HE LIMITED
versus
ZIMBABWE REVENUE AUTHORITY

SPECIAL COURT FOR INCOME TAX APPEALS
KUDYA J
Harare 1 December 2016 and 9 August 2019

**Income Tax Appeal**

*F Girach,* for the appellant
*T Magwaliba,* for the respondent

KUDYA J: The present appeal concerns the date on which a legal obligation to make payment from which non-resident tax on fees is chargeable arises and the propriety of imposing penalties and levying interest on such penalties.

**The background**

In 2011, the respondent conducted a full blown investigation into the tax affairs of appellant, a public company listed on the Zimbabwe Stock Exchange covering the period from 2009 to 2011. In the course of the investigations, the respondent discovered that the appellant was the cessionary to two technical assistance agreements concluded in 2007 and 2009, respectively, between its majority shareholder and a South African registered company. The majority shareholder in the appellant was a wholly owned subsidiary of this South African company. The terms and conditions stipulated in these two agreements, other than the dates of execution and commencement, were identical. In respect of each agreement, the appellant and the cedents executed addenda on 16 May 2007 and 25 November 2009 in which the cedents extended the agreement to the appellant and the appellant accepted to be bound by these agreements.

The South African company provided to the appellant highly trained and skilled personnel possessing intensive technical, commercial, agricultural, management and administrative experience, knowledge and expertise *inter alia* in the cultivation of sugar cane and the production, refining, processing, manufacture, sale, marketing and transportation of

sugar and animal feed. In addition, the appellant executed separate computer software support licencing agreements with an Australian registered company and another South African company.

The investigation revealed that the appellant was paying licence fees to each of the two foreign companies timeously but was not withholding the non-residents tax for these fees nor remitting them to the respondent for the period October 2010 to November 2011. It was also common cause that the appellant did not withhold 10% of the gross income payable to a parastatal which was offering it transport services during the period July 2010 to December 2010 when that parastatal did not hold a tax clearance certificate, ITF 263, in breach of the provisions of s 80 (2) of the Income Tax Act [*Chapter 23:06]*.

The appellant admitted liability in respect of the principal amounts and paid them during the course of the investigations. In its letter of objection of 19 August 2013 the appellant disputed liability in respect of both the penalties and interest on the penalties for the technical and management fees. In regards to the licence fees and the parastatal matter it objected to the imposition of the penalties and not interest. However, during the subsistence of the appeal, the parties continued to negotiate on the issue of penalties and interest with the result that the penalties were first reduced from 100% to 50% in respect of all the transactions. Further engagement on 17 February and 27 April 2015 resulted in the incorporation of the interest dispute into the appeal and the reduction of the penalties imposed in respect of the licence fees and the withholding tax from the parastatal to 10% in Annexure F to the statement of agreed facts, dated 26 October 2015. Notwithstanding, the favourable construction rendered by Mr *Magwaliba,* for the respondent, to Annexure F, at the commencement of the hearing and in his submissions, the respondent maintained the penalty imposed in respect of the technical and management fees at 50% and disallowed the appeal against interest in respect of all three transactions.

A pre-trial hearing was held on 18 November 2014 and five issues, which were supplanted by the three issues reflected in the last paragraph of the statement of agreed facts dated 24 October 2016, were referred on appeal. The appeal proceeded by way of a statement of agreed facts. I produce below the pertinent averments that are not covered in the background information.

