BCM (PVT) LTD
versus
ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
ZIYAMBI AJ
HARARE 16 November 2020 & 28 April 2021

FISCAL COURT OF APPEAL

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

ZIYAMBI AJ:

[1] This is an appeal in terms of s33 of the Value Added Tax Act [*Chapter* 23:12] ("the Act").

[2] The appellant is a company duly incorporated according to the laws of Zimbabwe and is an investment holding company for various locally registered subsidiaries. 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 various revenue statutes which it administers including the Act.

[3] Following a tax investigation and audit into the appellant's tax affairs, the respondent discovered that certain income, described as sundry income in the appellant's financial statements, as well as income received from advisory fees and other sources, had not been subjected to VAT. Being of the view that such amounts ought to have been subjected to VAT the respondent, on the 7 February 2018, issued assessments in accordance with s31 of the Act. In terms of these assessments the appellant was liable to pay a total sum of $3 397 322.26 inclusive of a 75% penalty on amounts which were not charged VAT during the period under audit being 2011-2015.

[4] On the 7 March 2018, the appellant lodged an objection to the assessments with the Commissioner in terms of s32 of the Act. Its main ground of objection – relating to the tax years December 2011 to December 2015- was:

> "That ZIMRA incorrectly charged 15% VAT instead of zero %, in terms of section 10(2)(l) of the Value Added Tax Act, on revenue from the provision of tax advisory services to clients who were non-residents of Zimbabwe at the time that the services were rendered.

> In addition, we also noted that ZIMRA incorrectly charged VAT on fair value adjustments which arise from certain accounting treatment necessitated by the need to comply with financial reporting standards. Such fair value adjustments are not vatable in terms of the VAT Act."

Consequently, it was alleged that the 75% penalty imposed was not justifiable.

[5] Six issues were presented for determination by this Court. They are:

- Whether or not the amounts taxed by the respondent for the years 2011, 2012 and 2013 as sundry income were in fact fair value adjustments;
- Whether or not the amount of $100 000.00 subjected to VAT for tax year 2011 as advisory fees were correctly classified by the respondent as advisory fees and if so, whether the aforesaid amount is subject to VAT in terms of the VAT Act;
- Whether the amounts of $608 191.00 and $237 568.00 subjected to VAT in the tax year 2013 are in fact share income from associates and dividend income respectively as averred by the appellant and if so whether those amounts are subject to VAT;
- Whether the amount of $2 447 092.00 which was subjected to tax in the tax year 2014 was in fact a supply rendered to and for the benefit of a non-resident taxpayer and if so whether such amount is subject to VAT at 0% in terms of section 10 (2) (l) of the VAT Act
- Whether the amount of $3 321 293.00 subjected to tax in the tax year 2015 was a fair value gain and if so whether fair value gains are subjected to VAT;
- Whether the penalty imposed on the appellant was appropriate.

Resolution of issues

[6] *1. Whether or not the amounts taxed by the respondent for the years 2011, 2012 and 2013 as sundry income were in fact fair value adjustments;*

The onus of proving the amounts were fair value assessments lies on the appellant who so alleges. The appellant's allegation in the objection letter that "*ZIMRA incorrectly charged VAT on fair value adjustments…* was met with the following response from the respondent:

> "2011- The sum of $1 219 359.57. This amount is stated in the financial statements submitted by the appellant as sundry income. The appellant was requested to submit documents to prove that the amount was a fair value adjustment which documents the appellant failed to submit.

> 2012- The sum of $2 268 015.68. Again this sum is stated as sundry income in the financial statements. The appellant failed to submit proof to show that the amount was fair value hence the inclusion of the income in the computation to determine tax liability.
>
> 2013- The sum of $1 271 436.66. This amount was stated as sundry income and the appellant failed to prove that the amount was a fair value amount".

