IN THE COURT OF APPEAL OF TANZANIA

AT DAR-ES-SALAAM

(CORAM: MASSATI, J.A., JUMA, J.A., And MUGASHA, J.A.)

CIVIL APPEAL NO.125 OF 2015

BP TANZANIA.....APPELLANT

VERSUS

THE COMMISSIONER GENERAL OF THE

TANZANIA REVENUE AUTHORITY.....RESPONDENT

(Appeal from the judgment and Order of the Tax Revenue Appeals Tribunal at Dar-es-Salaam)

(HUSSEIN MATAKA - VICE CHAIRMAN)

dated the 18th day of February, 2015
in
Tax Revenue Appeal No 6 of 2014

.....

JUDGMENT OF THE COURT

15th & 29th February, 2016

MUGASHA, J.A.:

The appellant BP Tanzania Ltd is a licensed oil company which markets and distributes petroleum products. On 24th November, 2009, the Respondent's Large Tax Payers Department conducted a tax audit on the appellant. The audit covered among other things, withholding tax for the financial years 2007 to 2008 regarding payments made by the appellant to non-resident companies in respect of services rendered to her.

Payments were made to BP International and BP South Africa as follows:-

1. ISP Global Charges in respect of Accounting Package that was used by BP globally which had the server in London and the appellant's employees accessed the server by using a pass word and a satellite dish supplied by a local provider.
2. Application System Support based and provided by BP South Africa whereby, in case of any technical difficulty the appellant's employee would make a phone call to South Africa and be assisted on how to sort out the problem.
3. Application System Licenses fees paid to suppliers of accounting packages installed in the server in London and were accessed by the appellant using a satellite dish from Dar- es- Salaam.
4. Information technology service fees to the BP International internet system which has a server in London and accessible to BP employees worldwide.

Also the appellant paid consulting professional fees to AON South Africa which availed the appellant support in respect of a Fund to which employees were contributing their salaries. The Fund was managed in

South Africa and on monthly basis the Fund would send emails to AON South Africa to do the accounting of the Fund.

Pursuant to the 2007 – 2008 audit exercise, the respondent concluded that, the appellant had withholding tax liability of Tshs. 477,776,665/= constituting principal tax liability of Tshs. 340,041,024/= and interest of Tshs. 137,735,641/=. The appellant was issued with a withholding Tax Certificate/Interest number WHT/MAT/4/9/10 thereupon the respondent demanded the respective withholding tax be paid by the appellant.

The appellant challenged the demand to the withholding tax liability on ground that, services were rendered by non-resident companies and payment effected by the appellant was not subject to withholding tax because payments and the services in question were on licence fees and sourced outside Tanzania. The appellant was not successful in both the Tax Appeals Board (The Board) and the Tax Revenue Appeals Tribunal (The Tribunal) hence this appeal with following grounds:-

a) That the Tribunal erred by deciding that services rendered by ISP Global Charges, Application System Support; Application System licenses; IT Service Fees and Other Consulting Professional fees are royalties and subject to the provisions of section 69 (e) of the Income Tax Act, 2004.

b) In the alternative and without prejudice, if the charges are royalties under the terms of Income Tax Act, 2004, then the Tribunal erred by deciding that the said payments were made in respect of assets in the United Republic of Tanzania.

The appellant was represented by Ms. Fatuma Karume, learned counsel whereas Mr. Salim Beleko, learned counsel represented the Respondent.

The hearing of the appeal was preceded by a preliminary objection raised by the respondent on the competence of the appeal on ground that, the record of appeal is accompanied by defective Judgment and Decree not signed and certified by the members of the Tribunal contrary to rule 21 of the Tax Revenue Appeals Rules, 2001 (GN. 58 of 2001). (Tax Appeals Rules).

Arguing the preliminary objection, Mr. Beleko submitted that, the Judgment of the Tribunal appearing at page 342 of the record was not signed by all the members. However, he did not make any submission on the defect in the Decree as reiterated in the notice of the Preliminary Objection. He urged the Court to strike out the appeal because it was incompetent.

On the other hand, Ms. Karume challenged the Preliminary Objection arguing that, Rule 21 of the Tax Appeals Rules was complied with because the original Judgment of the Tribunal was signed and certified by all its members. As such, she urged the Court to dismiss the preliminary objection with costs.