**Statement of Agreed Facts:**

1. The parties are agreed that the only facts they will be entitled to rely on for purposes of argument are those contained in this agreed statement of facts.
2. For current purposes the effect of the agreements was that in consideration for the provision of technical expertise, certain fees became payable by appellant to Tongaat.
3. S 30 as read with the 17th Schedule of the Income Tax Act *[Chapter 23:06]* (the Act), obliges a taxpayer to withhold the prescribed percentage from the fees paid to non-residents as and by way of non-residents withholding tax.
4. In accordance with the obligation to effect payment from time to time of the fees, appellant paid the same and caused to be deducted and paid to respondent the non-resident tax due. Attached hereto and marked annexure C1 is a schedule setting out the dates when the management accounts were ready, the amount due to [the payee], the date of the audit certificate, the dates when the fees were actually paid and the date of the audit certificate, the dates when the fees were actually paid and the date when relevant withholding tax was paid.
5. Respondent issued an assessment in respect of non-residents withholding tax, together with interest and penalties. A copy of that assessment is annexed hereto and marked annexure C2.
6. On 19 August 2013, the appellant filed an objection to the levying of interest and the raising of a penalty on the alleged late payment of withholding tax. A copy of that objection is annexed hereto and marked annexure D.
7. By letter dated 26 August 2013 respondent indicated that the objection was being considered but that in the interim appellant should pay the outstanding interest and penalty forthwith. Appellant complied with this and paid them between April and October 2014.
8. By way of letter dated 18 March 2014 respondent dismissed the objection aforesaid. A copy of the letter is annexed hereto and marked annexure E.
9. The stance of the parties is set out in the appellant's case and the respondent's case respectively and both parties will file heads in advance of the hearing. The respondent will contend that the processing of invoices in the appellant's books or the passing of journals in the payer's books of account or ledger constituted the deemed payment. The appellant will contend that deeming entailed the physical transfer of the fees to the payee's account after the passing of the journals in the appellant's ledger and the certification of the amount by the appellant's auditors.
10. The parties now seek a determination from this Honourable Court in regard to the following issues:
    - 10.1 as a matter of law, when the non-residents tax became due and payable by appellant to respondent;
    - 10.2 on the facts of this matter, was payment effected as and when it was due;
    - 10.3 In any event, is the imposition of interest and penalties justified?

I proceed to determine the issues in turn.

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*As a matter of law, when did the non-residents tax became due and payable by appellant to respondent*

The answer to this issue is found in para 1(2) (c) of the 17th Schedule of the Income Tax Act [*Chapter 23:06]*. It states:

> "(2) For the purposes of this Schedule—
> (*c*) 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;"

The meanings of fees, payee and payer, in so far as is relevant, are provided in para 1(1) thus:

> "(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,
> "payee" means a non-resident person to whom fees are payable or paid;
> "payer" means any person who……pays or is responsible for the payment of fees,"

A common golden thread that runs through fees, payee and payer is the word "payable" in regards to the first two and "is responsible for the payment of fees" in regards to payer. In my view, the latter phrase bears the same meaning as payable and must in context mean the person from whom the fees are payable. I stated as much in *M Company (Pvt) Ltd* v *Zimbabwe Revenue Authority* 2016 (2) ZLR 112 (SCITA) at 125D-E:

> "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…..In my view, a payer could be one of two persons between the one who actually pays and the one with an obligation to pay."

The meaning of para 1 (2) (c) was rendered by MAKONI J in *Barclays Bank of Zimbabwe* v *Zimra* 2004 (2) ZLR 151 (H) at 156A-D in these words:

> "The applicant contends that the phrase "conditions under which he is entitled to them are fulfilled…" relates to the granting of the exchange control authority for payment…if the first part of section 1(2) (c), whose meaning is not in dispute, is read in context with the second part, and the ordinary meaning of the words is ascribed it becomes clear that the section deals with two scenarios where the withholding tax becomes due. The first scenario is where fees are credited to the non-resident's account. The second scenario are instances where though the fees are not credited to the non-resident's account, they are dealt with by the payer in a manner which discharges the payer's obligation to the non-resident. These are instances were payments are deemed to have been made. The Legislature saw fit to make an omnibus reference to various other methods open to the payer to discharge his obligation to the non-resident other than direct payment to his or her account, because the list of indirect payments cannot be exhaustive."

