E (PRIVATE) LIMITED
versus
ZIMBABWE REVENUE AUTHORITY

SPECIAL COURT FOR INCOME TAX APPEALS
ZIYAMBI AJ
HARARE, 8 July 2021, 6 January 2022

Income Tax Appeal

M. Mbuyisa, for the appellant
S. Bhebhe, for the respondent

ZIYAMBI AJ:

[1] This appeal is brought in terms of s65 of the Income Tax Act [*Chapter 23:06*] (hereinafter called "the Act"). The issues for determination, as agreed by the parties, are:

1. Whether or not the roaming and interconnection fees payable to foreign Telecoms companies by the appellant should be subjected to Non- Residents tax on fees in terms of s 30 as read with the Seventeenth Schedule of the Act;

2. Whether the money paid by the appellant for roaming and interconnection services to non-resident companies in Mauritius, Canada, France, Malaysia, Norway, Poland, South Africa, Sweden and the United Kingdom is taxable in Zimbabwe; and

3. Whether there is a legal basis for the imposition by the respondent of a 5% penalty.

BACKGROUND

[2] The appellant is a licensed telecommunications company in terms of the Postal and Telecommunications Act [*Chapter 12:05*]. The respondent is an administrative body established in terms of the Revenue Authority Act [*Chapter 23:11*] and tasked with the collection of revenues due in terms of the Act, among other things. An audit carried out in 2018 by the respondent on the affairs of the appellant revealed that the appellant had paid fees to several non-resident persons without deducting the withholding tax required by s 30 of the Act as read with the Seventeenth Schedule ("the Schedule") thereto. As a result of the audit, the respondent, on 7 and 27 January, 2020, issued additional withholding tax assessments for the

tax years 2015 - 2018 and levied a penalty of 20%. An objection was lodged by the appellant in terms of s 62 of the Act on the bases that the fees paid to the foreign entities by the appellant were not for technical services as contemplated in the Schedule; the fees were not provided for in the double taxation agreement with Mauritius and as such fell under taxation of business profits which were not subject to taxation in Zimbabwe; and the penalty was unwarranted in the circumstances. That objection having been dismissed save for the penalties which were reduced to 5% from 20%, the appellant lodged this appeal.

I deal with the issues below mindful of the fact that the burden of proof in an appeal of this nature is placed squarely on the appellant by section 63 of the Act which provides as follows:

> **"63 Burden of proof as to exemptions, deductions or abatements**
> In any objection or appeal under this Act, the burden of proof that any amount is exempt from or not liable to the tax or is subject to any deduction in terms of this Act or credit, shall be upon the person claiming such exemption, non-liability, deduction or credit and upon the hearing of any appeal the court shall not reverse or alter any decision of the Commissioner unless it is shown by the appellant that the decision is wrong"

1. Whether or not the roaming and interconnection fees payable to foreign Telecoms companies by the appellant should be subjected to Non- Residents tax on fees in terms of section 30 as read with the Seventeenth Schedule of the Act;

[3] S30 of the Act provides as follows

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

Paragraph (1) of the Seventeenth Schedule of the Act contains the following definition of fees:

> "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—

It is common cause that the appellant paid fees to certain non-resident entities in respect of interconnection and roaming services provided to the appellant by those entities. It is also common cause that the fees emanated from a source within Zimbabwe. The appellant's contention was that the fees paid to the non-resident entities did not fall within the Schedule in that they were not paid for services of a technical nature.

[4] In support of its case, the appellant led evidence from its Product Specialist for Roaming and International Wholesale over the last 10 years. The witness confirmed that on 31 December 2012, the appellant concluded with Liquid Telecommunications Operations Limited ("the entity"), a company incorporated in Mauritius, an agreement termed a 'TRAFFIC TERMINATION, MANAGEMENT AND FACILITIES PROVISION AGREEMENT ("the agreement")in terms of which the appellant is entitled to enjoy interconnection services from the entity. The entity is an international carrier and provides services including the carriage of traffic between mobile telephone operators around the world. The appellant paid interconnection fees to the entity on terms and conditions set out in the agreement. The agreement is still extant and has not been amended. In terms of Clause 4 of the agreement, the entity agreed

> "to provide and maintain the Services, whereby each party may convey calls to each other's network either for termination to their respective destinations in consideration for the Charges and otherwise in accordance with the terms and conditions of this agreement."

