the appellant filed a notice of appeal on 25 March 2014 and served it on the respondent on the following day. The appeal was based on the deemed decision arising from the failure to respond to the letter of objection within three months as

[3] Electronic transfers of US$1 200 00 and US$ 3 052 647.57 dated 9 and 20 December respectively on p 24 and 21 of r 11 documents
[4] Annexure H of respondent's case

contemplated by s 62 (4) of the Act. The parties filed their respective cases on 28 May 2014 and 13 August 2014.

THE PRELIMINARY OBJECTION

The respondent took the point that as it did not issue any assessment on the appellant on 5 December 2013 or any other date, the objection of 10 December 2013 and the subsequent notice of appeal of 25 March 2014 was invalid and of no force or effect. The appellant contended, *inter alia*, that the appeal was validated by para (y) of the Eleventh Schedule to the Income Tax Act.

The 2007 appeal

Both counsel correctly submitted that the 2007 appeal was abandoned by the appellant. The effect was that the appellant accepted liability for the non-residents' tax on fees, which it failed to withhold and remit to the respondent. In addition, it also accepted that the commissions paid during the period prior to August 2007 constituted fees for services of a technical, administrative, managerial or consultative nature. It was common cause that the 2007 matter was not pending and could not preclude the appellant from objecting as it did to liability for failing to remit non-residents tax on fees for the period from January 2009 to October 2013. The suggestion in the respondent's pleadings and minutes of meetings that the present matter could not be objected to on the basis of the 2007 appeal was clearly devoid of any merit.

The objection of 10 December 2013[5]

The basis for the objection was set out in paragraph 2 of the letter of 10 December 2013. It reads:

> "We wish to object to the imposition of withholding tax on sales commissions. The 17th Schedule of the Income Tax Act defines fees as any amount from a source within Zimbabwe payable in respect of any services of a technical, managerial, administrative or consultative nature. The sales commissions paid to agents were for facilitating the sale of tobacco as a result of the sales and marketing services provided by the agent. It is clear that the commission was based on making a sale. Where there was no resultant sale, no commission was paid to the agent. It is therefore our contention that the sales commissions were not in any way technical, managerial, administrative or consultative in nature."

A reading of the whole letter clearly demonstrates that the appellant did not object to an assessment. The averments in para 3 and 4 of the appellant's case to the extent that they

[5] P 12 of r11 documents

declare that the appellant "duly objected to the said assessment" were not based on the letter of objection. In my view, the appellant merely objected to the decision of the Commissioner that the commissions constituted the type of fees contemplated by s 30 and the Seventeenth Schedule of the Income Tax Act.

The legislative provisions

In terms of s 65(4) of the Income Tax Act, both the High Court and Special Court are obliged to confine their decision to the grounds stated in the notice of objection unless leave based on good cause shown or agreement of the parties has been granted to the appellant to rely on other grounds. In the present matter no such leave was sought nor granted. It is therefore unnecessary for me to decide the issues that were raised and ventilated concerning assessments, notices of assessment and estoppel.

A taxpayer is entitled to object, *inter alia*, to any written decision of the Commissioner mentioned in the Eleventh Schedule in terms of s 62 (1) (b) of the Act, which states:

> "(1) any taxpayer who is aggrieved by—
>
> (*b*) Any decision of the Commissioner mentioned in the Eleventh Schedule;
> may, unless it is otherwise provided in this Act, object to such…… decision…….within thirty days after the date of the……written notification of the decision … in the manner and under the terms prescribed by this Act:"

The Eleventh Schedule

Para (y) of the Eleventh Schedule prescribes the decisions of the Commissioner that may be subjected to objection and appeal. In relevant, it reads:

> "The decisions of the Commissioner to which any person may object under paragraph (*b*) of subsection (1) of section *sixty-two* are those made in terms of—
> (*y*) the provisions of the Seventeenth Schedule, where the determination relates to—
> (i) whether or not any amounts are fees for the purposes of that Schedule;"

In the present matter, neither the appellant in its bundle of documents nor the respondent in the r 11 documents produced the written notification of the decision on which the letter of objection was based. The letter of objection does not indicate when the letter referenced 600/109/108/13 was written and what its contents were. The letter does not indicate whether the decision was verbal or in writing. I am therefore unable to determine whether the letter of objection complied with the requirements of s 62 (1) (b) of the Act. I would be inclined to strike the appeal off the roll for these reasons. While I acknowledge that

the appellant's case was predicated on "an assessment" and not on "any decision" it seems to me that the respondent should have been alerted by the letter of objection that the appellant was appealing against the decision. I will, for that reason, assume that the requirements of s 62 (1) (b) of the Act were met.

Mr *de Bourbon* correctly submitted that the appeal could be heard on the basis of para (y) to the Eleventh Schedule. I did not hear Mr *Magwaliba* make any contrary submissions. Accordingly, I agree with Mr *de Bourbon* that the appeal to the extent that it is confined to the determination of whether the commissions constituted fees as defined in s 30 and the Seventeenth Schedule is properly before me.