To the same effect was HLATSHWAYO J in *Z (Pvt) Ltd* v *The Commissioner General of the Zimbabwe Revenue Authority* 2016 (1) ZLR 1 (FAC) at 3F who stated that:

> "As far as the ***method*** of payment is concerned, fees are deemed to have been 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" (section 1 (2) (c) of 17th Schedule)."

And recently in *SW (Pvt) Ltd v Zimra* HH 499/19 at p 9-10 of the cyclostyled judgment I said:

> "It seems to me that the words "if they are credited to his account" refer to a direct payment into the banking account nominated by the appellant, as the payee, whether by way of a physical deposit or electronic or telegraphic transfer. The alternative mode of discharge contemplated by the words "or dealt with that the conditions under which he is entitled to them are fulfilled" refers to indirect payments of the amount due to the payee, which extinguish the liability such as set off, cancellation, forgiveness or reinvestment".

It seems to me that all the above cited sentiments were mainly based on the unadulterated meaning of "if they are credited to his account" and "or dealt with that the conditions under which he is entitled to them are fulfilled." No attempt was made in the above cited cases to construe these phrases against the words "deemed to be paid" that preface them.

The phrase "deemed to be" has been the subject of judicial construction in both South Africa and England. The *locus classicus* being the English case of *R* v *Norfolk County Council* ***(***1891) 60 LJ QB 379 (65 LT 222) where CAVE J said at 380**:**

> "Generally speaking when you talk of a thing being deemed to be something, you do not mean to say that it is that which it is deemed to be. It is rather an admission that it is not what it is deemed to be and that, notwithstanding, it is not that particular thing, nevertheless….it is deemed to be that thing."

In South Africa INNES CJ *Chotabhai v Union Government & Anor* 1911 AD 13 at 33 found the word "deemed" synonymous with "considered "and "regarded". He said:

> "The use of the word "deemed" was perhaps not a very happy one, because the term may be employed to denote merely that persons or things to which it relates are to be considered to be what they really are not, without in any way curtailing the operation of the Statute in respect of other persons or things falling within the ordinary meaning of the language used. If the word were so employed, the result would be artificially to extend the scope of the expression referred to, without attempting to define it…….*Rex v Norfolk County Council* 65 LT p 222 may usefully be referred to, and the remarks of Justice CAVE are very apposite. So the word deemed must here be taken in its general sense as meaning "considered" or "regarded;""

The above sentiments clearly demonstrate, in the words of BORUCHOWITZ AJA in *Commissioner for the South African Revenue Services v Tradehold Ltd* 2013 (4) SA 184 (SCA)

at para [11] that something that is deemed to have occurred is something that has not actually occurred.

In the present matter I am satisfied that the appellant credited the technical and management fees to the payee's account in the appellant's ledger on a monthly basis whenever it prepared its management accounts. In terms of the technical assistance agreement, the credit was conditional upon confirmation in an audit certificate issued by the appellant's auditors. But for that condition I would have found the credit into the management accounts to have constituted payment. The basis being that while ordinarily the entry of such a credit would not constitute payment, it is deemed to be a payment by the provisions of para 1 (2) (c) merely because it constitutes a credit posting into an account drawn in the books of the appellant which is in the name of the payee.

The terms and conditions for payment of the fees by the payer to the payee were set out in clause 3 of the technical assistance agreement in the following manner:

> "[The payer] shall pay [the payee] a fee for the services provided in terms of this agreement calculated at 2% of the gross annual turnover of [the payer] for each financial year, which fee shall be paid in the following manner:
>
> (a) As soon as possible after the end of each month the fee calculated to be due on that month's turnover as determined from that month's management accounts (if not in US$ then converted to US$ at an appropriate exchange rate) and confirmed in an audit certificate by [the payer]'s auditors shall be remitted to the [payee] in United States Dollars.
> (b) At the end of each financial year of [the payer] and following upon production of the audited accounts of [the payer] for that financial year, a calculation of the fee for the whole financial year shall be made and confirmed in an audit certificate by [the payer]'s auditors
> (c) Following upon production of the auditors certificate any adjustment of the fee paid monthly during the year shall be made and shall be taken into account, in the form of an addition or a deduction, as the case may be from future monthly payments of the fee."

