

M. M. W. (PVT) LTD
versus
ZIMBABWE REVENUE AUTHORITY

IN THE HIGH COURT OF ZIMBABWE
NDOU AJ
HARARE 21 June 2021 and 19 January 2022

Special Court for Income Tax Appeals

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

NDOU AJ: The respondent is an administrative authority tasked with the duty and obligation to collect taxes and other statutory dues under various legislative instruments. In particular, the respondent is mandated to collect income tax in terms of the Income Tax Act [Chapter 23:06] (“Act”).

In casu, sometime in 2014, the appellant paid the sum of US\$400, 000.00 (Four Hundred Thousand United States Dollars) to an organization known as the I. Cultural Institute (“the Institute”), a registered private voluntary organization. It is the appellant’s contention that this payment was a donation.

Pursuant thereto, the appellant applied tax deductions in accordance with the provisions of s 15(2)(r)(iii) of the Act. This provision allows a deduction on a donation to a charitable trust administered by the Minister responsible for Social Welfare or the Minister responsible for Health in his or her capacity as such, or by any official in his or her ministry in his or her official capacity. It is the respondent’s contention that both elements of this provision must be present for a deduction to be allowable. The respondent disallowed the deductions on the basis that the payment did not fall within the scope and ambit of the permissible deductions in s 15(2)(r)(iii), *supra*. The respondent opined that the I. Cultural Institute was not a charitable trust and was not administered by the Minister responsible for Social Welfare as contemplated by s 15(2)(r)(iii). The respondent proceeded to impose a 60 % penalty following the tax assessment. Having filed a s 62 objection which was dismissed by the respondent, the appellant has now appealed to this court in terms of s 65 of the Act.

According to the parties' joint pre-hearing minute the issues for determination in this appeal are:

1. Is the Institute a charitable trust administered by the Minister responsible for Social Welfare for the purposes of section 15(2)(r)(iii) of the Act?
2. Does the Institute's registration as a private voluntary organization exclude it from being construed as a charitable trust for the purposes of Act?
3. Should the 60% penalty imposed by the respondent be reduced?
4. If so, to what amount?

This appeal is by way of a stated case. The relevant and material facts that can be discerned from the Statement of Agreed Facts are the following:

For the above-mentioned payment, no consideration of any sort was received by the appellant from the Institute in return for the donation concerned. The Institute was registered as a welfare organization in terms of the Welfare Organizations Act on 26 June 2002 and is governed by a Constitution. In terms of their Constitution, the object of the Institute include, *inter alia*, to:-

- “(a) Promote the religious, cultural, educational and social welfare interests in and aims of all Asian Muslims, Cape Malays, Somalis and their descendants of Harare and the surrounding districts.
- (b) Assist charitable organizations and funds for the benefit of the same community.
- (c) Raise funds for all or any of the above purposes.
- (d) Invest and utilize any monies the Institute may have for the Institute's objects.
- (e) Acquire for the Institute any land and buildings furniture, equipment as may be required.
- (f) Do all such other things as are incidental or conducive towards achieving the objects above set out.”

The operations of the Institute, as alluded to above, are carried out for no profit, that being in accordance with its constitution and objectives. The Act in terms of which the Institute is registered as a welfare organization is administered by the Minister responsible for Social Welfare.

As alluded to above, during its assessment of the appellant's income tax liabilities in respect of the year 2014, the respondent disallowed the donation of US\$400,000.00 as an allowable deduction. Further to disallowing that deduction, the respondent also imposed a penalty of 60% of the disallowed deduction. The primary contention by the respondent is that the Institute is not a charitable trust and as such donations made to it cannot be allowed in terms of s 15(2)(r)(iii) of the ITA. It is contended by the respondent that the Institute is not a trust because it is a private voluntary organization governed by its Constitution in terms of the

Welfare Organization Act, [*Chapter 93*] (now the Private Voluntary Organizations Act [*Chapter 17:05*] (“PVOA”). The respondent relies on s 2(1) of PVOA which defines a private voluntary organization as follows:

“... “ Private voluntary organization” means anybody or association of persons, corporate or unincorporated, or any institution, the objects of which include or are one or more of the following
... but does not include –
(iii) any trust established directly by any enactment or registered with the High Court.”