[7] The appellant provided no evidence in support of its averments that the amounts in question were fair value adjustments. The books of account required to be kept by the appellant in terms of s37B of the Income Tax Act and s57 of the Act would have contained the necessary supporting evidence. These books were not produced. What the appellant did produce was a set of financial statements which clearly stated the amounts in question to be sundry income. Accordingly, the respondent cannot be faulted for rejecting the averments by the appellant which ran contrary to the narrations in its financial statements that the amounts in question were in fact sundry income.

2. Whether or not the amount of 100 000 subjected to VAT for tax year 2011 as advisory fees were correctly classified by the respondent as advisory fees and if so, whether the aforesaid amount is subject to VAT in terms of the VAT Act;

[8] Mr *Tshuma*, for the appellant, submitted that the respondent's grounds for subjecting the amount of $100 000 to VAT is that the appellant's accountant at the time, one Marshall Chimedza ("Chimedza"), advised the respondent that advisory services had been rendered by the appellant for $100 000 and, according to the respondent, it was entitled to believe him and raise an assessment for VAT. However, the respondent's assertions were not backed up by any evidence. Neither the appellant's financials nor its audited financial statements refer to any amount of $100 000 for advisory services. The only documents referring to such an amount are documents prepared by the respondent such as the document which appears on page 89 of the documents prepared by the respondent in terms of Rule 5 ('the Rule 5 documents').

He submitted that not only is there no documentary evidence to corroborate the respondent's assertions that Chimedza disclosed that services had been rendered by the appellant for $100 000, but all the documentary evidence discovered by the respondent renders such an assertion highly unlikely. For example, despite numerous exchanges recorded by the respondent as having taken place between Chimedza and the respondent's representatives, at pages 23-34 of the Rule 5 documents, the figure of $100 000 is not mentioned once. Further,

the document on page 35 of the Rule 5 documents which records a meeting between Chimedza and the respondent's representatives on the 12 July 2017, makes no mention of the sum of $100 000. In addition, the appellant's position has always been that it disputes the amount and has no knowledge of its source. Therefore, given the sheer lack of evidence and grounds to tax the sum of $100 000 allegedly for advisory services rendered by the appellant, there is clearly no basis for taxing this 'phantom amount' and the respondent's additional assessment, to the extent that it includes VAT on $100 000 for advisory services, should be set aside.

[9] Mr Bhebhe, on behalf of the respondent, submitted that the information regarding the amount of $100 000 was given to the respondent by the appellant's accountant, Chimedza, at a meeting held at the respondent's offices on the 17 October 2017. The information was provided to the respondent together with information relating to advisory fees which had not been declared for the years 2012, 2014 and 2015 and is what formed the basis of the schedule appearing at pages 89 and 92-93 of the Rule 5 documents.

[10] If the information was provided orally at the meeting of the 17 October 2017, there is nothing in the Rule 5 documents to confirm this fact. The only record of a meeting contained in the Rule 5 bundle relates to the 12 July 2017 meeting. The meeting of the 17 October 2017 was not documented. It appears from the emails forming part of the Rule 5 documents that a meeting was planned to take place between the respondent and Chimedza for 10am on Tuesday 17October 2017 and did indeed take place. At 2.46pm on the 17 October Chimedza emailed the respondent:

> "Find attached the financial information for [BCM (Pvt)] Ltd as requested at our meeting with yourselves."

This email was acknowledged by the respondent at 3.17 p.m. on the same date. The remaining emails between the respondent and Chimedza appear on pages 23-31 of the Rule 5 bundle and date from 31 October to 21 December 2017. There is no mention of the alleged disclosure in the emails.

[11] It appears to be the practice, judging from some of the cases I have dealt with in this Court, for the respondent's Commissioner to keep a record of such meetings stating briefly what transpired at the meeting. The memo on page 35 of the rule 5 bundle headed RECORD OF INTERVIEW and containing a summary of what took place at the meeting of the 12 July 2017 is an example. Such a record would have been of assistance in establishing what took place at the meeting.

