IN THE TAX REVENUE APPEALS BOARD

AT DAR ES SALAAM

INCOME TAX APPEAL NO. 78 OF 2014

CHEVRON TANZANIA LIMITED ..... APPELLANT

VERSUS

COMMISSIONER GENERAL ..... RESPONDENT

JUDGMENT

This is an appeal brought by Chevron Tanzania Limited (herein referred to as the appellant) and Commissioner General Tanzania Revenue Authority (the respondent). The statement of appeal shows that it is brought under section 14(2), 14(3), 16(1) and 16(3) of the Tax Revenue Appeals Act 2000 and Rules 6(1) and 6(2) of the Tax Revenue Appeals Board Rules 2011.

The particulars of the tax dispute shows that the taxation decision subject of this appeal was made by the respondent's large tax payers department at Dar Es Salaam in respect of additional PAYE liability against the Appellant in the amount of Tshs. 546,632,040.39 being principal PAYE of Tshs. 241,916,672.46 and interest thereon of Tshs. 304,715,367.93. The facts leading to this appeal are set out in the statement of appeal are as follows:-

Respondent conducted an audit of the appellant's tax affairs and as the result on 16th January, 2014 the respondent issued their tax audit findings

which covered value added tax, withholding tax, employment tax and corporation tax. It was indicated that the respondent had assessed additional PAYE of Tshs. 87,797,433 with Tshs. 39,329,729.71 arising from 2008 year of income and Tshs. 48,467,703.29 arising from 2009 year of income for appellant's expatriate, Mr. Prabhakara Rai and also that the respondent had assessed additional PAYE of Tshs. 83,955,710.83 with Tshs. 28,312,210.24 arising from 2009 year of income and Tshs. 55,643,500.59 arising from 2010 year of income for appellant's expatriate Mr. Alex Kitundu collectively making a total liability of Tshs. 171,753,143.83.

On the 20th February 2014 the appellant replied to the respondent's letter dated 16th January 2014 in which he stated that Mr. Alex Kitundu had a PAYE liability on taxable salary of Tshs. 56,197,280.79 for the year of income 2009 which resulted to additional PAYE liability of Tshs. 8,306,848.72 after deducting already paid PAYE of Tshs. 47,890,432.07.Further that in 2010 year of income Mr. Alex Kitundu had PAYE liability on salary of Tshs. 148,770,491.14 which resulted to additional PAYE liability of Tshs. 21,679,463.15 after deducting already paid PAYE of Tshs. 21,679,463.15. Therefore a total revised PAYE not in dispute for Mr. Alex KItundu is Tshs. 29,986,311.86.

Furthermore the appellant indicated that Mr. Prabhakara Rai had a PAYE liability on taxable salary of 98,400,658.28 for the year 2008 which resulted to an additional PAYE liability of Tshs. 12,077,852.35 after deducting already paid PAYE liability of Tshs. 86,322,805.93 while in the year of

income 2009 Mr. Prabhakra Rai had a PAYE liability on taxable salary of Tshs. 126,858,850.27 which resulted to additional PAYE liability of Tshs. 16,962,793.25 after deduction already paid PAYE liability of Tshs. 109, 986,057.02 hence PAYE liability not in dispute for Mr. Prabhakara Rai is Tshs. 29, 040,645.60.

On 21st May 2014 the appellant provided additional information to the respondent to the effect that taxes (PAYE) paid by the appellant on behalf of its expatiates are not allowable expenditure as provided under section 11(5)(a) of Income Tax Act, 2004.

The respondent issued notes of discussion and the PAYE computations for the years of income 2008 to 2010 indicating that the respondent had treated PAYE liability of Tshs. 56,197,281 for the year of income 2009 and Tshs. 148,770,491 for the year of income 2010 for Mr. Alex Katundu as employees taxable benefits similarly the respondent treated the PAYE liability of Tshs. 98, 400,658 for 2008 year of income and Tshs. 126,858,850 for 2009 year of income for Mr. Prabhakara Rai as employees taxable benefits in both cases contrary to section 7 of Income Tax Act 2004.