THE MERITS

The facts

The facts in this matter are derived from the pleadings, the r 11 documents and the appellant's bundle. Both the appellant and the respondent did not call any oral evidence. The facts were as follows.

The appellant company executed two successive "Sales and Marketing Commission Agreements" with two foreign companies domiciled in Bermuda and Switzerland respectively. The appellant was identified in both Agreements as the "Principal" while the two were specifically termed agents. In the first agreement the appellant was represented by its managing director and finance director while the agent was represented by its management committee member and secretary. In the second the parties were represented by their respective managing director and President. Except for the first two declarations in the preamble and the initial rate of commission in the first agreement, all the other terms of the two agreements were similar. In terms of clause 6 of the agreements:

> "….the validity, interpretation and enforcement of the agreement shall be governed by the laws of Zimbabwe."

The preamble proclaimed that the agent had "demonstrated expertise in the international marketing and trading of leaf tobacco enabling it to provide such services with greater efficiency and lower costs" and was willing to utilize its sales and marketing capacity and render services on behalf of the appellant.

Four duties of the agent were set out in clause 1. The agent undertook to use its "best efforts" to help the principal in the export sale of leaf tobacco without incurring financial responsibility or obligations even where it did not disclose that it was an agent of the

appellant. The agent also undertook to promote the export sales by the appellant in all major markets based on prices and conditions set by the appellant. It undertook to maintain and safeguard the quality of the product and image of the appellant and to supply personnel and materials necessary for the promotion of the appellant's exports. In addition the agreements authorised the agents to inform the appropriate local authorities in those export countries where necessary that it was the sales and marketing agent representing the principal's business interests for the sale of leaf tobacco exported from Zimbabwe.

The commissions under the first agreement were initially equal to 8.5% of the aggregate net sales from the export tobacco of the principal for each statutory year ending 31 March during the term of the agreement but was reduced to 7.5% in November 2005[6] to comply with the Zimbabwe Exchange Control approval. Under the second agreement the agent was paid commission of 7.5% of the Foreign Currency Account Zimbabwe sales value of each export of the principal during the term of the agreement. Both the aggregate net sales and the FCA Zimbabwe sales value for exports were computed by deducting freight costs to the destination port from the gross invoice value CIF port of destination.[7] These amounts were captured in the CD1 Form as gross FCA value.

The commissions payable were approved by the Exchange Control Authority[8]. In terms of paragraph 2 and 3 of the Exchange Control Authority dated 1 February 2012 the authority was granted on condition the 7.5% commission, as well as value addition would be declared on all the relevant Form CD1 prior to the export and "payment of the commission shall be from the appellant's local FCA". The provisions of the sales agreement constituted the entire agreement between the parties. It was certainly not a term of the agreement that the agents would deduct commission before remitting the balance into the FCA account of the appellant. The suggestion in the pleadings that it was in the agreement was contrived.

A meeting was held on 18 July 2013[9] at the premises of the appellant between the appellant and the respondent. As a result the appellant wrote the letter of 30 July 2013[10] in which it set out the duties of the agent in detail. The agent accompanied a major tobacco buyer and took part in price negotiations in Zimbabwe with the appellant. Other customers did not purchase their tobacco requirements in Zimbabwe. They were first supplied with

[6] Letter from appellant's managing director p 5 of appellant's bundle
[7] P 9 and 24 of appellant's bundle
[8] P 6-7 of appellant's bundle
[9] P 4 to 8 of rule 11 documents
[10] 9-11 of rule 11 documents

samples of the available export tobacco before placing their orders. The customers assessed the colour and appearance (the styles) and the sugar and nicotine levels, texture and quality (the smoking characteristics) of the export tobacco. Generally, price negotiations and marketing logistics for these customers were held outside Zimbabwe by the agent. The shipping mandate was the final responsibility of the Sales Administration Director. The invoice papers of all export sales from appellant flowed through the agent. The agent's main function was to establish and maintain customer relationships on a global scale.

In the letter of 30 July 2013, the appellant listed eight functions of the agent. The agent interacted with international customers by phone, e-mail and visits and conducted reviews of previous purchases and deliveries and projected order indications of the new season. In addition it arranged customer samples and volumes and assessed the price expectations of each customer and followed up customers' shipping arrangements. All shipping documents were sent to the agent for processing. The agent also invoiced the customers, collected payments and retained the commissions. The appellant's bundle contains the kind of documentation handled by the agent during the process of facilitating and making a sale. They show that the agent played a major role in selling the export tobacco.

The appellant contended that as the commissions were not fees as defined in the Seventeenth Schedule, it had no obligation to withhold non-residents tax. In addition, the appellant further contended that as the commissions were deducted by the agents from the gross foreign currency account value outside Zimbabwe before the balance was remitted to its account, it could not have withheld any non-residents tax nor would it have been obliged to remit any such tax to the respondent.

