

REPORTABLE (14)

UNKI MINE (PRIVATE) LIMITED
v
ZIMBABWE REVENUE AUTHORITY

SUPREME COURT OF ZIMBABWE
GUVAVA JA, UCHENA JA & MAKONI JA
HARARE, 8 SEPTEMBER 2020 & 3 FEBRUARY 2022

E. T. Matinenga, for the appellant

T. Magwaliba, for the respondent

GUVAVA JA:

1. This is an appeal against the whole judgment of the Fiscal Appeal Court HH 20/20 dated 8 January 2020. The court *a quo* dismissed the appellant's appeal against the decision of the Commissioner in respect of assessed tax and confirmed its amended income assessment made by the Commissioner on 2 September 2015.
2. The appellant is a company, with limited liability, duly incorporated in terms of the laws of Zimbabwe. It carries on the business of mining platinum in an area known as Middleridge Claims in Zimbabwe. The appellant and a related company known as Southridge Limited are subsidiaries of a registered company known as AmZim Holdings Limited Group ('Amzim'). Amzim is, in turn, a member of the Anglo American Group ('Amhold'). Amhold is not a trading or operating entity and is also not a Zimbabwean company. It merely holds all the shares in the appellant.

3. The respondent is a statutory body established in terms of s 3 of the Zimbabwe Revenue Authority Act [*Chapter 23:11*]. Its mandate is, amongst others, to assess and collect revenue on behalf of Government.
4. The appellant is the holder of a Special Mining Lease issued to it in March 2008 by the Government of Zimbabwe ('GOZ') in respect of the mining of platinum in an area known as Middleridge Claims. The appellant and Southridge Limited, for the purpose of facilitating the participation of other players in the platinum industry, ceded platinum claims (Bougai and Kironde) to the GOZ in an agreement signed between the relevant parties on 25 March 2008 (the 'cession agreement').
5. On 1 November 2012 the GOZ, the National Indigenisation and Economic Empowerment Fund, the Anglo American Platinum Limited, Amzim, Southridge Limited and the appellant entered into an agreement to implement the indigenisation implementation plan and indigenisation transaction. The agreement also provided for the 51 per cent equity ownership in Amhold being issued to Indigenous Entities. The founding document of the agreement was termed the Heads of Agreement ('Heads of Agreement'). The Heads of Agreement are part of an agreement in fulfilment of the indigenisation laws of Zimbabwe and was consequent upon the cessation agreement signed on 25 March 2008.
6. In 2007, the GOZ enacted the Indigenisation and Economic Empowerment Act No. 14 of 2007 [*Chapter 14: 33*] ('the Indigenisation and Economic Empowerment Act'). The Act came into operation on 17 April 2008. On 23 November 2011, a Deed of Trust for the Tongogara Rural District Community Share Ownership Trust ('the Trust') was founded. The founders of the Trust were Saviour Kasukuwere, the then Minister of Youth

Development, Indigenisation and Empowerment representing the GOZ, July Ndlovu duly authorised to represent Amhold, Collin Chibata duly authorised to represent the appellant, Gilbert Dhaidhai, Christmas Ndanga, Toendepi Banga, Walter Nemasasi and James Pasipano Maposa as founding trustees. The Trust Deed was to be read together with the Indigenisation Implementation Plan signed on 12 August 2012.

7. On 15 April 2010, Amhold submitted its initial indigenisation implementation plan under the Indigenisation and Economic Empowerment (General) Regulations, 2010 Statutory Instrument 21 of 2010 ('the Regulations'), which also covered its local subsidiaries, to the Minister of Youth Development, Indigenisation and Empowerment for approval. The indigenisation implementation plan was revised initially on 7 June 2012 and finally approved on 10 August 2012. In terms of the final approved indigenisation implementation plan, Amhold committed to donate US\$ 10 million as seed capital to the Trust through the appellant, its subsidiary. The actual payment of the US\$ 10 million donation was thus made by the appellant.