Rule 21 (1) of the Tax Appeals Rules, provides as follows:-

> *"After the conclusion of the hearing of the evidence and submissions of the parties the Tribunal shall, as soon as is practicable, make a decision in the presence of the parties or their advocates or representatives and shall cause a copy dully signed and certified by members of the Tribunal which heard the appeal to be served on each party to the proceeding".*

In terms of the cited Rule, the decision of the Tribunal must be signed and certified by all members. In the matter at hand, at page 342 of the record is the last page of the Tribunals' Judgement dated 18/02/2015 with abbreviation *'Sgd'* beside the name and the title of each member of the Tribunal who are: H. M. Mataka Vice Chairman, Mr. W. Ndyetabula, and Prof. J. Doriye. The decision was on 11/3/2015 certified by the same members. The Decree was signed by all the members but not certified.

It is our considered view that, the certification of the judgment of the Tribunal by all members of the Tribunal, signifies that those members did authenticate the decision delivered on 18/02/2015 while the decree bears signatures of all the Tribunal Members. As such, rule 21 (1) GN. 56 of 2001 was substantially complied with. If the Judgment and Decree were not entirely signed by the members, that would have been a serious omission impacting on validity and authenticity of the decision of the Tribunal. In this regard, we are satisfied that the competence of the appeal is not affected and we dismiss the preliminary point of objection.

Reverting to the substantive appeal, adopting what she submitted before the Tribunal, Ms. Karume stated that, the obligation on a resident tax payer to withhold tax is provided under sections 81 to 83 of the of Income Tax Act, 2004 and as specified in the schedule to the Act. She argued that, in terms of the law four conditions must be satisfied before imposing liability to withhold tax:-

a. The tax payer must be a resident person.
b. The payment must be dividend, interest, natural resource payments, rent, royalty or a retirement payment made by an approved retirement Fund.

c. The payment must have a source in the United Republic of Tanzania, and

d. The payment is not one which is excluded in terms of section 82 (2) of the Income Tax Act, 2004.

She further submitted that, services rendered to the appellant by the nonresident companies do not have a source in the United Republic of Tanzania and as such, the appellant was not obliged to withhold tax when she made payments for the respective services.

Relying on section 69 (e) of the Income Tax Act, (*supra*), Ms. Karume was of the view that, as long as the services were rendered from London and South Africa where servers/assets are located, the appellant could not in the course of making payments withhold tax because the appellant did not use an asset situated in the United Republic of Tanzania. In this regard, Ms. Karume argued that, the Tribunal erred to decide that the asset is BP Tanzania (the appellant on which services were rendered).

Regarding other Consulting Professional Fees, Ms. Karume submitted that, the Tribunal erred to dismiss the entire appeal despite deliberating that, the appellant was not obliged to withhold tax on consulting Professional fees on the Provident Fund of BP employees

managed in South Africa which was conceded by the respondent's official.

On the other hand, Mr. Beleko challenged the appeal and argued the two grounds together. He submitted that, the appellant was rendered services from BP International and BP South Africa and that is why she was charged royalty for using and enjoying services of the nonresident companies. Thus, in terms of section 82 (1) (c) the appellant was an agent and ought to have withheld money on payment made to foreign companies for services rendered to her in Tanzania. He added that, in the event the appellant did not withhold tax, she is obliged to pay the withheld tax from payments made for services consumed by the appellant while in the United Republic of Tanzania. Mr. Beleko urged the Court to dismiss the appeal with costs.

In rejoinder, Ms. Karume reiterated that, under section 69 (e) of the Income Tax Act requires that, the asset from which the service is sourced must be situated in Tanzania and not otherwise.

The issues for determination are whether payment by the appellant to non-resident companies for services rendered to her is royalty and if such payment has a source in the United Republic.

In the United Republic of Tanzania, the obligation to pay tax is a creature of section 6 (1) (a) (b) of the Income Tax Act (supra) which states:-

> "....6 (1)-Subject *to the provisions of subsection (2), the chargeable income of a person for the year of income from any employment, business or investment shall be:*
>
> *(a) in the case of a resident person, the persons income from employment, business or investment for the year of income irrespective of the source of income; and*
>
> *(b) in the case of a non-resident person, the person's income from employment, business or investment for the year of income, but only to the extent that the income has a source in the United Republic...."*

According to the cited provision, a non-resident person can be charged tax from an undertaking provided that the income has a source in the United Republic. Section 69 of the Income Tax Act (supra), defines and enlists what constitutes payments that have a source in the United Republic. The relevant provision in our case is section 69(e) which states:

"The following payments have a source in the United Republic of Tanzania:

(a) .....not applicable;

(b) .....not applicable;

(c) .....not applicable;

(d) .....not applicable;

(e) Royalties paid for the use of, right to use or forbearance from using an asset in the United Republic".