The respondent contended that the commissions were fees as defined and that the appellant as the principal was obliged to withhold and remit the non-residents tax on fees due to the respondent.

The issues

The issues for determination are:

1. Whether the commissions constituted fees as defined in the Seventeenth Schedule that were chargeable, leviable and collectable under s 30 of the Income Tax Act.
2. Whether the appellant was liable for withholding and remittal of non-residents tax on fees arising from the deduction of these commissions outside Zimbabwe before any proceeds of the sales had been remitted to it

The legislative provisions

The relevant tax is imposed by s 30 of the Act which reads:

> "**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 Seventeenth Schedule defines fees, foreign company, non-resident person, payee and payer in para 1(1) in the following manner:

> "1. (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—(none of the 8 apply herein)
> "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—
> (*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 paid;
> "payer" means any person who or partnership which pays or is responsible for the payment of fees,"

The application of the two sections to the appellant and the agents

The non-residents' tax is imposed on the agents. The first agent was resident in Bermuda and the second in Switzerland. The two agents were foreign companies and non-resident persons as defined in para 1 (1) and (1) (b) of the Seventeenth Schedule. The two agents would also be payees, if the commissions constituted fees payable or paid. Again, in the event that the commissions were fees, as defined, the appellant would be a payer, defined "as any person who…pays or is responsible for the payment of fees". A positive duty to withhold such tax is thrust upon the payer by para 2 (1) of the Seventeenth Schedule. It reads:

> "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."

Such a payer is mandated in subs (2) of para 2 to furnish the payee with a certificate showing the amount of fees paid and the amount of non-residents' tax on fees deducted and kept back. A payee who fails to furnish such a certificate or who furnishes an inaccurate certificate is liable to suffer the criminal sanctions set out in para 2 (3) of the Schedule. The duties and responsibilities of the payer and the resultant sanctions stipulated in para 2 above apply in equal measure in terms of para 3 (1) (2) and (2a) of the same Schedule to an agent

who receives the gross fees due to the payee from the payer. In terms of sub para (3) the agent is deemed to be an agent of the payee if the payer records its address as the address of the payee and delivers the fees to that address. The agent is treated under sub-para (4) as an agent of a taxpayer who is absent from Zimbabwe. It is apparent from the provisions of para 6 of the Seventeenth Schedule that the agent contemplated by para 3 (3) and (4) of the same Schedule is one who is in Zimbabwe. In terms of para 5 the payer or agent attaches a prescribed form to the payment of the fees. In terms of para 6 (1) a payer or agent who fails to withhold or pay the prescribed tax to the Commissioner under para 2 or 3 is personally liable for the payment not later than 10 days from the period that the actual amount was due and to an additional equivalent amount of such tax.

Mr *de Bourbon* listed six[11] other instances in the Income Tax Act where Parliament thrust a similar duty on a payer to withhold tax from a third party and remit it to the statutory tax collecting body. He correctly submitted that the resident payer had no obligation to pay the non-resident tax unless it failed to deduct and keep back the tax from the fees paid or from the fees payable. Mr *de Bourbon* submitted that para 6 of the Schedule did not create a tax liability for a resident taxpayer, rather it created a penalty for the resident taxpayer. He suggested that the heading of the section be amended to reflect that it was a penalty for failure to withhold non-residents tax. He based his submission on the well-recognised and established common law principle that the Commissioner is not accorded any legal right to waive taxes. I agree that the Commissioner is not accorded the legal right to waive taxes. See *Foroma* v *Minister of Public Construction and National Housing and Anor* 1997 (1) ZLR 447 (H) at 464B-H; *Ritch & Bhyat* v *Union Government (Minister of Justice) 1912* AD 719 at 735 and *SAR & H* v *Transvaal Consolidated Land & Exploration Co Ltd* 1961 (2) SA 467 at 481C. The Commissioner is only accorded the power to waive the equivalent penalty imposed under para 6 (1) (a). He cannot waive the amount of tax not withheld. The logical conclusion of the argument by Counsel arising from such an inability to waive the tax not withheld would be that this paragraph creates a tax liability and not a penalty for the appellant. In my view, Parliament imposed a tax on the resident who failed to withhold the non-resident tax on fees. Para 6 (1) (a) therefore created a tax payable by the appellant if it is

[11] Non-resident shareholders' tax (s 26 and the Ninth Schedule); residents' shareholders tax (s 28 and the Fifteenth Schedule); non-residents tax on remittances (s 31 and the Eighteenth Schedule); non-residents tax on royalties (s 32 and the Nineteenth Schedule); residents tax on interest (s 34 and the Twenty-First Schedule) and Pay As You Earn (s 73 and the Thirteenth Schedule).

found that it failed to withhold the contemplated tax. In this vein Counsel contended in para 13 of his written submissions that:

> "the resident becomes personally liable for the payment of the tax only if he, she, or it fails to withhold the tax from the fees payable, in the sense that he could do so and did not withhold the tax or thereafter failed to remit the tax so withheld to the Commissioner. But in normal circumstances the local resident is not the taxpayer in terms of s 30."

