G (PRIVATE) LIMITED
versus
ZIMBABWE REVENUE AUTHORITY

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

Income Tax Appeal

D. Ochieng, for the appellant
S. Bhebhe, for the respondent

ZIYAMBI AJ:

[1] On 28 December 2017, the respondent's Commissioner General ("the Commissioner") disallowed the appellant's objection to a number of VAT assessments made against it for the years 2015-2016 totalling US$206 880. This is an appeal against that decision and it is brought in terms of S 33 of the Value Added Tax Act [*Chapter 23:12*] ("the Act"). The appellant contends that the Respondent wrongfully decided that the appellant should account for VAT at the standard rate of 15% on services rendered to non-resident organizations, namely, foreign domiciled donor organizations implementing development projects in Zimbabwe with the assistance of the appellant. The appellant further contends that the penalty of 100% imposed by the Commissioner on the assessed VAT is excessive as there was no intent to evade or avoid paying any tax due.

[2] The appellant is a local company registered according to the laws of Zimbabwe. Its functions include the implementation and monitoring of foreign donor-funded projects in Zimbabwe. To that end, and during the relevant period, the appellant concluded various contracts with a number of foreign entities among whom were the Commonwealth of Australia, Deutsche Weldhungerhilfe, a German organization and the British Council all through their offices in Harare.

[3] The respondent is an administrative body established in terms of the Revenue Authority Act [*Chapter 23:11*]. It is tasked with the collection of revenues on behalf of the State in terms of the Act as well as various other statutes which it administers including the Act. In 2017,

the respondent carried out an audit into the appellant's affairs to ensure tax compliance. The audit revealed that the appellant had an income above the prescribed $60 000.00 annual threshold and that it was not registered for VAT purposes. The respondent, therefore, registered the appellant for VAT in terms of s23(1) of the Act -which registration had a retrospective effect dating back to 1January 2015- and issued assessments for activities carried out by the appellant in 2015-2016 which called for the payment of VAT. These assessments, communicated to the appellant on 14June 2017, included a 100% penalty and had a total value of US$206 878.08. Interest at the rate of 10% per annum was payable on all outstanding amounts.

[4] The issues for determination were agreed to be the following:

Whether or not the services rendered by the appellant to foreign donor organizations were rendered for the benefit of and contractually to non-residents; and

Whether or not the 100% penalty levied by the respondent was justifiable and appropriate in the circumstances.

[5] The sole witness called by the appellant was its managing director. He told the court that the role of the appellant was merely to monitor projects by certain donor organizations (hereinafter referred to collectively as "the organizations") and to report to them. With regard to the Commonwealth of Australia, the appellant contracted with the Commonwealth of Australia, although the agreement was signed at their AusAID offices in Harare by their duly authorised representative. He told the Court that in terms of the contract, the appellant was to monitor, and report to the Commonwealth of Australia on, the impact of the agricultural input program in terms of which FAO funded and distributed agricultural inputs to rural communities in Zimbabwe. He referred to the agreement contained in the r 5 documents beween the appellant and the Commonwealth of Australia and stated that the work performed by the appellant was for the benefit of the Commonwealth of Australia to whom he submitted the reports and by whom he was paid.

With regard to the German company Deutsche Welthungerhilfe, the appellant's mandate was to monitor and report upon the water sanitation and hygiene program which was being implemented by that organisation but funded by AusAID.

As to the agreement with the British Council it was emphasized that the agreement was with London and not the local office in Harare although signed by the British representative at the British council offices in Harare. The appellant's function in this agreement was to monitor and report upon an artists and youth program funded by the British Council in Zimbabwe. The

appellant was to seek out partners with whom the organization could work. According to the witness, the appellant's role was merely to organize workshops at which the would-be partners and the donors would meet. The appellant, he said, was not involved in the implementation of any projects.

With regard to all three organizations, the appellant contracted with foreign residents to do work for their benefit.

[6] Section 10(2) of the Act states as follows:

> "(2) Where, but for this section, a supply of services would be charged with tax at the rate referred to in subsection (1) of section *six*, such supply of services shall, subject to compliance with subsection (3) of this section, be charged with tax at the rate of zero *per centum* where—
> (*a*)-(k)..
> (*l*) the services are supplied for the benefit of and contractually to a person who is not a resident of Zimbabwe and who is outside Zimbabwe at the time the services are rendered, not being services which are supplied directly in connection with…" (not applicable).

From the above it appears that:

i) there must be a service

ii)supplied for the benefit of and contractually to a person who is not a resident of Zimbabwe; and

iii) the recipient of the service in i) must be outside Zimbabwe at the time the service is rendered.