From the foregoing definition in the PVOA the respondent contends that a private voluntary organization cannot be considered to be a trust. Put in another way, the respondent’s contention as outlined by *Mr Bhebhe* is as follows. The dispute between the parties is really on whether or not the appellant is a charitable trust administered by the Minister responsible for Social Welfare. If that question is answered in favour of the appellant then they will fit within the definition, within the provision that is in question and the appellant would be entitled to the relief it seeks. But if the appellant is not a charitable trust administered by the Minister responsible for Social Welfare then the respondent’s decision in disallowing the appellant’s objection should stand. In other words, it is not just any trust that benefits from the provisions of section 15(2)(r)(iii) A, *supra*, for the trust to benefit it has to be a charitable one and further be administered by the Minister responsible for Social Welfare. While the respondent concedes that the appellant is a charitable organization, it is in dispute whether it is a charitable trust and whether it is administered by the Minister of Social Welfare.

The word “trust” is not defined in the Act, trustee is the word that is defined. The respondent’s argument is that in finding out what a trust is you must deduce the meaning from the definition of trustee. The respondents submits that the appellant does not fit into any deductible definition of trustee. The Act also defines a trust instrument in s 2. In the circumstances the respondent argues that a trust is an organization which is managed or administered by a trustee and which is created in terms of a trust instrument. The respondent’s primary basis in disallowing the deduction claimed by the appellant is that the Institute’s Constitution does not disclose that it is a trust. As such, the respondent ultimately finds that Institute falls outside the definition of a trust. The appellant conceded that “trust” is not defined in the Act. It however, argues that when construing the term, its ordinary and natural meaning as demanded by legislative context will apply. It argues that a trust arises in a situation where ownership or control of an asset are separated from the benefit and enjoyment of the asset. In other words, a trust arises where one entrusted with control exercises it on behalf of and in the

interest of another. The Institute seeks to raise funds and assets to utilize for the benefit of the Muslim community. Whilst the Institute owns and controls the funds and other assets, it does this not on its own behalf but in the interests of 3rd party beneficiaries i.e members of Harare's Muslim community. The appellant emphasizes that the deductability of charitable donations indicates that the legislature's aim was to encourage taxpayers to make donations to institutes that assist the Social Welfare of citizens. It is common cause that the Institute is charitable and that it aims to assist the social welfare of the relevant community. Respondent argues that simply because of the legal form the Institute takes, the legislature did not encourage donations to be made to it. The appellant argues that by adopting such a restrictive and legalistic interpretation the legislature's intention would not be served. If the legislature's intention was to acknowledge and encourage the social utility of charitable donations, the trust must not be restrictively interpreted as contended for by the respondent. From the foregoing arguments, the appellant contends that the Institute is a trust.

In its Supplementary heads of argument the appellant contends that on a proper understanding of the law, the respondent has not only misdirected itself, but has failed to apply its mind to the issues at hand, with the result that it had acted unreasonably in denying the appellant a deduction it is entitled to at law. Further, as there is no definition of trust in the Act, the word trust must be accorded its common law meaning – *Endeavour Foundation and UDC Ltd v Commissioner of Taxes* (1995) 57 SATC 297. It is argued that a trust is a legal relationship created (in lifetime, or on death) by a settlor when assets are indeed under the control of a trustee for the benefit of a beneficiary or for a specified purpose. The key characteristics of a trust is that it permits the separation of legal ownership and beneficial interest: the trustees become the owners of the trust property as far as third parties are concerned, and the beneficiaries are entitled to expect that the trustees will manage the trust property for their benefit – *Estate Kemp v McDonald's Trustee* 1915 AD 491.