The word "withhold" is defined in the *Shorter Oxford English Dictionary* as "to keep from doing something, to hold back, restrain, refrain from, to keep back, to keep in one's possession what belongs to or is due to". I would accept the word "to keep back" as the best possible meaning of the word in the context of the provision.

Where the commissions fees as defined

I turn to determine whether the commissions constituted fees as defined in the Seventeenth Schedule. I dealt with a similar question in *G Bank Zimbabwe Ltd* v *Zimbabwe Revenue Authority* HH 207/2015. The facts in that case are distinguishable with those in the present case in two material respects. In that case the appellant used the term bank charges interchangeably with bank fees while in the present matter the appellant used the term "commissions" for the contract payments that it was obliged to pay. Again, G Bank admitted paying the charges directly to the foreign banks while in the instant case the appellant disputed making any direct payments.

At pp 29-30 of the cyclostyled judgment I said:

> "Mr *de Bourbon* submitted that the Nostro bank charges were not subject to withholding tax as they did not fall under any one of the four categories of technical, administrative, managerial or consultative. It seems to me that the four categories in question are merely adjectives which describe a particular activity. According to the *Shorter Oxford English Dictionary* administer means *inter alia* "to manage;" "to handle" while administrative is defined as "pertaining to management." One of the many permutations of "to manage" is "to deal with carefully". Like McDonald JP in *Commissioner of Taxes v F, supra,* at 115F where he was off course referring to "transaction, operation or scheme", I would agree that each of the words "technical, managerial, administrative and consultative" that is used in the para under consideration:
>
> > 'is of wide and general import and there are a few activities of a taxpayer which will not be appropriately described by one or other of them.'"

Mr *de Bourbon* vigorously attacked my finding that the four categories in the definition of fees are of wide and general application and suffice to cover almost every activity undertaken by a taxpayer. My finding was based on the meaning I ascribed to the ordinary grammatical meaning of the adjectives "technical, managerial, administrative or consultative". The Act itself does not define any of these words. The established position in

Zimbabwe is to adopt the ordinary, literal and grammatical meaning of words unless doing so leads to glaring absurdity or to results which Parliament would never have intended[12]. See *Madoda* v *Tanganda Tea Company* 1999 (1) ZLR 374 (S) at 377A-C and the cases cited thereat. In doing so the Court must be mindful of the words of WESSELS AJA in WESSELS AJA, as he then was, in *Stellenbosch Farmers Winery Ltd* v *Distillers Corp* (SA) Ltd 1962 (l) SA 458 (A) at 476 on the importance of the textual context in which words sought to be interpreted are found that:

> "In my opinion, it is the duty of the court to read the section of the Act which requires interpretation sensibly, i.e. with due regard, on the one hand, to the meaning or meanings which permitted grammatical usage assigns to the words used in the section in question, and, on the other hand, to the contextual scene, which involves consideration of the language of the rest of the statute as well as the matter of the statute, its apparent scope and purpose, and, within limits, its background."

See also the sentiments of CHEDA J in the *Sunfresh Enterprises (Pvt) Ltd* v *Zimra* 2004 (1) ZLR 506 (H) at 509C-E.

Mr *de Bourbon* contended that our established position is better expressed by Wallis JA in *Natal Joint Municipal Pension* v *Endumeni Municipality* 2012 (4) SA 593 (SCA) at 603-604 in para [18] in these words:

> "The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of ordinary rules of grammar and syntax; the context in which the provision appears, the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermine the apparent purpose of the document. Judges must be alert to and guard against the temptation to substitute what they regard as reasonable, sensible or businesslike for the actual words used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. *The inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document*."(my emphasis)

Again, the same learned judge of appeal emphasised in *Firstrand Bank Ltd* v *Land and Agricultural Development Bank of South Africa* 2015 (1) SA 38 (SCA) at 49 para [27], that:

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[12] Per Garwe J, as he then was, in *Mashamhanda v Mpofu* 1999 (1) ZLR 1 at 5C and Chatikobo J *in Expedite Haulage (Pvt) Ltd v Scotfin Ltd* 2000 (2) ZLR 113 (h) at 116A.

> "The process of interpretation is no longer one in which we seek out a notional plain meaning of the words used, ignoring context and the circumstances in which the document being interpreted, whether a contract or a statute or a patent specification, came into being. Nonetheless it must start with the actual words used."

It seems to me that barring the semantics used, the formulation advanced by Wallis JA is not different from the approach followed in Zimbabwe. A court is not concerned with the notional meaning but with the practical application of the principles that emerge from the formulation. I proceed to deal with the essential requirements of fees as defined. Before I do so I emphasize that what constitutes fees is defined; therefore all reference by Mr *de Bourbon* in oral argument to the perceived notional meanings of "fees" with reference to advocates and "commissions" by reference to commodity brokers is of no significance. The meaning of fees in the present case is delineated by the definition in the Seventeenth Schedule.