[7] The respondent contended that the services rendered by the appellant did not qualify to be zero rated in that the services were supplied for the benefit of, and contractually to, residents of Zimbabwe. The respondent submitted that while ordinarily the foreign organizations would not normally be regarded as residents of Zimbabwe they are deemed to be so by virtue of s 2 of the Act which defines 'resident of Zimbabwe' as follows:

> "resident of Zimbabwe" means a person, other than a company, who is ordinarily resident in Zimbabwe or a company which is incorporated in Zimbabwe:
> Provided that any other person or any other company *shall be deemed to be a resident of Zimbabwe to the extent that such person or company carries on in Zimbabwe any trade or other activity and has a fixed or permanent place in Zimbabwe relating to such trade or other activity*;
> (The italics are mine).

[8] The contract with the Commonwealth of Australia was stated to be a GRANT AGREEMENT DEED between THE COMMONWEALTH OF AUSTRALIA represented by the Australian Agency for International Develoment (AusAID). It was signed at Harare by the Counsellor, Zimbabwe Unit, AusAID. Various narrative reports required to be provided by

the appellant were to be sent to AusAID, Australian Embassy, 1 Green Close Borrowdale, Harare, Zimbabwe.

Similarly, the contract with the British Council states that the latter is "operating through its local office at at 16, Cork Road, Belgravia, Harare".

Two contracts with Deutsche Welthungerhilfe form part of the documents filed with the Court known as the rule 5 documents. The earlier of the two which is stated to be an AGREEMENT OF ALLOCATION between that organization and the appellant, states the address of Welthungerhilfe as 14, Natal Road, Harare, Belgravia, Zimbabwe, was signed at Harare, by its Regional Director on the 14th April 2013 and stated to have a duration of 2.5 months from 1st April to 14 June 2013. The object of this agreement was to *"set in value the expertise of (the appellant) in the elaboration of WASH Baseline and M&E system gained in the 10 years role as the managing consultant for the PRP multi-stakeholder programme."*

The costs and financing were said to be stipulated in the 'currently valid cost and financing plan enclosed (Annex 3).' However the document Annex 3 which is attached to the agreement and appears on p34 of the rule 5 documents bears no relation to the contract under mention in that it purports to be the appellant's cost and Financing Plan September 2013 to December 2013 and is dated 1st September 2013 two and a half months after the expiry of the contract.

The second contract which appears at p 36 of the documents and which Mr O'Chieng refers to as being the relevant contract for consideration by this Court was signed at Harare by the same Regional Director on 1 September 2013. It sets out the content of that project in paragraph 2 thereof as follows:

> "The project comprises delivery of services in developing, establishing and managing effective Monitoring and Evaluation, Knowledge Management and Learning systems which will measure the progress results and impact and capture the lessons learned during the implementation phase of the Welthungerhilfe SELF Project, which is part of the AusAID CSO WASH Programme, and which will be implemented by GRM within the period agreed. The corresponding project planning matrix (Indicative Work Plan for the first 12 months) is enclosed in Annex 2."

Annex 2 was not attached to the papers but suffice it to say at this juncture that the appellant was tasked with the implementation of the project. In addition, the appellant was to train consortium members in M&E and ensure timeous and quality reporting from consortium members to form project reports. The two contracts are clearly related and, as mentioned before, both contracts were signed at Harare on behalf of Welthungerhilfe by its Regional Director.

[9] What emerges from the above is that all three organisations have offices in Zimbabwe from which they carry on various activities. The British Council maintains offices both in Harare and Bulawayo. These offices, in my view, fall within the definition of '*fixed or permanent place in Zimbabwe relating to such trade or …activity'*. The agreements the subject of this appeal were all signed at their respective offices in Zimbabwe by representatives of the three organizations.

The word '*activity*' encompasses a wide sphere of enterprise or action and is wide enough to include the activities undertaken by the organisations under mention. These organizations, all having *fixed or permanent places in Zimbabwe relating to such trade or other activity*, fall within the purview of the proviso to s 2 of the Act and are deemed to be residents of Zimbabwe. As it was aptly put by CAVE J in *R* v *County Council of Norfolk*(1891) 65 LT NS 222 and quoted with approval in *Zimbabwe Football Association* v *Pickwell & 16 Others* HH-12-21

> "When it is said that a thing is to be deemed to be something, it is not meant 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, for the purposes of this Act, it is deemed to be that thing."