Resolution of the Issues:

It is apparent that the appellant contended, on the one hand, that the Institute was a charitable trust administered by the Minister responsible for Social Welfare for which it was entitled to deduct the donation by virtue of the provisions of s 15(2)(r)(iii) of the Act. The respondent, on the other hand, made the contrary contention that the Institute was neither a charitable trust nor administered by the Minister responsible for Social Welfare and was therefore precluded from deducting the donation made thereto.

As alluded to above, it is common cause that the Institute is a charitable private voluntary organization, a PVO registered in terms of s 9(5) of the PVOA. There is no definition within the Act of the word “trust”. I must therefore look to the common law for the definition of “trust”. In my view, the underlying concept of a trust is that while the legal dominium is vested in trustees in their capacity as such, they have no beneficial interest in the trust property but are bound to hold and apply it for the benefit of some person or persons or for the accomplishment of some specific purpose. In other words, the characteristic of a trust is that it permits the separation of legal ownership and beneficial interest. The trustees become the owners of the trust property as far as third parties are concerned and the beneficiaries are entitled to expect that the trustees will manage the trust property for their benefit. While the Act does not define the word trust it does give guidance as to what type of relationship it envisages as being subject to tax as a trust. While the word trust is not defined in the Act, the following relevant terms are defined in the Act:

“trust instrument” means a deed, will, contract of settlement as other disposition, including a verbal declaration, by which a trust is created;

“trustee” includes –

- (a) the administrator or executor of a deceased estate; and
- (b) the trustee or assignee of an insolvent estate; and
- (c) the liquidator or judicial manager of a company which is being wound up or is under judicial management, and
- (d) the legal representative of any individual under a legal disability, or other person having, whether in an official or private capacity, the possession, disposal, control or management of the property of an individual under a legal disability; and
- (e) the person having the administration or control of property subject to a usufruct; *fideicommissum* or other limited interest; and “trust”, “property the subject of a trust” and “income the subject of a trust” shall be construed accordingly.”

From the foregoing, even an oral declaration is sufficient to create a trust instrument. This expansive definition of trust instrument compels the respondent to look beyond whether there was any written trust instrument and examine whether the relationship between the appellant and the Institute was such that it created a trust relationship. Further, the use of the words “includes” in the definition of “trustee” indicates an expansive and non-exhaustive definition of who can be a trustee.

The word “includes” when it occurs in interpretation clauses in contradiction to the word “means” normally suggests enlargement of meaning rather than exhaustive – *CIR v De Beers Holdings (Pty) Ltd* 1984 (3) SA 286 (T); ITC 1394 (1984) 47 SATC 119 (Z) and *Dilworth v Commissioner of Stamps* [1899] AC 99.

While the South African Income Tax Act now has a definition of “trust” the words of Silke prior the introduction of a definition of “trust” in the latter are instructive in understanding how the respondent should have approached the issue of whether the relationship between the appellant and the respondent created a trust. Silke notes that –

“The wide statutory definition of “trustee” includes persons who are not trustees in the strict sense of the word, with the result that they are treated as trustees for the purpose of the Act, that is to say, as representative taxpayers – Silke on South African Income Tax Chapter 12:18 (Estates and Trusts) – AP de Kocker and Estate Kemp – *supra*. If one accepts that a trust is a contractual relationship, then it follows that unless there is a specific law prohibiting a PVO from being a trust, then a PVO can be a trust. As the Institute is neither a trust established directly by enactment, a trust registered with the High Court, nor an education trust approved by the Minister there is nothing in law which precludes it from being a trust. A PVO is capable of being a trust.