Clause 4.4 provides:

> "Each party shall be responsible for the costs of interconnection at its own point of interconnection. Any transmission or other costs relating to the interconnection, if applicable, shall be shared 50:50 in equal proportions. Where satellite and terrestrial fibre optic connectivity has been provided by Liquid for the purpose of interconnection between [the appellant] and third parties' networks, Liquid shall invoice [the appellant] for the full circuit costs. Such circuit costs may be deducted and set off from any amounts due from one party to the other"

'Services' is defined in Clause 1.1.21 as:

> 1.1.21 "Services" shall mean the services to be provided by (the entity) to (the appellant) more particularly described in annexure "A", including, without limitation, all products, facilities, equipment, expertise, know-how, management, systems and software;" (All underlining is mine.)

The witness explained that there is an interconnection between the appellant's network and that of the entity through their switches. The interconnection allows for the movement of voice traffic between the appellant's home network and foreign countries. Thus by virtue of interconnection, a call made by someone in Zimbabwe using the appellant's network can be received in another country. The appellant pays the entity for outbound traffic to be terminated at the destination of the international call. Payment is at a termination rate agreed by the parties and the amount payable is determined by the total minutes of voice calls made by the appellant's customers to international destinations. There was, she emphasised, no human intervention in the trafficking of outbound traffic. However, if there was a system error,

engineers from the appellant or the entity would attend to fixing the error depending on the whether the error occurred within or outside Zimbabwe.

Notwithstanding the title of the agreement and the provision of Clause 1.1.21 (*supra*) the witness was adamant that the services for which the appellant paid fees to the entity were not services of a technical, managerial, administrative or consultative nature. She was at pains to explain the significance of clause 1.1.21 and concluded by saying that regardless of that clause, and the services listed in annexure A of the agreement, the appellant was not provided with all the services as agreed but only with the services provided in paragraphs (e) and (f) of annexure A which provide for:

> "(e) The carrying and routing of all (the appellant's) inbound and outbound international voice and data traffic; and the
> (f) provision of SS7 signalling, roaming and SMS services."

The witness conceded that the switch signalling link involves the use of software which constituted equipment used to carry the signal. She also told the court that the switch signalling links require technical set up and that technical assistance would be required in the event of any faults or malfunction issues. Further, she stated that human intervention was required for maintenance services and system upgrades. However, each party was to provide the technical assistance required for any issues on its own network and used its own engineers to do so.

The witness did not provide all the invoices in respect of which payment was made by the appellant to the non-resident operators. Only 3 invoices from the entity for calls for the months of December 2015, April 2016 and November 2017 were supplied the reason for the non-production of other invoices being stated by the appellant's witness to be that they were not requested. However the letter to the appellant by the Commissioner dated 8 march 2019 at p52 of the r 11 documents appears to suggest otherwise. It states:

> "..You advised the meeting that when ZIMRA requested call data records (CDRs) on 14 January 2014, the company did not comply with the request based on legal advice obtained…As a result, you maintain the position that your company would not avail the CDRs to ZIMRA. The lawyers' letter also clearly articulates this position…."

Neither the call data records nor the remaining invoices were produced to the Commissioner or the Court.

[5] As to the roaming services, the witness stated that upon signature of a roaming agreement, all operators are regulated by the GSM Association. This is an association of mobile telecommunication operators around the world and is responsible for regulating the relationship between its members. The appellant has contractual relationships with 266 mobile operators from different countries in the world. These mobile operators are its roaming partners and are

members of the GSM. By virtue of a standard form roaming agreement which is signed by all members, GSM regulates all roaming services and members are required to implement technical connectivity between operators to allow for the proper functioning of the roaming services. Roaming, the witness explained, allows a customer of the appellant to make and receive calls while in a foreign country. For example, the appellant has a roaming agreement with MTN South Africa ("MTN"). By virtue of this roaming agreement a customer of the appellant visiting South Africa is able to use the MTN network to make and receive calls. Payment for these services to the appellant's customer is made to MTN by the appellant. It is these payments made to MTN and other foreign operators by the appellant which constitute roaming fees.