Any amount from a source within Zimbabwe

The word amount is defined in s 2 of the Act in relation to the determination of gross income, income and taxable income in terms of s 8 (1) as "money or any other property, corporeal or incorporeal property having an ascertainable money value". The commissions would constitute part of the gross income of the agents. It was common cause that the amount was received by or accrued to or was in favour of the agents from a source deemed to be within Zimbabwe by virtue of para 1 (2) (a) of the Seventeenth Schedule. It reads:

> "(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 ……is ordinarily resident in Zimbabwe;"

The appellant was at all material times ordinarily resident in Zimbabwe. Mr *de Bourbon* made a conditional concession that if the commissions were found to constitute fees then they would be deemed to have been from a source within Zimbabwe. He contended that the agent and not the appellant was the payer.

Payable

The word payable connotes a payment that is due, which ordinarily arises from an unconditional obligation on the payer to pay. See *Edgar Stores Ltd* v *Commissioner for Inland Revenue* 1988 (3) SA 876 (A) at 889A-C; 50 SATC 81 (A) and *ITC 1587* (1994) SATC 197 at 103-104. The sales commission and marketing agreements, in clause 2, imposed such an unconditional obligation to pay on the appellant. The responsibility of paying the commissions was imposed on the appellant by the agreements and by the

Exchange Control Authority. Payer is defined as "any person who pays… or is responsible for the payment of fees". In my view a payer could be one of two persons between the one who actual pays and the one who has the unconditional obligation to pay. Thus while on the contention of the appellant the agent paid itself I would find that the person who was responsible for the payment of the fees was the appellant. If the commissions constitute fees I would therefore find the appellant to have been the payer.

Any services of a technical, managerial, administrative or consultative nature

The starting point is that the four categories of services are disjunctive rather than conjunctive. A finding that the physical activities of the agents fell into any one of these categories would suffice to found liability for the payment of non-residents tax on each category. It was common cause that the agents supplied a service to the appellant. The appellant and the agents termed the service a sales and marketing of export leaf tobacco service. The physical activities carried out by the agents on behalf of the appellant were first outlined in the minutes of 18 July 2013 whose accuracy was confirmed by the signatures of both parties on 6 and 7 August 2013. These activities were further listed in the letter of the appellant to the respondent of 30 July 2013.

The sales and marketing of export leaf tobacco involved negotiating prices with foreign purchasers. There were two types of foreign purchasers. The first was the major purchaser from the Far East, which accounted for between 40 and 50% by volume and between 50 and 60 % by value of the appellant's exports. The purchaser in question negotiated with the appellant in Zimbabwe. The tone of the minutes indicated that these meetings were facilitated and co-ordinated by the agent. While the directors of the appellant had the final say on the prices and volumes allocated to the major purchaser, the agent played a prominent role in the negotiations. In terms of the sales and marketing agreement the agent assisted the appellant by exerting its best efforts and demonstrated expertise in international marketing and trading of the export leaf tobacco. The second type of buyer was the one who did not come to Zimbabwe to negotiate and assess the packed tobacco. This type of buyer requested a sample of the tobacco on sale. The "price negotiations and other marketing logistics" for this buyer were done by the agent.

The four adjectives that describe the nature of fees are not defined in the Act. WALLIS JA recognised in both the *Natal Joint Municipal Pension* case and the *Firstrand Bank Ltd* case, *supra*, the primacy of the actual words used in the statute. The appellant did not refer to

any dictionary for the meanings of each of these four words. The respondent referred to the *Oxford Advanced Learner's Dictionary*. I relied on the *Shorter Oxford English Dictionary.*

The definition of technical

Mr *de Bourbon*, without reference to any dictionary suggested that the word "technical" was a term of art which referred to manufacturing, engineering or architectural activities. The *Oxford Advanced Learner's Dictionary* renders the word as "connected with the skills needed for a particular job"; "an adjective relating to a particular subject, art or craft or its techniques". The *Shorter Oxford English Dictionary* defines the word as follows: "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,"