In terms of Annexure C1, the compilation of the management accounts for each month was completed between the 13th and 15th of the month following upon the provision of the technical and management services. The audit certificate for the period April 2009 to March 2011 was issued on 16 December 2011. The fee for April 2009 was paid to the payee on 19 December 2011 and the fees for the subsequent 23 months to March 2011 were paid on 14 March 2012. However the withholding tax for the 24 months under consideration were all paid on 13 May 2011. It was common cause that the payment of the withholding tax predated both the audit certificate and the payment of the fees to the payee. The payment of the fees however was subsequent to the audit certificate.

In computing penalties and interest on penalties, the respondent in Annexure C2 to the statement of agreed facts, ignored the date on which the management accounts were ready. Annexure C2 shows that the monthly interest for the period April to December 2009 was either computed from the 1st or the 9th of the second month following the supply of the technical services while in respect of the period from January 2010 to March 2011, the monthly interest was calculated from the 10th of the month after the supply of the technical services.

*The dates from which penalties and interest are imposed under the 17th Schedule*

Para 2 (1) as read with para 6 (1) and (3) of the 17th Schedule to the Income Tax Act prescribes the time within which penalties are imposed and interest begins to run. Para 2 (1) of the Schedule provides:

> "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."

Unless the Commissioner extends the time, the tax must be paid within ten days from the date on which the fees are paid or are payable. The appellant contended that as the payments of the fees were made on 29 December 2011 and 14 March 2012, it was obliged under para 2 (1) to pay the tax to the Commissioner within ten days of those dates, that is, by 8 January 2012 and 24 March 2012. The appellant further contended that as the tax was paid on 13 May 2011, long before the due dates, it was not liable for penalties and interest on such penalties.

Para 6 (1) (a) and (b) of the 17th Schedule states:

> "6. Subject to subparagraph (2), a payer…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,…..failed to pay to the Commissioner; and
>
> (*b*) a further amount equal to one hundred *per centum* of such non-residents' tax on fees."

It is clear from para 6 (1) of the 17th Schedule that the penalties for failing to withhold or remit the tax are imposed from the date on which the tax should have been paid. Interest is chargeable on penalties only under para 6 (3) of the same schedule, which reads:

> "(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."

Interest is therefore charged on the unpaid penalty from the date on which the tax should have been paid and continues to run until the full penalty is paid. The appellant contended that the prepayment of tax made on 13 May 2011 negated the payment of any penalty and any interest on such penalty, which would have been imposed on 8 January and 24 March 2012. In response, the respondent contended that the tax on fees was due and payable on the earlier of the dates on which the fees were paid or deemed to have been paid. Mr *Magwaliba* further contended that the fees were deemed to have been paid on the dates on which the appellant credited the fees in its management accounts. In my view, the natural consequence of his contention was that the date of the deemed payment would be the date on which the penalties and the interest on such penalties commenced to run. The dates on which the management accounts were ready were provided in Annexure C1 and ranged between the 13th and 15th of the month following the provision of the technical services. On his argument, it was clear that the dates in Annexure C2 from which the respondent computed interest on penalties were be incorrect.

*The application of para 1 (2) (c) of the 17th Schedule to the Income Tax Act to clause 3 of the Technical Assistance Agreement*

In my view, clause 3 of the Technical Assistance Agreement was a computation, verification and method of payment clause. In terms of clause 3 (a) the appellant was to pay the fees as soon as possible after the end of each month. The amount payable was to be 2% of the monthly turnover. It was to be ascertained from the appellant's management accounts and then verified by the appellant's auditors before it was paid out to the foreign supplier. Clause 3 (b) and (c) concerned the reconciliations that would arise between the audited annual turnover and the monthly turnover and the resultant annual fee and monthly fees, which were to be captured in an annual audit certificate issued by the appellant's auditors and used to make any necessary adjustment to impending monthly fees.