(a) Whether the relationship created between the appellant and the Institute was a trust relationship

Rather than apply its mind as to whether a trust relationship had been created, the respondent adopted a restrictive definition of trust. The respondent’s main basis in disallowing the deduction claimed by the appellant is that the Institute’s constitution does not disclose that it is a trust. As such, the respondent ultimately finds that the Institute falls outside the definition of a trust. In other words, the respondent opined that there was no trust instrument which evinced the existence of a trust. Respondent opined that the Institute is not a charitable trust but a PVO undertaking charity work. As alluded to above, there is nothing that precludes a PVO from being a trust. The definition of trustee in the Act is couched very widely, and would include persons such as officers of the PVO. Further, the registration certificate and the Constitution of the Institute reinforce the construction of the Institute as a trust. The Act does not provide that all trusts must be established by way of a trust instrument. The Act implies that there may be trusts that have been established in some way other than by a trust instrument e.g definitions of “beneficiary with a vested right” and “income the subject of a trust to which no beneficiary is entitled” in s2 of the Act. This court is concerned with the reality of a taxpayer’s position and not with the characterization of that position by the taxpayer or anyone else. In other words, substance takes precedence over form. Otherwise the entirety of the Act could be easily defeated by taxpayers simply mischaracterizing their true position. The essence of a trust, is the separation of ownership or control from enjoyment. A trust arises where one entrusted with control exercises it on behalf of and in the interest of another. This is exactly what the Institute’s Constitution prescribes. The Institute may raise funds, invest the same,

purchase property etc. However, all of these powers must be exercised for the Institute's objectives, viz in the interests of beneficiary Muslim community in Harare. It is for these reasons that I hold that the Institute was a charitable trust. Accordingly, the appellant is entitled to benefit from the provisions of s 15(2) (r)(ii) of the Act.

(b) **Whether the Institute is administered by the Minister responsible for Social Welfare for the purposes of s 15(2) (r) of the Act:**

The issue of administration by the Minister and the management by executive committee of the Institute are not in dispute. The respondent's contention is based on the fact that the Institute, while it is registered as PVO in terms of the PVOA, cannot give reprieve to the appellant for it to claim those donations as allowable deduction in terms of s 15(2)(r)(iii) of the Act as registration as PVO is distinct from being a charitable trust. Put in another way, the respondent contends that the Institute does not qualify to be a charitable trust, rather, it qualifies as a PVO engaged in charity work under the PVOA which is not the issue contemplated in s 15(2)(r)(iii) of the Act. The respondent makes a distinction in the definitions of administration and management by explaining that administration relates to the administration of the Institute as a PVO in terms of the PVOA and management relates to the management of the Institute by the executive committee not the Minister as outlined in the Constitution submitted in terms of the PVOA. The respondent conceded in its averments, that the Minister responsible for Social Welfare administered the Institute. It seems to me that the concession, involving as it does the interpretation of words in a statute, would constitute a question of law and not fact. I am, therefore, not bound by such a concession. I have to interpret the words in question. It is clear that the facts showed that the Minister, primarily, registered the Institute of a PVO. Although there is no evidence adduced during the investigations and on objection and appeal that the Minister or his officials ever exercised the discretionary powers conferred on him by ss 20, 21 and 22 of the PVOA in regards to the inspection and examination of the accounts of the Institute, the suspension of the executive committee etc, the fact remains that the Minister was clothed with these statutory powers. The words "administered by the Minister responsible for Social Welfare" should be subjected to a literal interpretation and given effect to the ordinary and grammatical meaning as there is no absurdity, repugnance or inconsistency arising from such interpretation in *Zambezi Gas Zimbabwe (Pvt) Ltd v NR Barber (Pvt) Ltd* SC 3-20 and *ZIMRA v Murowa Diamonds (Pvt) Ltd* 2009(2) ZLR 213 (S).

I will, however, not lose sight of the fact that this is a fiscal case which has a different regime of statutory construction. In the case of *Loewenstein v COT* 1956 (4) SA 766 (FS) at 772 B MURRAY CJ quoted Lord Cairns in *Partington v AG* 21 LT p 375 as follows:

“I am not at all sure that in a case of this kind – a fiscal case – form is not amply sufficient, because as I understand the principle of all fiscal legislation it is this: if the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free however apparently within the law the case might otherwise appear to be. In other words, if there be an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statutes.”