I am unable to agree with Mr *de Bourbon* that there exists in the context of the Act any limitation to the meaning of the word to applied sciences only when by definition it also applies to the mechanical arts. Thus whether one considers the skills needed in selling tobacco as mechanical arts or applied sciences, the "best efforts" and "demonstrated expertise" of the agent is covered in the definition of technical. The practical application of the knowledge possessed by the agent of the climatic and soil conditions, the style and smoking characteristics of the export leaf necessary for determination of the appropriate blend required by the customers fell into the ambit of technical services provided by the agent to the customer on behalf of the appellant. But even if the narrow definition advocated by Mr de Bourbon were adopted, the appellant did not establish on a balance of probabilities that the agent did not require knowledge of the type of export blending leaf required in the manufacture of cigarettes in order to make a sale. The averment made that knowledge of these characteristic was not a requirement to effect a sale were contrary to the averment in the letter of 30 July that the appellant used such technical knowledge to purchase the appropriate blend on the auction floors and from contract farmers for export. This technical knowledge was the expertise that the appellant required in making local purchases from both auction floors and contract farmers and in negotiating suitable prices with the major purchaser. The appellant also relied on this technical knowledge to purchase the tobacco that met these specifications from both auction floors and contract farmers in order to satisfy the ultimate

manufacturing requirements of the end customers. The bill of lading[13] indicates the expertise of the agents in regards to the shipping of export tobacco. The six documents required were bills of lading, EUR 1 certificates, fumigation certificates, detailed weight lists, container packing lists and invoices. These were all distributed to the agent. The agent gave special instructions on the time frames for dispatching documents and the type of containers used for carrying export tobacco and the manner of storage and fumigation standards applicable to the tobacco.

I would find that the agent supplied technical services to the appellant.

The definition of managerial

In para 19 of his written submissions, Mr *de Bourbon* contended that the word managerial was synonymous with directing the activities of the appellant. In para 1.3 of the minutes on p 5 of the r 11 documents, the appellant indicated the agent was responsible for "price negations and other marketing logistics". In my view these activities were carried out on behalf of the appellant by the agent. The agent was directing the activities of the appellant in these foreign markets and was required to even advise the local authorities that it was acting for the appellant. I find that the practical activities of the agents fell into the ambit of the definition of managerial advocated by Counsel. Again, applying the definition of "manage" derived from the *Shorter Oxford English Dictionary*; the agents were running the affairs of the appellant in those markets. The agents exercised actual authority on behalf of the appellant. Indeed the letter of 30 July established that the eight functions of the appellant that were managed by Sales Administration Director in Zimbabwe were mirrored by the eight functions run by the agents outside Zimbabwe on behalf of the appellant. I agree with Mr *Magwaliba* that some of the functions constituted both managerial and administrative services.

The definition of administrative

The word is defined in the *Oxford Advanced Learner's Dictionary* as "relating to the running of a business, organisation etc." The synonyms accorded to the word include "managerial". In both his oral and written submissions Mr *de Bourbon* was unable to make any practical distinction between administrative and managerial services. He conceded that filling forms, rendering reports, filing documentation and making payments constituted

[13] P 16 of appellant's bundle

administrative functions. These administrative services were in my view inseparable from managerial services. These were carried out by the agent on behalf of its principal, the appellant. The documentation consisted of sales confirmation invoices, orders, shipping instructions, bills of lading, EUR 1 certificates, fumigation certificates, detailed weight lists, container packing lists and customs clearance invoices which were dispatched to the agent for processing exports in the countries of destination. I find that the practical activities of the agents constituted administrative services.

The definition of consultative

In the *Shorter Oxford English Dictionary* consultative means "pertaining to consultation, deliberative, advisory, take counsel, deliberate, confer, to plan, advise, have recourse to professional advice". The preamble to the agreements proclaim the purpose for selecting the agents was based on their professionalism and ability to promote, supply, safeguard and maintain personnel and materials required to make a sale. In para 19 of his written submissions Mr *de Bourbon* contended that the word "consultative" connoted the offering of expert professional services and not "simply speaking to the appellant". The suggestion that the agents were engaged for their expertise in "simply speaking" to the appellant is devoid of merit. The very fact that the agents accompanied an accomplished and major international buyer of export tobacco demonstrates the high pedigree of the professional services rendered to the appellant by these agents. Again, I find as a matter of hard fact that the agents provided consultative services to the appellant.

The four words appear in the context of s 30 of the Act. That section is designed to tax fees that are payable or paid to an agent who is based outside Zimbabwe but from a source in Zimbabwe. In my view the words "payable" and "paid" as used in the definition of "payee" in para 1(1) to the Seventeenth Schedule are synonymous with "received by" or accrued to" or "in favour of" that are used in s 8 (1) of the Income Tax Act. The overall purpose of the Income Tax Act is to tax taxable income "received by or accrued to or in favour of" the targeted taxpayer including the non-resident in question. The objective and sensible application of the meaning of each of these words is one which discards the notional plain meaning of the words in favour of the contextual meaning. It seems to me that the real test of the pudding prepared by WALLIS JA is in the actual application of the facts found in each matter to the principles that he outlined. The narrow meaning contended by Mr *de Bourbon* does violence to the context and purpose of enacting the provision.

The true essence of a sale involves technical, managerial, administrative and consultative competencies of the agent. That is why I maintain that there are hardly any activities of a taxpayer that can escape the wide embrace of the definition of fees that is found in the Seventeenth Schedule. Accordingly, I am satisfied that the commissions in question constitute the type of fees contemplated by s 30 and para 1 of the Seventeenth Schedule.