Section 3 of the Income Tax Act, 2004, which is the interpretation provision defines words 'royalty' as follows:-

'Royalty' means any payment made by the lessee under a lease of an intangible asset and includes payment for:-

(a) The use of, or the right to use, a copyright, patent, design, model, plan, secret formula or process or trade mark;

(b) The supply of know how including information concerning industrial, commercial or scientific equipment or experience;

(c) the use of, or right to use, a cinematography film, video tape, sound recording or any other like medium;

(d) The use of, or right to use, industrial, commercial or scientific equipment;

(e) The supply of assistance ancillary to a matter referred to in paragraphs (a) to (d);

(f) A total or partial forbearance with respect to a matter referred to in paragraphs (a) to (e).

But excludes a natural resource payment;"

A similar definition of royalty is found in Royalties Article 12 of July, 2008 Edition of the UN Organisation for Economic Development and Cooperation (OECD) Model Convention on Income and on Capital as follows:-

"The term 'royalties' ... means payments of any kind received as consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience".

In the Indian case of **CIT vs AHMEDABAD MANUFACTURING AND CALICO PRINTING CO (1983) 139 ITR 806,** royalty is defined as:

"A sum payable for the right to use some else's property/ asset for the purpose of gain."

In a nutshell, royalty is a payment for the use of or the right to use something that does not belong to the payer and this may well relate to the right to use intangible property as defined under section 3 of the Income Tax Act (*supra*).

In the matter at hand, except for the professional consulting professional fees, in terms of sections 3 and 69(e) of the Income Tax Act (*supra*) the appellant who is the resident tax payer in the United Republic paid royalty to foreign companies which rendered services to the appellant.

The contentious remaining issue is whether the royalty payment has a source in the United Republic so as to attract withholding tax as claimed by the respondent.

In an article titled International Taxation- **Royalty and Fees for Technical Services by Chhaya Desai**, discusses sections 5 and 9 of the India Income Tax on the overall taxability under domestic law in that, nonresidents are liable to tax on:

(a) income received or deemed to be received in India, and

(b) Income which accrues or arises or deemed to accrue or arise in India.

Furthermore, income by way of Fees for Technical services would be taxable in India if payable to the non-resident. This position is further clarified in an Article by Deloitte International on Positive Developments for corporate withholding Tax in India which states:

> *"When a nonresident company provides services to a local company, the invoiced amount will often be subject to a tax withholding applied at source by the customer. This withholding is the remitted to the local tax authorities .....".*

The taxability of technical, managerial or consulting services provided by foreign companies to the Indian clients performed outside India was an issue before the Supreme Court of India in the case of **Ishikawajima Harima Heavy Industries** (288 ITR 408).

Foreign Companies were taking a stand that such services should not be taxable in India, since they were not performed in India and had no territorial nexus with India. The apex Court held that:-

> *"Services should be rendered as well as used in India for being taxed in India. If both conditions are not fulfilled, the*

fees for the technical services are not chargeable to tax in India."

The exemption to charge withholding tax in India is where there is a Treaty with the Country where the foreign companies are resident.

In in Kenya, Royalties if paid to a nonresident are subject to withholding tax of 20% **(Delloitte International).**

Thus, in a nutshell; payment of royalty to a nonresident and subjecting the same to withholding tax is a well-established phenomenon at the global level in a specified legal framework. We have deliberately cited some examples to amplify that subjecting payment of royalties to withholding tax for the obvious reason of ensuring that income derived from business is taxed at the source and the Local Tax Collection Authority imposes and collects the requisite taxes and that this issue is a global issue.