Further, in *Cape Brandy Syndicate v IRC* [1921] 1 KB 64, the court stated:

“In a taxing case one has to look merely at what is clearly said. There is no room for any intendments. There is no equity about a tax. There is no presumption as to tax. Nothing is to be read in common nothing is to be implied. One can only look fairly at the language used.”

There is no presumption as to a tax. It was argued that the respondent, as an administrative authority must have a reasonable basis for any assessment it issues. In *Commissioner for South African Revenue Services v Pretoria East Motors (Pty) Ltd* [2014] 3 All SA 266 (SCA) at p 272 was stated:

“The [revenue officer’s] approach was fallacious. The raising of an additional assessment must be based on proper grounds for believing that, in the case of VAT, there has been an under declaration of supplies and hence of output tax or an unjustified deduction of input tax ... It is only in this way that [the revenue authority] can engage the taxpayer in an administratively fair manner, as it is obliged to do. It is also the only basis upon which it can, as it must, provide grounds for raising the assessment to which the taxpayer must then respond by demonstrating that the assessment is wrong.”

In other words, a strict approach is appropriate in interpretation of fiscal legislation – *CVS v COT* 1988 (2) ZLR 27 (HC). A taxing statute is not to be interpreted according to “the spirit of the law”, nor words to be extended so as to operate against the subject – “*Principles of Legal Interpretation*” (1995) by EA Kellaway at p 341.

The basic principle in tax law is that it is the duty of the taxing or revenue collecting authority to assess and collect tax according to the laws enacted by parliament and not forgo a tax which is properly chargeable and payable – *Commissioner for Inland Revenue v Simpson* 1949 (4) SA 678 (A) at 695 and *NOC (Pvt) Ltd v ZIMRA* HH 765-19. This approach applies in all tax cases where there is no doubt.

However, in cases where there is an ambiguity in tax legislation, the ambiguous provision must be interpreted in a manner that favours the taxpayer. This is the *contra fiscum* rule. The

complete expression is in “*in dubio contra fiscum*” – *Glen Anil Development Corporation Ltd v Commissioner for Inland Revenue* 1975 (4) SA 715 (A).

An extension to this principle is that where a provision is capable of two reasonable constructions, the court will adopt the interpretation that imposes the smaller burden on the taxpayer – *Badenhorst v CIR* 1995 (2) SA 207 (N) at p 215 and *AB CC v CSARS* [2014] ZATC 4 (9 December 2014). In this case the parties did not refer to the *contra fiscum* rule directly. However, by making reference to the strict approach in the interpretation of fiscal legislation they “invited” the *contra fiscum* rule into the equation because the latter is a relevant rule of interpretation of legislation. From the foregoing deliberations, it is clear to me that there is an ambiguity on the interpretation of s 15(2)(r)(iii) of the Act. This is fiscal provision. The issue is whether the Institute is a trust as defined this provision. Further, whether the Institute is administered by the Minister responsible for Social Welfare. In the circumstances, the *contra fiscum* rule has to be used to resolve these two issues. The resolution favours the appellant’s case. It is against this background that I find that:-

- (a) a PVO is capable of being a trust.
- (b) the relationship between the appellant and the Institute is a trust relationship, and,
- (c) the Institute is administered by the Minister responsible for Social Welfare.

Disposition

Accordingly, it is ordered:

1. That the appeal succeeds.
2. That the decision of the Commissioner be and is hereby set aside.
3. That the Commissioner reduces its assessment of the appellant’s taxable income for the year 2014 by US\$400 00-00 representing the deductible expense of a donation made by the appellant to a charitable trust pursuant to section 15(2)(r) of the Act.
4. That the Commissioner removes the penalty imposed on the appellant relating to the objection.
5. That the Commissioner authorizes a refund to the appellant for any overpayment of tax and penalties made by the appellant.

6. Each party bears its own costs.

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