The appellant also alleges that in all of the assessed PAYE certificates/interest for the years of income 2008, 2009 and 2010 the respondent assessed additional unwarranted PAYE liability of Tshs. 182,889,617 being Tshs. 87,131,800 for Mr. Alex Katundu and Tshs. 95, 757,817 for Mr. Prabhakara Rai hence the appellant is disputing the cascading method which is not supported by the income Tax Act 2004.

The appellant also states that in the assessed PAYE certificate/interest for the above stated years of income the respondent assessed interest on late payment of additional PAYE amounting to Tshs. 304,715,367.93 in which the appellant dispute.

The appellant having been aggrieved by the respondent's decision advanced three grounds of appeal in relation to the years of income 2008, 2009 and 2010 which are:

(i)The respondent has erred both in law and facts by treating the PAYE paid by the appellant on behalf of it's two expatriates as the employees taxable benefits in arriving at the amount of tax in dispute of Tshs 546,632,040.39 which is contrary to section 7 of the Income Tax Act 2004.

(ii) The respondent is erred both in law and facts by using the unknown goal seek formula (cascading formula) in arriving at the amount of tax in dispute of Tshs 546,632,040.39

(iii) The respondent has computed and assessed additional unpaid taxes of Tshs 241, 916,672.46 and interest of Tshs 304,715,367.93 under section 100 of the Income Tax Act 2004 based on the disputed principal amount.

Therefore the appellant craves for the following reliefs:-
The honourable Board reviews the respondent's final assessed certificate/interest number P/24/07/2014 and hold.
(i)That the respondent's additional PAYE liability of Tshs. 182,889,617 on the appellant's employees salaries for the years of income 2009 and 2010

is erroneous as it has been arrived based on the cascading formular that is not supported by the Income Tax Act 2004.

(ii)That, the PAYE paid by the appellant on behalf of its employees (Mr. Alex Katundu and Mr. Prabhakara Rai) should not be treated as employees taxable benefits.

(iii)The interest charged of Tshs. 304,715,367.93 is erroneous as it has been computed based on the wrong tax base amount of Tshs. 241,916,672.46 which is under dispute.

On a complete rebuttal to the appellant's appeal, the respondent's legal counsel Mr. Noah Tito insisted that it did not error either in law or facts as the PAYE paid by employer on behalf of an employee is a benefit in kind on the employee hence taxable, further that the additional un paid taxes (PAYE) arising from the benefit in kind are proper hence the interest computed on the said taxes are proper as well. He insisted that PAYE treated as benefit in kind is the tax payable by employees for which the employer is an agent obliged to collect the said tax and remit the same to the respondent failure of which the agent is liable to pay the tax. Respondent prays for dismissal of the appeal with costs.

Mr. Malima learned advocate submitted that in terms of section 110(2) and 111 of the Evidence Act Cap 6 RE 2002 it is the law of this country that he who alleges must prove. The appellant withheld part of its employee's salary and remitted it to the respondent as income from employment (PAYE) and the respondent received the amount. The respondent argues

that the said amount remitted by the appellant is not income from employment (PAYE) but rather a benefit to the employees. It follows therefore that the respondent has a duty and obligation to prove the amount remitted by the appellant is not employment tax as it is provided under sections 7(2)(f) and 81(1) of ITA, Cap 332 RE 2006 but rather a benefit to an employee as per section 27 of ITA.

He stated further that as indicated in exhibit A3 through appendices 3(a) and 3(b) the respondent admits that a certain sum of money was paid as PAYE and then continues to conclude that the said amount is not PAYE tax but rather a benefit to those employees. The respondent has no evidence to warrant his assertion. He explained that the income from employment is provided for under section 7, 27 and 81 of Income Tax Act Cap 332 whereby it is the law that the income tax from employment which is due and payable by the employee is paid by the employer through the mechanism under section 81 of the same Act known as withholding. Through the mechanism the employer is required to deduct the income from employment tax from the employee before paying the salary to the employee, meaning that the employees receives a net salary which means that the salary received by the employee has already suffered the tax due.