Mr *de Bourbon* submitted that para 6 (1) merely imposed a penalty and not a tax on the payer or agent who failed to deduct and keep back or pay the appropriate non-resident tax on fees to the Commissioner in the stipulated period. He argued that the personal obligation did not extend to a payer who could not physically deduct the non-resident tax on fees in Zimbabwe because the fees had been retained outside Zimbabwe. He contended that as the appellant did not and could not physically deduct and keep back the fees from the gross FCA value of the exports, it had no legal obligation to remit any non-residents tax on fees to the Commissioner. Para 6 of the Seventeenth Schedule reads:

> ***Penalty for non-payment of tax***
>
> "6. Subject to subparagraph (2), a payer or an agent in Zimbabwe who fails to withhold or pay to the Commissioner any amount of non-residents' tax on fees as provided in paragraph 2 or 3 shall be personally liable for the payment to the Commissioner, not later than the date on which payment should have been made in terms of paragraph 2 or 3, as the case may be, of—
>
> (*a*) the amount of non-residents' tax on fees which the payer or the agent, as the case may be, failed to pay to the Commissioner; and
>
> (*b*) a further amount equal to one hundred *per centum* of such non-residents' tax on fees.
>
> (2) The Commissioner, if he is satisfied in any particular case that the failure to pay to him non-residents' tax on fees was not due to any intent to evade the provisions of this Schedule, may waive the payment of the whole or such part as he thinks fit or repay the whole or such part as he thinks fit of the amount referred to in subparagraph (*b*) of subparagraph (1).
>
> (3) If a defaulting payer or agent referred to in subparagraph (1) does not pay the penalty in full on the date on which the default has ceased, interest, calculated at a rate to be fixed by the Minister by statutory instrument, shall be payable on so much of the penalty as remains unpaid by the payer or agent during the period beginning on the date the default has ceased and ending on the date the penalty is paid in full, and such interest shall be recoverable by the Commissioner by action in any court of competent jurisdiction Provided that in special circumstances the Commissioner may extend the time for payment of the penalty without charging interest."

In my view, whether the above cited paragraph is regarded as a penalty or non-residents' tax on fees charging provision it creates a legal liability for the holder or agent who fails to withhold or pay this type of tax to the Commissioner. I have already found that the commissions in question constituted fees as contemplated by both s 30 and the Seventeenth

Schedule of the Income Tax Act. The next sub issue to determine is whether the appellant was the payer of the fees. It was agreed that the appellant was required by Exchange Control Authority to pay the fees from its local foreign currency account. In terms of clause 5 of the Sales and Marketing Commission Agreements these agreements were negotiated and executed within the laws of Zimbabwe. The validity, interpretation and enforcement of the agreements were also in terms of the same clause governed by the laws of Zimbabwe. That the Exchange Control Authority had the force of the laws of Zimbabwe is beyond dispute. The powerful influence of this Exchange Control Authority was highlighted by the reduction of the commission payable to the first agent from 8.5% to the 7.5% in compliance with the requirements of the Exchange Control Authority. The appellant did not disclose the basis on which the offshore payment arrangements of the commission were made. They were certainly made outside the mandatory requirements of the Exchange Control Authority and were to that extent illegal. It seems to me that the illegality conducted by the appellant would obviously impact the decision on whether or not to waive the penalty equivalent to the unpaid non-residents' tax on fees under para 6 (2) to the Schedule. If adjudged illegal, then it would not qualify for waiver as the intention on the part of the appellant would be to evade withholding such tax arising from any payments from its local foreign currency account.

The appellant averred that it made no payments to the agents. The agents simply deducted the fees due to them offshore before making telegraphic transfers into the evidence accounts at the appellant's local bankers. Mr *de Bourbon* submitted that in those circumstances there was no amount against which tax could be withheld. Like in the *G Bank*, case, *supra*, Mr *de Bourbon* relied on the decision of this Court in *Sunfresh Enterprises (Pvt) Ltd t/a Bulembi Safaris* v *Zimbabwe Revenue Authority* 2004 (1) ZLR 506 (H) which appeared to suggest that the local safari operator was not a payer of the commission that was deducted offshore from the overall fees due to him in Zimbabwe. The facts in that case are unclear. They appear in the recitation of the taxman's arguments on pp 508G and 509G of the report. It would appear that the safari operator provided the foreign independent operators with the gross value of its hunting services. Foreign prospective hunters paid this amount to the foreign independent operators who in turn deducted some agreed amounts as commission before remitting the balance to the account of the safari operator. CHEDA J held that the source of the payment was from outside Zimbabwe and for that reason the payment did not constitute fees. He also held that as the payment had been made to the agent by the

prospective hunter and not by the safari operator, the safari operator was not the type of payer contemplated by the Seventeenth Schedule to the Income Tax Act.