Failing a record of the meeting, since the figure of $100 000.00 does not appear in any of the appellant's financials or in any of the other documents before the Court, evidence from Chimedza or a representative of the respondent present at that meeting would have assisted in clarifying the source of the $100 000. A bare allegation, without more, by the respondent, that there was a meeting at which the appellant confessed that it had not declared a figure of $100 000 leaves a nagging doubt in my mind particularly in the face of the sustained stance by the appellant that it has no knowledge of the source of this amount.

[12] In the result, I am of the view that neither the fact that the amount of $100 000 was undeclared income nor the fact that this amount is liable to VAT has been established. I would therefore find in favour of the appellant that this amount was not proved to be liable to VAT. Accordingly the amount assessed for VAT for the year 2011 is to be reduced by $100 000 and the necessary adjustments made to the final amount of VAT payable by the appellant for that year.

3. Whether the amounts of 608 191.00 and 237 568.00 subjected to VAT in the tax year 2013 are in fact share income from associates and dividend income respectively as averred by the appellant and if so whether those amounts are subject to VAT.

[13] In its notice of appeal the appellant alleged that for the year ended 31 December 2013:

> "7 The respondent erred in subjecting the amount of US$1 271 435.66 reflected in the accounts as sundry income to VAT, as opposed to its proper treatment as income resulting [from] fair value adjustments which is not subject to VAT.
> 8. The respondent erred in finding that fair value adjustments constitute either "consideration" or a "taxable supply" as contemplated in the VAT Act.
> 9. Furthermore, the respondent erred in subjecting share income from associates of US$608 191 to VAT, as share income from associates is not "consideration" for the "supply" of goods or services and is therefore not subject to VAT."

The appellant's trial balance for the period January –December 2013 records a sum of $1 271 436.66 as sundry income. A further sum of $237 568.33 is recorded as 'Discount Received'. No entries are recorded for share income from associates and dividend income.

[14] In disallowing the objection the respondent said:

> "Based on the information submitted before me the amount of $1 271 436.66 was sundry income and the client failed to prove that the amount was a fair value amount. The dividend income of $237 568 was not mentioned in the submitted financial statements together with share of income from associates of $608 191. The two amounts are not mentioned anywhere in the financial statements."

[15] As mentioned above there was a 'discount received' of $237 568.33 but no figures recorded under the heads alleged by the appellant. The figure of $608 191 does not appear in the statements. In terms of s37 of the Act, the appellant bears the burden of proving that the amounts in question were not liable to tax. This burden of proof was not discharged by the appellant which produced no evidence in support of its allegation that the amounts represented share income from associates and dividend income, respectively. In short the appellant failed to prove that the Commissioner erred in subjecting the said amounts to VAT.

4. *Whether the amount of 2 447 092 which was subjected to tax in the tax year 2014 was in fact a supply rendered to and for the benefit of a non-resident taxpayer and if so whether such amount is subject to VAT at 0% in terms of section 10 (2) (l) of the VAT Act*

[16] This issue, though raised in the letter of objection does not form part of the grounds of appeal.

The notice of appeal invites comment. It was filed on 13 June 2018. It is curiously drafted. It sets out, on the first two pages, 9 grounds of appeal against assessments for the years ended December 2011 to 2013. There are no grounds of appeal against the assessments for the years 2014 to 2016. The third and what appears to be the last page of the notice, contains the appellant's address for service as required by the Rules and the addressees of the Notice of Appeal, being the Registrar of the Fiscal Court and the Respondent.

Next follows a page headed MATERIAL FACTS. The appellant repeated therein its allegations that for the years 2011, 2012 and 2013 it was taxed on amounts which the respondent erroneously subjected to VAT despite their source being from fair value adjustments which are not subject to VAT.