He insisted that in terms of section 84(4) of ITA Cap 332 the employer as a withholding agent if he fails to deduct income from the employment of the employee he is liable to pay the same. In the instant case the employer had two expatriate. It was the duty of the employer to ensure that it deducts and remits the income tax due and payable to the respondent. As

per appendices 3(a) and 3(b) to exhibit A_3 the appellant did so. Only the respondent is charging that the amount remitted by the appellant does not constitute income from employment but a benefit. The respondent has no evidence to show on what grounds the said remitted amount has turned from being PAYE to benefits to employees.

He insisted that to prove that the amount paid by the appellant as exhibited under appendices 3(a) and 3(b) is not PAYE the respondent must show that the said amount does not constitute part of the salary of the employees, withheld and remitted by the appellant to the respondent. There is no evidence presented by the respondent to show the same hence in the absence of evidence then the respondent's findings are erroneous under the law and ought to be quashed.

He insisted that auditors learnt that PAYE tax was shouldered by the employees an employee was guaranteed a certain fixed amount of take home pay on a free of tax basis. In that arrangement the employee received full employment remuneration exclusive of any taxes which is contrary to the provisions of section 7 of Income Tax Act, 2004. Tax auditors had revised employment tax (PAYE) computations on a free tax basis by incorporating tax paid by the company as part of taxable benefits and established additional tax per appendices 3(a) and 3(b). He stated that in the above findings there is no mention of the basis of the said findings by the auditors hence the conclusions are not warranted. They avers that the appellant withheld PAYE from the employees salary and remitted to the respondent hence the respondent failed to adduce evidence to show that

the amount withheld by the appellant and remitted to the respondent was not PAYE. Therefore it is contrary that he who alleges must prove. They referred the **case of Commissioner General Versus National Social Security Fund (2005**) TLLR 54. They also referred the case of **Dr. Wilbert B. Kapinga versus Commissioner General (2005) TTLR 27** in which it was held that the Commissioner General is duty bound to give reason for his decision. It follows that the first and second issues must be answered in the affirmative and in respect of the third issue the appellant is entitled to declaration that the additional PAYE tax claimed by the respondent is bad at law and the same ought to be quashed and set aside.

They humbly pray the Board to grant all the orders sought in the statement of appeal which are declatory order that the respondent's additional income from employment (PAYE) liability of Tshs. 182,889,617 and the interest thereon to the tune of Tshs. 304,715,367.93 on the appellant's expatriates employees salaries for the years 2008,2009 and 2010 is erroneous. He requested the PAYE certificates/interest number P. 24/07/2014 be quashed.

In reply submission Mr. Noah Tito legal counsel for the respondent submitted that the burden of proof on the issue is on the appellant in terms of section 18(2)(b) of the Tax Revenue Appeals Act Cap 408 RE 2010 and not otherwise.

He stated that the appellant's submission in paragraphs 8,10,11 and 12 show that the only evidence that the appellant is relying upon is appendices 3(a) and 3(b) (exhibit A_3) which is the respondent's audit

findings. The appellant claims that the appendices prove that the appellant deducted PAYE from employees salaries hence it is the duty of the respondent to prove the contrary otherwise the respondent findings are erroneous. They stated further that though appendices 3(a) and 3(b) show that PAYE was remitted to the respondent yet the appendices are not the evidence for the appellant to prove that PAYE was deducted from the employees' salaries.

The reasons are that the appendices are the workings of the respondent which support the key audit finding at paragraph 3 of exhibit A3 that the appellant paid tax free salaries to employees and paid PAYE from its own income for such employee. There is no merit for the appellant to interpret the respondent's audit findings as evidence hence the appellant has failed to present evidence that challenges the respondent's audit findings. Also the appellant's response to the audit finding marked as exhibit A_4 and A_5 which is the letter by KPMG dated 20th February 2014 does not dispute the audit findings on tax free salaries. The appellant disputes an exclusion of NSSF contributions in computing taxable salaries of the employees in relation to this appeal. Further the appellant disputes the method of computing PAYE and insists that such additional PAYE be allowed as deductible expenditure from the appellant's taxable income so as to avoid double taxation.