In the United Republic of Tanzania, such practice is structured in statute whereby royalty and technical service fee paid to non-residents is subject to withholding tax if the payment is sourced in the United Republic of Tanzania. This is pursuant to sections 82 (1) (a) and 83 (1) (b) of the Income Tax Act, 2004. Similarly, the duty is imposed on a resident tax

payer to withhold tax under sections 82(1) (b) and 83 (1) (b) of the Income Tax Act, 2004 at a rate specified in the First Schedule to the Act.

There is no dispute that, the servers of non-resident companies which rendered services to the appellant are physically located in London and the Republic of South Africa. The appellant accessed and enjoyed the requisite services while in Tanzania.

The contentious issue is that since the servers/assets are not in the United Republic, Ms. Karume argues that imposition of withholding tax is not according to the law. With due respect, the contention put forward by Ms. Karume that because the servers/assets are not in the United Republic no withholding tax is payable has no legal basis.

Like it was the case in the Tax Appeals Board and the Tax Appeals Tribunal, before us, Ms. Karume reiterated that, the interpretation of section 69 (e) of the Income Tax Act is to the effect that servers ought to have been situated in the United Republic so as to attract withholding tax when paying for service rendered by the non-residents companies.

Ms. Karume repeated what she submitted in the Tribunal as to what constituted true construction of section 69(e) of the Income Tax Act (supra). It is imperative to reproduce what is contained at page 237 of the record:-

*"Section 69(e) of the Income Tax Act 2004, does not contain the word **"situated in"** but in its true construction/meaning the section means "withholding tax is due on royalties paid for the use of, right to use or forbearance from using an asset **inside or within** the United Republic" and clearly there is little difference in the English language between saying that an asset is in the United Republic; or an asset is inside the United Republic; or an asset is within the United Republic or an asset is situated in the United Republic".*

Having carefully examined section 69 (e) of the Income Tax Act, 2004 and the couched immediate quoted submission, we are not in agreement with the interpretation given by Ms. Karume for what will be unveiled in the due course.

For the sake of clarity, it is imperative to make a comparison of items which under section 69(1) (a) to (e) constitute payments which have a source in the United Republic to see if the word *'situated'* which does not appear in section 69 (e) was intended or it was deliberately omitted for a purpose.

"The following payments have a source in the United Republic of Tanzania:-

(a) Dividends paid by a resident corporation;

(b) Interest paid by a resident person or domestic permanent establishment;

(c)Natural resource payments made in respect of or calculated by reference to natural resources taken from land or the sea ***situated*** *in the United Republic of Tanzania or its territorial waters;*

(d) Rent paid for the use of, right to use or forbearance from using an ***asset situated*** *in the United Republic;*

(e) ***Royalties*** *paid for use of, right to use or forbearance from using an* ***asset*** *in the United Republic of Tanzania;"*

As the word "situated" is not in section 69(e) as presupposed by Ms. Karume, the physical presence of the servers or assets in the United Republic is not necessary for payment to access right to use to qualify as sourced in the United Republic.

In **REPUBLIC VERSUS MWESIGE GEOFREY AND ANOTHER, CRIMINAL APPEAL NO 355 OF 2014** (Unreported) when discussing the familiar canon of statutory construction this Court quoted with approval the decisions of the US Supreme Court as follows:

In **CONSUMER PRODUCTS SAFETY COMMISSION et.al V GTE SLYVANIA, Inc. et. Al 227 U.S. 102 (1980):** "with the familiar canon of statutory construction the starting point for interpreting the statute is the language of the statute itself. Absenting a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive" The same Court went further and held that it a statute's language is plain and clear"

> *"the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion".*

In **CAMINETTI V. UNITED STATES, 242 U.S 470 (1917)** the court categorically ruled that:

> *"It is elementary that the meaning of a statute must in the first instance, be sought in the language which the act is framed, and if it is plain..... the sole function of the courts is to enforce it according to its terms*

In **REPUBLIC VERSUS MWESIGE GEOFREY AND ANOTHER,** this Court ruled that: when the words of a statute are unambiguous," judicial inquiry is complete" there is no need for interpolations, lest we stray into the exclusive preserve of the legislature under the cloak of overzealous interpretation. This because:-

"courts must presume that a legislature says in a statute what it means and means in a statute what it says: **CONNECTICUT NAT'L BANK v GERMAIN, 112 s. Ct 1146, 1149 (1992).**

In the light of cited decisions, section 69 (e) does not require physical presence of the non-resident service provider in the United Republic. In our considered view, in section 69(e) the word **'situated'** was not intended and that is why it is not in that provision. The word situated was intended in 69(c) and (d) and that is why it is expressly stated in that provision. The wording of section 69 (1) (e) lists down services obtained from outside and utilised in the United Republic of Tanzania which requires the user to pay for the use did not envisage the physical presence of the service provider as an asset in the United Republic of Tanzania. What is required to be proved is use of, or the right to use the software including the grant of a licence irrespective of whether any right or property is located in the United Republic.