Because roaming is complex in that it involves minute by minute capturing of data, the GSM requires its members to engage the services of data clearing houses which will be responsible for managing the roaming process. The appellant uses Syniverse as its clearing house. Syniverse does all the data capturing and record keeping for all money due to the appellant from, as well as all money payable by the appellant to, the various roaming partners of the appellant. The appellant receives a monthly invoice from Syniverse for its management services and has always withheld Non Residents' Tax on Fees paid to Syniverse in satisfaction of that invoice. The data processing house, she said, also raises invoices for the roaming fees payable to the Visited Public Network Operators. The witness conceded, when cross examined, that a telecommunications network provider is unable to run a roaming service without technical assistance and engineers.

Submissions by the appellant

[6] It is common cause that the word 'fees' as defined in the Schedule is limited to the service that is provided by the non-resident person. The appellant submitted that since the respondent raised the additional assessments on the basis that interconnection and roaming fees are fees for services of a technical nature, the respondent was estopped from relying on the other adjectives forming part of the meaning of fees such as 'managerial', 'administrative' or 'consultative', that is, the respondent was estopped from changing the basis upon which it levied additional assessments. For this submission reliance was placed on *Econet* v *Zimra* SC 17-2019.

It was further submitted that this Court should adopt the meaning of 'technical' adopted by the High Court of India which held that

> 'where simply an equipment or sophisticated machine or standard facility is provided albeit developed or manufactured with the usage of technology, such a user cannot be characterised as providing technical services'[1]

Thus it was argued that the supply of equipment or facilities without human involvement would not qualify as a technical service within the meaning of the Indian statute. From this premise, the appellant submitted that the interconnection service supplied by the entity to it did not fall within the definition of 'fees' as it is not a technical service.

Submissions by the respondent

[7] The respondent submitted that if the nature of the services rendered to the appellant by the foreign entities is such that it falls within the definition of any of the four adjectives, that is the end of the matter and the appellant was obligated to withhold and remit to the Commissioner, the non-residents' tax on fees. The appellant is accordingly liable for payment of the tax levied by the respondent in the additional assessments.

The approach to the interpretation of s30 as read with the Schedule was well settled. 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.[2]

He urged the court to have regard to the dictionary definitions of the word 'technical':

-Oxford Advanced Learners Dictionary –"connected with the practical use of machinery, methods etc in science or industry..."

-Collins Concise Dictionary- "of specializing in industrial, practical or mechanical arts and applied sciences..."

-Merriam Webster- "marked by or characteristic of specialization"

It was submitted that the concession by the witness for the appellant that the entity is required to use its own software and equipment to signal traffic through the network and provide service to the appellant was an admission that the entity clearly provides specialized and technical facilities or equipment in the discharge of its obligations to the appellant in terms of the agreement.

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[1] Siemens Ltd v CIT ITA No. 4356/Mum/2010; Bharti Cellular Ltd (2010) 330 IRT 239 (SC); CIT v Bharati Cellular Ltd (2009) 319 ITR 258 (Del) ; Bhanti Airtel Limited v ITO (TDS) [ITA Nos 3593 to 3596/Del/2012]; Skycell Communication Ltd v DCIT [2001] 251 ITR 53 (Mad); Vodafone East v Addl. CIT [ITA No. 243/Kol/2014]; UPS SCS (Asia) Ltd v. ADIT (2012) 18 taxman.com 302 (Mum).

[2] M CO v COMMISSIONER-GENERAL, ZIMRA 2016 (2) ZLR

The various decisions from the Indian jurisdiction relied upon by the appellant for its case that 'technical services' require a human element are of no application within our jurisdiction and the context of Zimbabwean legislation since the Indian statute is differently worded.

He submitted that unlike the Income Tax Act of Zimbabwe, s9 (1) (vii) of the Income Act, 1955 ("the Indian Income Tax Act") contains a definition of 'technical services' which expressly includes managerial, and consultancy services.

[8] I propose to deal with the question whether the fees were for services of a technical nature as this is the pith of the appellant's submissions.

The services to be provided by the entity were *all products, facilities, equipment, expertise, know-how, management, systems and software.*

The word 'technical' is not defined in the Act but has been interpreted in previous decisions of this Court. In *M CO* v *COMMISSIONER- GENERAL, ZIMRA* 2016 (2) ZLR112 (SCITA) KUDYA J (as he then was) said the following[3]:

> "The *Oxford Advanced Learner's Dictionary r*enders 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 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 science generally."