He explained that note of discussion between the parties an email correspondence in relation to the note of discussion both marked as exhibit A6 the appellant never disputed the audit findings in relation to payment of

PAYE for employees. The appellant disputed the additional PAYE computation method insisted that the PAYE was an allowable deduction from its taxable income so to avoid double taxation.

He insisted that the appellant was supposed to present the evidence to prove that PAYE was deducted from the employees which includes among others employees contracts of employment which are records of the appellant, salary slips of the employees which indicate gross salary, net salaries and deductions including PAYE evermore evidence include Payroll record which indicate gross salary of each employee, deductions including PAYE and net salaries. They would assist the Board to resolve the dispute regarding deduction of PAYE. Therefore the appellant failed to present the evidence as stated herein and therefore failed to discharge the onus of proof. They submitted that the case of **Commissioner General versus National Social Security Fund** referred to by the appellant supports the respondent to the effect that the audit findings appendices, notes of discussion and correspondences annexed to the appellant's statement of appeal make it clear reasons and computation of the additional PAYE liability.

They insist that PAYE that was not deducted from the employees' salaries but paid by the appellant for employees was taxable benefit hence the respondent was right in assessing additional PAYE on such benefit such assertion was made clear in the case of **Geita Gold Mining versus Commissioner General (2004) 2 TTL at page 104** that tax paid by an employer on behalf of employee was a taxable benefit and the position is

supported by the decision of the Board in the case of Pan African Energy Tanzania Limited versus Commissioner General appeal number 17/2014.

He further contended that as the appellant did not submit on the second issue it is obviously that he conceded to the respondent's computation of additional PAYE hence the issue is no longer in dispute.

Therefore they pray the appeal be dismissed with costs and appellant be ordered to pay the additional statutory and commercial interest on the tax liability from the date when the PAYE certificate for demand of the tax was served upon the appellant to the date upon payment of the said tax liability.

In rejoinder submission Mr. Malima learned advocate states that the counsel for the respondent conceded that PAYE was remitted to the respondent hence no dispute to that assertions but unfortunately the respondent's counsel all over the sudden argues that the amount remitted was not PAYE but a taxable benefit. There is no evidence at all presented by the respondent to show that the amount of PAYE remitted by the appellant to the respondent was not income from employment for the two employees but a taxable benefits in the hands of those employees and therefore in terms of section 81 of the Income Tax Act, the appellant was duty bound to withhold part of the payment as taxable benefit. The submission by the respondent's counsel is a contradiction of terms with inconsistent.

He insisted that there is distinction between PAYE and payments characterized as taxable benefit payments. Salary or wages in terms of section 7(2) of the Income Tax Act Cap 332 are taxed under progressive rates provided under section 4 of Income Tax Act and paragraph 1(1) and 4(6) of the first schedule of the same statute whereas taxable benefit are not taxed under the same rules. They do not fall under the progressive tax rates provided for under paragraph 1 of the first schedule of the Income Tax Act. They fall under paragraph 4(1) of the first schedule and the applicable vote is a flat rate of 15 or under the rules of qualification as provided under section 27 of the same Act. He avers that while payments like salary which automatically leads to PAYE falls under a progressive tax rate, other payments which are categorized as taxable benefits do not fall under a progressive tax rate. The two are different hence none can be a substitute for the other.

He insisted that the appellant presented employees contracts, salary slips and payroll records to the respondent during the audit on basis of those documents the respondent was able to generate and produce exhibit A3 which are appendices 3(a) and 3(b) hence the respondent was satisfied that the PAYE was dully remitted.

He insisted that if the respondent believes in what is stated in exhibit A3 appendices 3(a) and 3(b) then it is conceding that PAYE was dully remitted by the appellant and if the respondent does not believe so then he is illegally and unconstitutionally imposing tax liability to tax payer. In

contrary the respondent does not show why PAYE remitted to respondent is not PAYE but a taxable benefit.