8. On 30 May 2011, the appellant submitted its self-assessment for the tax year ending 31 December 2011 wherein it claimed, *inter alia*, the US\$ 10 million as a deduction against its taxable income in terms of s 15 of the Income Tax Act [*Chapter 23:06*] (the 'Income Tax Act'), as read with para 4 (1) (a) of the Twenty-Second Schedule to the Income Tax Act, thereby reducing its taxable income by that amount. The assessment by the appellant showed an assessed loss of US\$ 41 652 575. The total expenses excluding interest and tax were in the sum of US\$ 30 254 951, which included the sum of US\$ 10 million donation categorised in its financial statements for the year ended 31 December 2011 as "Contribution to Community Share Trust".

9. The respondent then carried out an investigation on the tax compliance of the appellant on 12 November 2012 for the period January 2009 to December 2012. On 2 September 2015, the respondent issued to the appellant an amended Manual Notice of Assessment for income tax (Assessment Number 1/5114) for the year ending 31 December 2011, in which, *inter alia*, the respondent disallowed as a deduction the said sum of US\$ 10 million donation.

10. A dispute arose between the appellant and respondent as both parties disagreed over the nature of the appellant's payment of the US\$ 10 million donation. The appellant filed a notice of objection on 11 November 2015 to the amended notice of assessment dated 2 September 2015. In making the objection the appellant argued that it had made the US\$ 10 million payment in compliance with the Indigenisation and Economic Empowerment Act and the Indigenisation and Economic Empowerment Regulations. The appellant alleged that it had an indigenisation implementation plan approved by the Minister of Youth Development, Indigenisation and Empowerment in terms of which it was obliged to make a payment of US\$ 10 million to the Trust. Consequently, the appellant contended that the payment was of a revenue nature, as it was incurred for the purpose of trade or in the production of income.

11. On 13 April 2016, the respondent disallowed the objection and reasoned that the US\$10 million payment was not made wholly and exclusively for the purposes of the special mining lease operations but largely for obtaining approval of the indigenisation implementation plan. It also determined that the expenditure of the US\$10 million was of a capital nature.

12. Aggrieved by the decision of the respondent, the appellant lodged an appeal with the court *a quo* on 11 July 2016. The parties filed a statement of agreed facts on 30 November 2017. The parties were in agreement that the appellant paid the sum of US\$10 million to the Trust. The parties were also agreed that the appellant contended that the payment was made in part fulfilment of its legal obligation to indigenise in terms of the Indigenisation and Economic Empowerment Act and as such the payment was a deduction against its taxable income in terms of s 15 of the Income Tax Act. It was agreed that the respondent on the other hand, contended that the appellant did not have any legal obligation to pay the money to the trust and as such the payment was of a capital and not revenue nature.

13. On 20 March 2017 a Pre-Appeal Meeting was held and a pre-appeal minute was agreed between the parties wherein the issue for determination was stated as follows:

“a. Whether the expenditure (payment of US\$10 million to the Tongogara Rural District Community Share Ownership Scheme made in 2011) claimed as a deduction is allowable as such.”

On 8 January 2020, the court *a quo* in determining the appeal found that the donation of US\$ 10 million was not designed to establish, improve, or add to the income earning capacity nor did it generate any income for the appellant hence it was not of a revenue nature but capital. The court *a quo* agreed with the respondent that the disbursed US\$10 million was designed to preserve the appellant’s income-earning structure hence it was expenditure of a capital nature and not of a revenue nature.

14. The court *a quo* also dismissed the appellant’s contention that the US\$ 10 million was paid in compliance with the indigenisation implementation laws of Zimbabwe and on the provisions of the indigenisation implementation plan. The court *a quo* found that the

disbursement was a donation which had been made by the appellant on behalf of its holding company, Amhold, which was a separate legal entity and as such the appellant could not claim a deduction of the same. The court further found that the provisions of the Indigenisation Act and its Regulations did not require the appellant to make any donation in order to be indigenous compliant as it was a Zimbabwean company. In the result the court made the following order:

- “1. The appeal be and is hereby is (*sic*) dismissed in its entirety.
2. The amended assessment issued by the Commissioner on 2 September 2015 be and is hereby confirmed.
3. Each party shall bear its own costs.”