In the premises, the focus in the construction of section 69(e) of the Income Tax Act (*supra*) is whether the payment of a royalty was for the purposes of business, or earning any income from any source in the United Republic or services are utilized in Tanzania. The moment these

conditions are met, irrespective of whether payment is done by a resident or non-resident, the income would be taxable in the United Republic. Also irrespective of the place of rendering services, if utilized in United Republic shall be taxable in the United Republic. Besides, royalty is payable for the right to use someone else's property for the purpose of gain as reiterated **CIT vs AHMEDABAD MANUFACTURING AND CALICO PRINTING CO. (1983) 139 ITR 806.**

The word **"situated"** as solicited by Ms. Karume is indeed contrary to the interpretation of Tax Legislation which requires Tax Law to be read as it is and one should not attempt to smuggle in the words not intended to avoid setting dangerous precedents. In the premises, the Tribunal erred to determine that the asset in question for the purposes of section 69(1) (e) is BP Tanzania (the appellant company). The assets in the context of the law are servers in Britain and Republic of South Africa where nonresident companies are located from which the appellant accessed and enjoyed services in the United Republic to do his business.

In the premises, we are satisfied that, the appellant made payments of royalty to BP International and BP South Africa have a source in the United Republic and as such, the appellant ought to have withheld tax of

in the financial years 2007 to 2008 in respect of ISP Global Charges; Application System Support; Application System Licences and IT Service Fees. As the appellant did not withhold tax he must pay the unwithheld tax.

Regarding payments for other consulting professional fees, the non-payment of the withholding tax it was not contested by the respondent as correctly deliberated by the Tribunal but had the entire appeal dismissed. Considering that, the Provident Fund to which the employees made contributions was managed in South Africa where the consulting professional services were rendered then; the withholding tax was wrongly demanded.

Therefore, the grounds that payments by the appellant to non-resident companies were not subject to withholding tax because the payments for the services in question were sourced outside the United Republic and on licence fees is not merited are hereby dismissed.

Another issue is in respect of the withholding of the BP Provident Fund. As correctly submitted by Ms. Karume in her submission before the Appellate Tribunal, it is true that the Tanzania Revenue Authority did not dispute that it was not correct to withhold tax in respect of the BP Provident Fund.

Notably, as rightly submitted by the appellant's counsel in the appeal before the Appellate Tax Tribunal, the Provident Fund is a collection of employees' money for the welfare of the employees. Normally, Provident Funds is a portion channeled for employees' benefits after taxing the employee's basic salary. In other words, a remittance to the Provident Fund arises after the basic salary is taxed. Even though the money accumulated in the Provident Fund may be invested elsewhere, the right to impose tax only arises at the point when such investment is landed in the United Republic or rather revolves within the United Republic as a royalty in respect of payments which have a source in the United Republic. In the event this issue was conceded by the respondent, the dismissed ground of appeal succeeds to that extent in the interest of justice.

It is in that ground we hold improper to withhold tax in respect of the Provident Fund. Such ground dismissed by the Appellate Tax Tribunal succeeds to that extent in the interest of justice. In view of the aforesaid, we partly allow the appeal.

Payments by the appellant to BP International and BP South Africa have a source in the United Republic and are subject to withholding tax payable in the United Republic. As such, the appellant must pay the

withheld tax of in the financial years 2007 to 2008 in respect of ISP Global Charges; Application System Support; Application System Licences and IT Service Fees. The two grounds of appeal raised by the appellant are hereby dismissed.

DATED at **DAR ES SALAAM** this 26th day of February, 2016

S.A MASSATI
JUSTICE OF APPEAL

I.H.JUMA
JUSTICE OF APPEAL

S.E.A.MUGASHA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

B. R. NYAKI
DEPUTY REGISTRAR
COURT OF APPEAL