Thus, I agree with the submission advanced by the respondent that the definition of '*resident of Zimbabwe'* used in s 2 of the Act provides for circumstances where, even though a person may not be resident in Zimbabwe as a matter of fact, he or it will be regarded for the purposes of the Act to be a resident of Zimbabwe

Accordingly, it is my view that the three organisations in question are residents of Zimbabwe for the purposes of the VAT Act. That being so, the services which the appellant claims were rendered for their benefit fall outside the ambit of s 10(2)(l) of the Act as they were rendered for the benefit of residents of Zimbabwe. In addition, the fact of their residence in Zimbabwe disqualifies the services rendered to them for zero rating since the requirements of s10 (2) (l) are cumulative and must all be present in order to qualify the services for zero rating.[1]

[10] Another aspect of the question whether the services rendered by the appellant are for the benefit of residents of Zimbabwe was advanced by the respondent. While the finding above is decisive of that question in that the recipients of the appellant's sevices are deemed by the

[1] See BCM (PRIVATE) LIMITED V ZIMBABWE REVENUE AUTHORITY HH-214-21.

Act to be residents of Zimbabwe, it was the respondent's further view, a view opposed by the appellant but not without merit, that the services rendered by the appellant were for the benefit of local Zimbabweans. For example the WASH program was to provide water, sanitation and health services in rural communities; the program funded by the Commonwealth of Australia and monitored by the appellant involved the distribution of certain agricultural inputs to local farmers; while the British Council program sought to promote young artists in Harare and Bulawayo.

Be that as it may, I have already found that the donor organisations, the persons alleged by the appellant to be recipients of the services in question, were residents of Zimbabwe and in Zimbabwe at the time of the performance of the services on their behalf by the appellant.

Whether or not the 100% penalty levied by the respondent was justifiable and appropriate in the circumstances.

[11] In his determination of the appellant's objection communicated to the latter on 28 December 2017, the Commissioner stated his reason for disallowing the appellant's objection to the 100% penalty as follows:

> "In this case, ZIMRA only registered your client compulsorily after an analysis of the nature of services rendered. Had there there been no audit conducted on (the appellant), the fiscus would have been prejudiced."

It was submitted on behalf of the respondent that the Commissioner correctly imposed a tax of 100% as he is empowered to do by the Section 39 of the Act and that the conditions for remission of the tax whether in whole or in part as laid down in s39(5) were not satisfied by the appellant. S39(5) provides:

> "(5) Where the Commissioner is satisfied that the failure on the part of the person concerned or any other person under the control or acting on behalf of that person to make payment of the tax within the period for payment contemplated in paragraph (*a*) of subsection (2), or subsection (3) or (4)
> (*a*) did not, having regard to the output tax and input tax relating to the supply in respect of which interest is payable, result in any financial loss, including any loss of interest payable, to the State; or
> (*b*) such person did not benefit financially, taking interest payable into account, by not making such payment within the said period or on the said date;
> was not due to an intent to avoid or postpone liability for the payment of the tax, he may remit in whole or in part any penalty or interest payable in terms of this section."

The appellants, on the other hand, submitted that even the respondent at one time believed that the appellant was not liable to register for VAT. The appellant's director told the Court that when he approached the respondent to enquire whether the appellant needed to

register for VAT he was told by a representative of the respondent that 'since the projects undertaken by the appellant were funded by foreign donor organisations, the appellant was not liable for registration for VAT. Indeed he was told that registration by the appellant would be a disadvantage to the respondent because the appellant would not be paying VAT but would be entitled to claim VAT on purchases, for example, of fuel electricity and so on.

It was submitted that this visit to the respondent's offices and the outcome thereof demonstrates the absence of any intention to evade VAT liability. Secondly, the advice received was to the effect that the appellant was not liable to register for VAT which established the *bona fides* of the belief that the appellant was not liable to pay VAT seeing the respondent itself held the same belief at one time.

Further, the appellant was cooperative with the respondent in respect of the audit and other enquiries. In view of the above it was submitted that the penalty ought to be set aside.

[12] It was not disputed by the respondent that the appellant at one time about 2012-2013, approached it to ask for advice as to its liablity for registration and payment of VAT and that it was told that it was not liable to VAT which advice it acted upon. Nor did the respondent produce any evidence that this advice had changed up until the time of the audit in 2017. For its part, the appellant continued in the belief that it was not liable for registration for VAT until it was compulsorily registered for VAT with effect from 1 January, 2015.

I accept the submission made on behalf of the appellant that it acted *bona fide* and had no intention to evade payment of tax. This, in my view, is a case where the penalty ought to be remitted in its entirety.

[13] Accordingly, the appeal succeeds in part and it is ordered as follows.

1. The penalty imposed in this matter is set aside.
2. The appeal is, otherwise, dismissed.
3. There shall be no order as to costs.

Atherstone & Cook, applicant's legal practitioners
Kantor & Immerman, respondent's legal practitioners