They reiterated their submission in chief and went ahead stating that the cases cited by the respondent in their reply submission are distinguishable from the instant case. He requested their prayers be granted as prayed.

Issues which were agreed upon by the parties are:-

1. Whether the appellant withheld pay as you earn (PAYE) from the employees salaries subject to this appeal and remitted the same to be respondent.
2. If the answer to issue number 1 is no whether the respondent's calculations of the PAYE was legal and justifiable.
3. To what reliefs are the parties entitled.

The Board carefully reads the statement of appeal brought by the appellant and also went through the written submissions filled by both parties and found that the dispute among the parties arises due to the action of respondent issuing PAYE certificate/interest on 23rd July 2014 which had additional PAYE tax composing of principal amount Tshs. 241,916,672.46 and interest thereon of Tshs. 304, 715,367.93 for the years of income 2008, 2009 and 2010.

Now the question is whether the appellant withheld PAYE from the employees salaries subject to this appeal and remitted the same to the respondent.

Section 81(1) of the Income Tax Act 2004 states:-

> **" A resident employer who makes a payment that is to be included in calculating the chargeable income of an employee from the employment shall withhold income tax from payment at the rate provided for in paragraph 4(a) of the first schedule.**

(2) **"The obligation of an employer to withhold income tax under subsection (1) shall not be reduced or extinguished because the employer has a right or is under an obligation to deduct and withhold any other amount from the payment or because of any other law that provides that an employees income from employment shall not be reduced or subject to attachment.**

Further that section 7(1) of the Income Tax Act 2004 clearly states

> **" An individual's income from an employment for a year of income shall be the individuals gains or profits from the employment of the individual for the year of income"**

Also that section 7(2) (a-g) the Income Tax Act 2004 clearly provides for all payments which are subject to deductions by the employers.

Upon carefully reading the submissions filed by both parties the Board noted that the appellant and the respondent did not dispute the fact that the PAYE paid by the appellant and remitted to the respondent was not deducted from the appellant's two expatriates namely Mr. Alex Katundu and Mr. Prabhakara Rai salaries and that the PAYE was paid from the

appellant's business income as the appellant admits to have paid the PAYE on behalf of its employees.

Therefore it goes without saying that the appellant did not withhold the PAYE from its employees salaries subject to this appeal instead the appellant paid PAYE from his business income and remitted to the respondent hence contrary to section 8 and 7 of the Income Tax Act 2004. The fact that the appellant paid the same from his business it follows therefore income from employees did not bear the taxes hence it was a perpetuation of benefit to an employee that is why it is supposed to be taxed up to last cent of benefit.

The Income Tax Act of 2004 requires an employer to deduct tax from the total emoluments paid to employees. In our instant case the tax paid by the appellant on behalf of its employees was a benefit to such employees that ought to have been taxed but it was not taxed.

The Board upon careful perusal of the submissions and documents filed by the appellant is of the findings that the appellant rely on exhibit A_3 which is the respondent's audit findings for the years of income 2008-2010 to show that PAYE was remitted to the respondent but with one respect this Board would like to put it clear that such exhibit A3 is not the evidence for the appellant to prove that PAYE was deducted from employees salaries.

In the case of Williamson Diamonds Ltd versus Commissioner General Income Tax Appeal no 4 of 2008, The Tax Revenue Appeal Tribunal held that" In terms of section 18(2)(b) of the Tax

Revenue Appeals Act 2000 the burden of proving that the assessment issued by the respondent is excessive or erroneous lies on the taxpayer(appellant) and no way it be shifted to the respondent: therefore the Board was right when it held that the respondent commissioner General was not bound to seek verification from the Regulatory authority Government Agency or elsewhere to establish whether the variations submitted by the appellant were correct."

As per the cited case above in relation to the instant case, in terms of section 18(2) (b) of the Tax Revenue Appeals Act Cap 408 RE 2010 it was upon the appellant to present evidence especially employees contracts of employment, salary slips as well as payroll record so that this Board would determine whether PAYE was deducted from salaries of the employees or not. Therefore the appellant has failed to prove that the respondent's final assessed certificate/interest no p/24/07/2014 was excessive or erroneous.