In the *G Bank* case, at p 29 of the cyclostyled judgment, I said of the *Sunfresh Enterprises (Pvt) Ltd* case:

> "If the commission in the *Sunfresh* case was deducted from the overall hunting fee remitted to the safari operator as submitted by Mr *de Bourbon*, I would with respect differ from the finding of Cheda J. The payment by the foreign client to the foreign based agent, in my view, would simply constitute a prepayment on behalf of the safari operator. It would have been subject to withholding tax."

I remain of the view that if the deduction of the commission was made from the total package charged by the safari operator for providing hunting services from Zimbabwe then it would constitute an advance payment by the safari operator to the independent agent from moneys due to the safari operator. In addition, I would have found that the source of the payment was from within Zimbabwe on the ground that the originating cause of the payment was from the hunting services offered in Zimbabwe. The words "from a source in Zimbabwe" denote the originating cause. In *K* v *Commissioner* 1990 (1) ZLR (H) at 197F-198A SMITH J stated that:

> " I accept that it is settled law that the source of any payment means the originating cause thereof and *prima facie* that would be where the work was performed - see *Commissioner of Taxes v Shein* 1958 R&N 384 (FSC) at 387E; 1958 (3) SA 14 SC) at 16H (also (1958) 22 SATC 12) where TREDGOLD CJ said:
>
> > "It may be accepted that, *prima facie*, the test of the source of a payment for services rendered is the place where those services are rendered."
>
> The learned CHIEF JUSTICE went on, however, to say that the ultimate test of source is the originating cause."

I would for these reasons disagree with the decision in the *Sunfresh* case and would therefore decline to follow it.

There is also a more fundamental reason for rejecting the *Sunfresh* decision and the argument advocated by Mr *de Bourbon*. The provisions of para 1 (2) (c) to the Seventeenth Schedule provide that "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". I understand this provision to mean that even though the actual payment is pending, if the payer, in this case, the appellant has credited the account of the payee, the agent, with the fees, the payer is deemed to have paid the fees. This first rung does not apply to the facts of this case. The second rung deems the fees paid where such fees are due and payable and the payer makes prior arrangements for their payment. The payer thus

incurs an unconditional liability to pay and arranges for the payment of such fees. In the present case the fees became due and payable to the agent and the appellant incurred an unconditional liability to pay each time a sale was made. The arrangements that were made in respect of payment before the payment took place were that the agent would retain the fees from the gross FCA value of the exports receipts. It seems to me that the making of the sale together with these prior arrangements is deemed to constitute payment of the fees by the second rung of para 1 (2) (c) to the Seventeenth Schedule. The argument advanced by Mr *de Bourbon* that liability for the appellant was based on actual payment flounders on the provisions of the second rung of para 1 (2) (c) to the Seventeenth Schedule.

In any event the agreements in the present case, in terms of clause 5, are governed by the law of Zimbabwe. The law of agency is *inter alia* applicable to this case. Christie in *Business Law in Zimbabwe*[14] at p 326 provides the working definition of agency in these terms:

> "Agency may be defined as a contract whereby one person (the principal) employs another, (the agent) to act for him and to enter into contractual relationships binding between him and third parties."

Lee and Honore in *The South African Law of Obligations*[15] are to the same effect. In para 606 the learned authors write:

> "A contract of agency is a contract whereby one person (termed the agent) agrees to represent another (termed the principal) in dealings with third parties".

The learned authors go on to explain in para 658 that:

> "An agent contracting as agent whether for a named or unnamed principal does not generally render himself personally liable or acquire rights under a contract made with third parties, but he may contract in such terms as to do so".

Again, Silke in *The Law of Agency in South Africa* 3rd ed at p 11 provides a more illuminating definition of agency in these words:

> "The essence of the modern view of agency is that there must be a third party in contemplation and the agent acts purely as a channel bringing the principal into legal relations of a contractual nature with the third party. The acts of the agent are done in the name of the principal and are deemed to be the acts of the principal himself, ensuring to his benefit or rendering him liable without any benefit accruing or liability attaching to the agent."

The academic writers make the self-evident point that an agent acts for the principal and its actions are ascribed to the principal. The deduction of the commission from the gross

[14] Juta 1998 reprinted 2014
[15] Butterworths 1950

FCA value of the exports by the agent by operation of law are attributed to the appellant, who it is common cause is resident within Zimbabwe. It cannot lie in the mouth of the appellant to protest that it made no payment to the agents. I find that it did. It was obliged by para 2 (1) of the Schedule to withhold non-residents tax on fees. It failed to do so. It was therefore legally liable to pay such fees under the provisions of para 6 of the same Schedule. I therefore find that the Commissioner correctly fostered liability on the appellant.

The appeal based on the decision of the Commissioner is dismissed. I do not find the grounds of appeal to have been frivolous. In accordance with the provisions of s 65 (12) of the Income Tax Act, I therefore make no order as to costs.

Disposition

Accordingly, the appeal is dismissed with no order as to costs.

Gill, Godlonton and Gerrans, the appellant's legal practitioners