My reading of clause 3 is that the appellant was required to expeditiously compile its monthly management accounts, expeditiously obtain an audit certificate from its own auditors verifying the fees payable as ascertained from its management accounts and expeditiously remit such fees, all within the month following the provision of the technical services. In short, the appellant was obliged to carry out these three processes within the month following the

supply of the technical services. The facts show that the appellant did not do so in respect of the fees that were payable to the foreign supplier, which was a related party. It however remitted licence fees that were due to other foreign suppliers, who were unrelated parties.

The essence of Mr *Magwaliba'*s contention was that the processing of the payee's invoices in the appellant's books or the passing of journals in the payer's books of account or ledger constituted the deemed payment. On the other hand, Mr *Girach's* contention was that deeming entailed the physical transfer of the fees to the payee's bank account after the passing of the journals in the appellant's ledger and the certification of the amount by the appellant's auditors.

I agree with Mr *Girach* that the unconditional obligation to pay by the appellant, in terms of the Technical Assistance Agreement would only arise once the appellant's auditors had issued a monthly audit certificate verifying the amount recorded in the relevant monthly management accounts. But I disagree with his further contention that the withholding tax could only be withheld and paid out after payment of the fees. I am unable to conceive of how the appellant would be able withhold the tax after payment. It would only be able to do so before payment was made and that would, in terms of the agreement, be after the monthly certification by its auditors.

It is apparent that the appellant breached the contractual requirement to expeditiously obtain certification and thereafter remit the fees due. Mr *Magwaliba* argued that in those circumstances, the Commissioner and on appeal, this Court was obliged to invoke the doctrine of fictional fulfilment. I did not hear Mr *Girach* make any contrary submissions.

The doctrine of fictional fulfilment was given full expression in *Macduff & Co Ltd (In Liquidation)* v *Johannesburg Consolidated Investment Co Ltd* 1924 AD 573 at 591 where INNES CJ said:

> "I am therefore of the opinion that by our law a condition is deemed to have been fulfilled as against a person who would, subject to its fulfilment, be bound by an obligation, and who has designedly prevented its fulfilment, unless the nature of the contract or the circumstances show an absence of *dolus* on his part."

The basis of the doctrine was underscored in the same case in a separate concurring judgment by KOTZE JA at p. 611 in these words:

> " It is part of a wider rule that no one can take advantage of his own wrong to the loss or injury of another"- *Nemo ex suo delicto meliorem suam conditionem facere potest*……No one can

take advantage of his own wrong, for it is unjust and contrary to good faith that he should do so."

In the present case, the appellant did not offer any explanation on why it defaulted in its duty to act expeditiously as contemplated in clause 3 of the agreement. In the absence of any explanation, I am inclined to find that the appellant deliberately reneged on the obligation to obtain a monthly audit certificate and remission of the fees in order to forestall the withholding of the non-residents tax on fees and thereafter their remission to the respondent. I would find the appellant was liable to withhold the tax on the date on which the monthly certificate would most likely have been issued by the auditors. In verifying the correctness of the figures in the management accounts the auditors would require no more than the use of the documents relied upon by the appellant to pass the fees into its management accounts. As it turned out from Annexure C1, the auditors appeared to issue an audit certificate confirming the accuracy of the fees in the monthly management accounts for the 24 months in question in one day. In my view, the auditors would need no more than a day to make the verification and issue the audit certificate. The date on which I would have found the audit certificate to have been due would have been the day after the management accounts were ready in each month. Using Annexure C1 as the baseline, the certificate would have been ready between the 14th and 16th of the month following the supply of technical services.

The answer to the first issue raised in the statement of agreed facts is that the non-residents tax on fees was due and payable within 10 days from the date on which the audit certificate would have been issued by the appellant's auditors, which date I hold to have been the day after the management accounts for each month, as reflected in Annexure C1, were ready. These dates would fall between the 24th and 26th of the month following the provision of the technical services.