At the end of p 2 of the MATERIAL FACTS, appears the heading 'Year ending 2014' followed by the allegation that the respondent had erroneously subjected to VAT, at the standard rate, consideration paid to the appellant despite the fact that the services provided were to a non-resident person and therefore subject to VAT at zero percent. As noted above, this complaint though forming part of the objection was not included by the appellant in its grounds of appeal. For that reason alone, the issue relating to that point should never have been an issue for determination as it did not arise from the grounds of appeal. However, even if the issue had arisen from the grounds of appeal, I would have decided it against the appellant for the reasons that follow.

[17] Section 10(2)(l) of the Act makes provision, on certain conditions, for the charging of tax at the rate of zero per centum in respect of services which 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.* (My italics)

Section 2 of the Act 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 appellant, in 2014, rendered certain advisory services in respect of a transaction involving Atlas Mara and ABC Holdings Limited relating to BancABC Zimbabwe ('BancABC'). The invoice to Atlas Mara forUS$2 447 092.74 forms part of the papers. ABC Holdings Limited is the parent company of BancABC which carries on business in Zimbabwe. The invoiced amount being advisory fees was subjected by the respondent to VAT at 15%.

In response to the appellant's objection as set out above[1], the respondent stated:

> "Based on the information submitted before me the income from the deal between the client and the two Companies Atlas Mara and Banc ABC was correctly charged 15% VAT because the deal was concluded locally, and the recipient of the service provided is a local company which is BancABC. The ground of objection is fully disallowed."

[18] Among the documents submitted by the appellant to the respondent was an email dated 6 December 2017 wherein the appellant responded to the position taken by the respondent that the transaction was not zero- rated for VAT purposes. In this email the appellant stated:

> "The variance fee income relates to the BancABC invoices which we have provided to you. Please share with us the extract from the VAT Act that is being used to claim VAT on this invoice as the advisory work done was for a foreign entity as indicated on the agreement shared with you which was for various entities within the ABC Group and included Zimbabwe..."

[19] It was submitted on behalf of the respondent that once it is accepted that the work was done for various entities including an entity which is a resident of Zimbabwe in terms of section 2(1) of the VAT Act, that should be the end of the matter. The fact that the contract was entered into between Atlas Mara and the appellant is not in itself a conclusive basis upon which it can be determined that the services were zero rated in terms of s 10(2)(l) of the VAT Act.

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[1] [4] *supra*

It was further submitted that the services were not for the exclusive benefit of Atlas Mara and the appellant's services did not fall within the ambit and scope of section 10(2) (l) for where any person to whom the services are rendered is resident in Zimbabwe, regardless of residence elsewhere, the section cannot be invoked. While the services were rendered in terms of the contract between Atlas Mara and the appellant, however the services were rendered in Zimbabwe and for the benefit of a Zimbabwean entity thereby excluding the transaction from the zero rating. Accordingly, the decision of the respondent was correct in law and cannot be set aside.

[20] The appellant's only argument is that the contract was with a foreign entity but more is required if the transaction is to be zero rated. The contract, it seems to me, must be for the sole benefit of the foreign entity. If, as was submitted by the respondent, and supported by correspondence from the appellant, the contract is also for the benefit of a local resident, the section does not apply because the service is not done for the benefit of a foreign resident who is outside Zimbabwe at the time the service is rendered. That BancABC is a local resident is not in dispute. Where the contract is also for the benefit of a local resident the transaction does not qualify for zero rating. The requirements of s10 (2) (l) are cumulative. It follows that if one or more of the requirements is absent, the section is not applicable. I conclude that the appellant has not succeeded in showing that the Commissioner was wrong in taking the view that the transaction did not qualify for zero rating in terms of the Act.

5. *Whether the amount of 3 321 293.00 subjected to tax in the tax year 2015 was a fair value gain and if so whether fair value gains are subjected to VAT*;

[21] In its letter of objection dated 7 March 2018, the appellant made the blanket assertion, set out above,[2] regarding the December 2011 to December 2015 tax years. The appellant requested then that collection of the estimated taxes and interest as advised be held in abeyance pending the submission of detailed grounds of objection.