Appellant submitted that employees contracts, salary slips and payroll records were made available during the audit and on the basis of those documents the respondent was able to generate exhibit A_3 which is the respondent's audit findings. On the other hand the respondent denied the appellant's assertion to the effect that such documents were not presented to prove that PAYE was deducted from the appellant's employees.

Therefore the board is of the finding that the stated documents were material documents which ought to have been appended to the statement of appeal and tendered as part of appellant's evidence. As the stated

documents were not presented to the Board, the appellant failed to discharge the onus of proof to challenge the respondent audit findings to the effect that the PAYE paid by the appellant was not deducted from employees salaries.

The Board perused exhibit A_4 which is a letter by KPMG dated 20th February 2014, exhibit A_5 which is also a letter by KPMG dated 21st May 2014 and exhibit A_6 which is a note of discussion between the appellant and respondent but nothing shown to prove that the PAYE was deducted from the employees salaries

The appellant alleged to have acted as withholding agent as required under section 84(4) of the Income Tax Act 2004 which confirm the fact that the appellant did not withhold PAYE from its employees salaries but paid on their behalf contrary to the Income Tax Act 2004.

Therefore as per the evidence adduced this Board is of collective finding that the appellant failed to withhold PAYE from the employees salaries subject to this appeal and remit the same to the respondent.

Another issue is if the answer number 1 is no whether the respondent's calculations of the PAYE was legal and justifiable.

The appellant claims that the PAYE paid by the appellant and remitted to the respondent on behalf of its expatriate employees is not taxable benefits as the stated PAYE was withheld from employees salaries. He insisted that the additional PAYE claimed by the respondent for the years 2008-2010 is erroneous and that interest charged thereon is erroneous too for being

based on wrong tax base. Therefore they are not liable to additional PAYE plus interest.

On the complete rebuttal to appellant's assertion the respondent avers that the amount paid by the appellant was not withheld from the appellant's expatriates salaries hence a benefit granted to them hence has to be taxed and it is the appellant's obligation to prove that the amount was deducted from the employees salaries by producing evidence of salary slips, payroll computations and employees contracts of employment. He insisted that the appellant paid free of tax salaries it was contrary to section 7 of the Income Tax Act hence the respondent was right to revise employment tax computations by incorporating tax paid by the appellant as part of taxable benefits hence establishment of additional taxes and interest.

The Board wants to put it clear that the appellant (Chevron Tanzania Limited) is incorporated under the laws of Tanzania. That being the case it is obvious that they are bound to comply with our laws (provisions of income Tax Act 2004 and be guided by the employer's guide to PAYE and not otherwise. Therefore the appellant is bound by the PAYE guide in deducting PAYE tax from the employee's salaries and emoluments.

This Board strongly concurs with the respondent's assertion that the amount paid by the appellant was not withheld from its expatriates salaries therefore they had been paid free of tax salaries hence a benefit to them which must be taxed. As the appellant failed to provide the evidence to the contrary therefore the Board is hereby satisfied that the respondent's calculation of PAYE was legal and justifiable.

In the upshot therefore we hold that the appeal lacks merit and he is hereby dismissed. No order as to costs.

Hon. A.W. Mmbando, Vice Chairperson- Sgd

Mr. D.K. Pabari, Board Member- Sgd

Mr. V.U. Lyapa, Board Member- Sgd

02/11/2015

Judgment delivered this 02nd November, 2015 in presence of Peter Kanua and Denis Tumaini for the appellant and Mrs. Joyce Sojo, for the respondent.

Board: Right to appeal fully explained

Hon. A.W. Mmbando, Vice Chairperson- Sgd

Mr. D.K. Pabari, Board Member- Sgd

Mr. V.U. Lyapa, Board Member- Sgd

02/11/2015

Certified Copy of the Original
Proceedings, Judgement rulling, Order

Chairperson .....

V/Chairperson .....

Board members (1) .....

(2) .....

Date: 26/11/16