He went on to find

> "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 within the ambit of technical services provided by the agent to the customer on behalf of the appellant."

Thus the Court found that the skills and expertise of the agent in that particular trade of selling tobacco fell within the ambit of technical services as defined in the Schedule.

In my view there is merit in the submission by the respondent that the interconnection services which allow the appellant to terminate international calls or the roaming services which allow the appellant to provide services to its users through visiting networks, are by their very nature,

[3] At page 126 D-F

exclusive and customised services as well as facilities provided by the non-resident entities to the appellant.

As can be readily seen from the definitions given above, the word 'technical' is of sufficiently wide import to embrace the interconnection and roaming services rendered to the appellant by the foreign entities in that they are specialized services which require the expertise and knowhow of those specially trained and equipped with skills necessary for operation in the field of telecommunication. I would agree with the definition adopted in *M CO* (*supra*) and add the further definitions urged by the respondent in para [7] above.

The Indian cases cited by the appellant[4] in its attempt to prove that the services provided to the foreign entities were not technical services in that they do not require human intervention are in my view of no assistance to this Court since they were decided on the basis of a differently worded statute. It is common cause that unlike the Zimbabwe Income Tax Act, the Indian statute which was being interpreted in these cases contains a definition of 'technical services'. The cases cited by the appellant were concerned with an interpretation of the statutory definition of 'technical services' a different position altogether from that with which we are here concerned.

The entire Indian statute was not produced to this Court and I am unable to comment on it.

Because of the common stance taken by the parties I do not find it necessary to do so but I must nevertheless observe here that it is the obligation of the appellant to produce evidence and other acceptable material in support of its case. Failure to do so might result in a failure to discharge the burden of proof which rests upon it to prove what it alleges.

[9] In any event, the interconnection and roaming services provided to the appellant were shown even on the appellant's evidence, to require human intervention in order to ensure the successful termination of calls, the installation of the system, its configuration and reconfiguration and the monitoring and maintenance of the system in order to ensure successful provision of the services.

I conclude therefore that the interconnection and roaming services rendered to the appellant by the foreign entities were services of a technical nature within the definition of 'fees' in the Schedule and the non-residents' tax was correctly held by the Commissioner to be due on the fees paid by the appellant to these entities in respect of those services.

[4] Footnote 1 para [6] supra

[10] Another reason why the appeal on this issue cannot succeed is this. The services rendered to the appellant as spelt out in the agreements clearly include managerial and administrative services. In my view, in the face of an abundance of evidence that the parties contracted for both technical and managerial services, the Court cannot turn a blind eye to services which fall squarely within the definition of 'fees' simply because the parties chose to focus on one limb of the definition. The application of the principle in *Econet* v *Zimra* to divorce one adjective from the other three contained in the definition of "fees" was, in my view, erroneous.

In the final analysis, the appellant has failed to show to the satisfaction of the Court that the decision of the Commissioner was wrong.

2. Whether the money paid by the appellant for roaming and interconnection services to non-resident companies in Mauritius, Canada, France, Malaysia, Norway, Poland, South Africa, Sweden and the United Kingdom is taxable in Zimbabwe

[11] The appellant submitted that in the event that this Court found that interconnection and roaming fees are 'technical fees' then such fees are not taxable in Zimbabwe because of the existence of Double Taxation Agreements (DTA) between Zimbabwe and the countries listed above. The interconnection fees subject of this appeal are paid to the entity which is a company domiciled in Mauritius with whom Zimbabwe has a Double Taxation Agreement (the DTA) promulgated in terms of Statutory Instrument 135/1993. Since the DTA does not contain a specific provision that regulates the taxation of technical fees earned from a source in Zimbabwe, such fees should be treated as business profits - in terms of Article 7 - which are not taxable in Zimbabwe as the providers of the interconnection and roaming services do not operate through a permanent establishment in Zimbabwe.

[12] To this the respondent countered:

That the fees were taxed on the basis of Article 22 paragraph 3 of the DTA. Para 3 would take precedence over paragraphs 1 and 2 and the non-resident fees become taxable in Zimbabwe at the rate of 15% since there is no concessionary rate agreed between Zimbabwe and Mauritius.