Additionally, Mr *Girach* contended that the imposition of the penalties and consequential interest was proscribed by the 1965 Double Taxation Agreement between Zimbabwe and South Africa. He raised this issue for the first time on appeal. He did not observe the procedural requirement stipulated in s 65 (4) of the Income Tax Act. He failed to seek either the consent of the respondent or the leave of the Court before taking the issue. I therefore decline to consider the issue. In any event, as the appellant accepted liability for the NRTFs, the new ground would merely be a red herring.

*On the facts of this matter, was payment effected as and when it was due;*

In view of my finding on the first issue, the payment of the tax on the dates shown in Annexure C1 by the appellant was well out of time. The tax was due within ten days after the nominal dates that I have found the audit certificates to be ready, which dates fell between the 24th and 26th of the month following the provision of the technical services.

*In any event, is the imposition of interest and penalties justified?*

The imposition of the penalties is governed by the provisions of para 6 (1) and (2) of the 17th Schedule to the Income Tax Act. In terms of para 6 (1) (b) the Commissioner is required to impose a 100% penalty where the payer failed to withhold or pay to the Commissioner the appropriate amount of tax calculated from the date such tax was due. The power to waive the penalty in full or in part is exercisable once the Commissioner is satisfied that the payer did not intend to evade the payment of the tax. The Commissioner initially imposed penalties of 100% on all three transactions. He reduced the penalties to 50% after he was satisfied that the appellant lacked any intention to evade the provisions of the 17th Schedule. After further negotiations he reduced the penalties in respect of the licence fees and the failure to withhold tax from the parastatal to 10%.

In regards to the tax on non-resident s fees, it seems to me that the failure to fulfil the verification aspect of clause 3 of the agreement was deliberate. It turned out that the appellant was not withholding or remitting tax on licence fees which it paid out to other foreign companies. It seems to me that the appellant may have acted out of ignorance of the legal provisions. I therefore agree with the Commissioner's finding that the appellant lacked the intention to evade the payment of the tax. It paid the principal amounts without demur once it was convinced that the taxes were due. It also paid the penalties and interest that were demanded.

I would characterise the moral turpitude of the appellant in respect of the default in paying tax on the technical fees as grossly negligent. The appellant raised the same mitigatory feature on this ground as it did before the Commissioner. In the exercise of my own discretion I would impose a penalty similar to the one imposed by the Commissioner of 50%.

Again in regards to the penalty and interest in respect of the licence fees and withholding tax on the parastatal, the appellant regurgitated the same grounds that it raised before the Commissioner. It seems to me that the moral turpitude of the appellant was high in regards to the default in the payment of tax on the technical fees due to its related foreign payee. There was clearly a lack of diligence on the appellant in failing to pay licence fees and withholding tax from the gross payments due to the parastatal, which necessitated some

measure of punishment. I believe that the appropriate penalty which would serve as personal deterrence on the appellant would be one of 10% of the principal amounts due.

In regards to interest on the penalties, the appellant failed to justify the full waiver of such interest. I agree with the respondent that interest is imposed to compensate for the time value of money lost. I do not see why the appellant should escape from paying interest on the penalties imposed.

**Costs**

The appeal involved difficult questions of law which negate an adverse order of costs against either party. Each party will therefore bear its own costs.

**Disposition**

Accordingly it is ordered that:

1. The appeal against the respondent's decision imposing penalties of 50% and interest on such penalties for the non-residents tax on fees in respect of technical and management fees payable to a connected foreign payee be and is hereby dismissed.

2. The appeal against the respondent's decision imposing penalties of 10% and interest on such penalties in respect of the licence fees paid to two unrelated foreign parties and withholding tax on a local parastatal be and is hereby dismissed.

3. The respondent shall compute interest on the penalties imposed in respect of the technical and management fees within ten days from the date on which the audit certificate for each month was due.

4. Each party shall bear its own costs

*Scanlen and Holderness*, the appellant's legal practitioners