On the 13 March 2018, the respondent's Commissioner General replied denying the extension requested on the grounds that there were no reasonable grounds for the extension. However, it appears that this decision was reversed because on the 5 April 2018, the appellant filed detailed grounds of objection some of which were referred to in the Commissioner's determination. In the letter dated 5 April 2018, the appellant alleged, referring to the 2015 tax year, that:

[2] [4] *supra*

> "Of the $3 321 293 that was subjected to VAT, the Company objects to the inclusion of an amount of $3 301 393. The Company's records do not reflect a possible source of this amount. Therefore, the Company do hereby objects (sic) that it is liable for the payment of principal VAT amount of $757 076.09 together with 75% interest thereon."

[22] The allegations relating to the tax year ending 2015 did not form part of the grounds of appeal. Yet in the material facts the appellant makes the added complaint that the respondent used a submitted (income) tax return in order to calculate the appellant's VAT liability. The letters of objection dated 7 March 2018 and 5 April 2018 have been quoted above. In neither is this added ground of objection raised. Again, this issue does not appear to arise from the notice of appeal and is a non-issue.

[23] Section 33 of the Act provides in subs (3) as follows:

> "(3) At the hearing by the Fiscal Appeal Court of any appeal to that court—
> *(a)* the appellant *shall be limited to the grounds of objection stated in the notice of objection* referred to in subsection (2) of section *thirty-two* unless the Commissioner agrees to the amendment of such grounds or the appellant, on good cause shown prior to or at such hearing, is given leave by the court to amend such grounds of objection within a reasonable period and on such terms as to any postponement of such hearing and costs which may result from such postponement as the court may order;.." (My italics for emphasis)

At no stage was an amendment agreed to nor was leave sought or granted to the appellant to amend its grounds of objection. Not only is there no appeal and therefore no issue regarding the tax year ended December 2015, but even if there was an appeal the appellant is precluded by the provisions of s 33 (3) *supra* from relying on this supposed new ground of objection. In any event, the appellant appears to have abandoned this issue as no submissions were made thereon.

6. *Whether the penalty imposed on the appellant was appropriate*

[24] The Notice of Appeal contains no grounds relating to the penalty.

On the 14 June 2018, one day after the notice of appeal was filed, a document of questionable legal validity entitled ADDENDUM TO NOTICE OF APPEAL was filed by the appellant's legal practitioners. It drew to the attention of the addressees the fact that the appellant "files this addendum to its Notice of Appeal filed on the 13 June 2016". It set out a single ground of appeal relating to an assessment of VAT made by the respondent for the 2016 tax year and the penalty. It denied any basis exists for such additional liability, denied liability therefor and maintained that it had accounted in full for all VAT payable during that tax year.

Rather appropriately, in my view, no mention was made by the parties of this document nor was the subject matter therein raised as an issue at the hearing. I mention it solely to point out

that such documents are unnecessary and embarrassing to the Court and to the respondent who must spend valuable time in perusing them since they form part of the appellant's papers.

Since there is no appeal against the penalty imposed in respect of the tax years 2011-2016, again, strictly speaking, the appropriateness thereof is a non-issue and ought not to have formed part of the issues for trial as it did not arise from the notice and grounds of appeal. However, having regard to my findings on the issues above and the failure by the appellant to produce any proof in support of its averments, I can see no reason to fault the penalty imposed by the Commissioner in the exercise of his discretion except in so far as a recalculation becomes necessary in view of my determination on issue 2 *supra.*

[25] It is accordingly ordered as follows:

1. The appeal succeeds on issue 2
2. The rest of the appeal is dismissed
3. The respondent is directed to reassess the liability of the appellant for VAT for the year ended 2011 as well as any penalty attendant thereon in the light of this judgment.

Gill, Godloton & Gerrans, appellant's legal practitioners
Kantor & Immerman, respondent's legal practitioners