That the DTA, having been incorporated into law in Zimbabwe, has, by virtue of its proclamation, the same force and effect as if enacted as part of the Act[5]. Accordingly, in

[5] Proclamation 19 of 1993 (Statutory Instrument 135 of 1993).

interpreting the DTA, the same principles governing fiscal statutes are applicable, that is, one must adhere to the words of the statute and *'nothing is to be read in common nothing is to be implied. One can only look fairly at the language used.*[6]

That the DTA, in Article 2(3), has clearly expressed the categories of tax to which it applies and that save for business profits, interest and royalties, none of the other taxes specifically covered by the DTA are provided for as being excluded from taxation within Zimbabwe. In the circumstances, the provisions of Article 22 of the DTA which provides for items of income tax not dealt with expressly or explicitly in the DTA, become applicable.

[13] **Article 22 of the DTA with Mauritius provides**:

"(1) Subject to the provisions of paragraphs (2) and (3) of this Article, items of income of a resident of a contracting state, wherever arising, being income of a class from sources not expressly mentioned in the aforegoing Articles of this convention in respect of which he is subject to tax in that state, shall be taxable only in that state.

(2) The provisions of paragraph (1) of this article shall not apply if the person deriving the income is being resident a resident of a contracting state, carries on business in the other contracting state through a permanent establishment situated therein, or performs in that other state independent personal services from a fixed base situated therein, and the right of property in respect of which the income is paid is effectively connected with such permanent establishment or fixed base. In such a case the provisions of Article 7 or 14 may apply.

(3) Notwithstanding the provisions of paragraphs (1) and (2) of this Article, items of income of a resident of a contracting state not dealt with in the foregoing Articles of this convention and arising in the other contracting state may be taxed in that other state…"

Therefore, in terms of Article 22(3) of the DTA, which is the overriding sub-clause in Article 22, income which arises within Zimbabwe and has not been specifically dealt with in the Articles under the DTA may be taxed in Zimbabwe.

[14] The submission by the appellant that "*Since the DTA does not contain a specific provision that regulates the taxation of technical fees earned from a source in Zimbabwe, such fees should be treated as business profits"* is in my view fallacious and runs contrary to para (3) of Article22. That paragraph clearly states that where no specific provision is made in the

[6] Partington v AG 21LT 375; Lowenstein v COT 1956 R G & N 502; 1956 (4) SA 766 (FS) at 772B; CAPE Brandy Syndicate v IRC [1921] 1 KB 64

DTA for certain income that income may be taxed in the state in which it has arisen. Nowhere is it provided that such income should be treated as business profits. In any event, the appellant has not shown that the income concerned amounted to profits. The common ground is that these are fees paid for services to the appellant. Profits in the ordinary sense of the word is normally an excess of income over expenditure. No evidence was led to show that the 'fees' amounted to profits. At most for the appellant, the payment of fees constituted income for the non-resident contracting party.

I would therefore agree with the submission by the respondent that no specific provision having been made elsewhere in the DTA, s 22(3) is applicable and the non-resident fees paid to the entity by the appellant in this case are taxable in Zimbabwe.

From the above, it will be noted that the discussion centers on the DTA with Mauritius. No argument was presented to the Court in respect of the other countries listed in the issue to be determined nor were the DTAs with those countries except for South Africa, produced. Since the provisions of the DTA with South Africa differ from the Mauritian one, I have confined this judgment to the DTA with Mauritius on the basis that this issue must be determined by reference to the provisions of the DTA with each of the listed countries as and when the question arises.

3. **Whether there is a legal basis for the imposition by the respondent of a 5% penalty**.

[15] The legal basis is paragraph 6 (1) (b) of the Schedule. It provides:

> **"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."

The Commissioner is empowered to impose a penalty of one hundred *per centum* on the amount withheld. Upon objection by the appellant the penalty was reduced to five per centum. No attempt was made by the appellant to prove the Commissioner wrong. It is not surprising that counsel for the appellant made no submissions on this issue.

[16] Accordingly, the appeal is dismissed in its entirety.

Mtetwa & Nyambirai, appellant's legal practitioners
Kantor & Immerman, respondent's legal practitioners