15. Dissatisfied by the decision of the court *a quo* the appellant noted the present appeal on the following grounds of appeal:

- “1. The learned Judge erred at law in finding, in the main, that the payment of US\$ 10 million to a Community Share Ownership Trust was a donation to such trust. He ought to have found that the payment was made to satisfy Appellant’s legal obligation to comply with Zimbabwe’s indigenous laws.
2. The learned Judge erred at law in making the following incidental/ancillary findings against Appellant:-
 - (a) The Appellant was not obliged to comply with indigenisation despite it being a business as defined and obliged to be indigenous compliant in terms of the law.
 - (b) Having earlier found that the Appellant’s parent company had submitted an indigenisation plan for itself and its subsidiaries (including Appellant) later contradicted himself in finding that:-

“Appellant could not rely on an indigenisation implementation plan that did not relate to it to claim the deduction in question.”
3. The learned Judge erred at law in finding that the payment of US\$ 10 million to the Trust was expenditure of a capital and not of a revenue nature.

The appellant’s grounds of appeal in my view raise the following issues for determination:

1. Whether or not the appellant was obliged at law to donate the sum of US\$10 million to the Community Share Ownership Trust?
2. Whether or not the court *a quo* erred in finding that the payment of US\$10 million to the Trust was expenditure of a capital and not of a revenue nature?"

SUBMISSIONS BEFORE THIS COURT

16. Counsel for the appellant, Mr. *Matinenga*, submitted that the US\$ 10 million donated by the appellant to the Trust was not a donation in the strict sense considering the context in which the payment was made. He insisted that the appellant was obligated to make the donation in order to be compliant with the requirement for indigenisation in accordance with the indigenisation laws of Zimbabwe.

Counsel further submitted that the payment was a deductible expenditure of a revenue nature because it was for licensing purposes in order for the appellant to trade. He contended that, had the appellant not made the donation, its mining license would have been revoked. He thus urged the Court to allow the appeal.

17. *Per contra*, counsel for the respondent, Mr *Magwaliba*, submitted that the donation was a donation proper which is not deductible in terms of part 4 (a) of the Twenty-Second Schedule of the Income Tax Act. He contended that the donation did not benefit the appellant but was designed to benefit Amhold, its parent company, a 3rd party. In any event it was his contention that there was no legal obligation on the appellant to make the donation or to be compliant with the indigenisation laws of Zimbabwe.

Counsel explained that no consequence would have befallen the appellant had it not made the donation and even if there would have been any such consequence, it would have befallen the parent company, Amhold, which had the obligation to indigenise and not the appellant. He also submitted that the amendment to the Income Tax Act allowing

deductions of payments made to Community Share Ownership Trusts was only made on 1 January 2013 hence the appellant could not claim a deduction in its tax assessment report compiled in 2011 in relation to the donation as the amendment did not apply retrospectively.

ANALYSIS

Whether or not the appellant was obliged at law to donate the sum of US\$10 million to the Community Share Ownership Trust?

18. The appellant's contention is that the payment of US\$10 million to the Trust was made in compliance with the indigenisation laws of Zimbabwe to enable it to continue operating its special lease mining operations. Further, that the payment was for purposes of trade or in production of income and not of a capital nature. On the other hand the respondent maintained that the payment of US\$10 million by the appellant was strictly a donation as there was no legal obligation on it to make the donation. Further, that the legal obligation to be compliant with the indigenisation laws was on the parent company Amhold and not the appellant. It was also submitted, for the respondent, that the payment could only have been of a capital nature as it was not paid for the purpose of trade or production of income.

19. The resolution of this appeal, in my view, revolves upon the determination of whether or not the appellant had a legal obligation to make the payment of US\$ 10 million. In the event that it did, then the court must then determine whether the payment was of capital or revenue in nature.

20. It should be borne in mind, from the onset, that the relationship between the GOZ, Amzim and its subsidiary companies has always been regulated by different laws and agreements.

The Heads of Agreement were signed between the GOZ, Anglo American Platinum Limited, Amzim Holdings Limited, Southridge Limited and the appellant. Clause 1.4 of the agreement provides for Amzim Holdings Limited which is a member of the Anglo American Group ('Amhold'). The appellant and Southridge Limited are in turn members of the Anglo American Group. Clause 2.15 of the agreement further defines "Amhold Group" means "Amhold and all its direct and indirect subsidiaries including Unki Mine ...". Clause 4.2 of the agreement provides for the nature of the indigenisation transaction as follows:

"... 51% equity ownership of Amhold shall be issued to the indigenous entities, utilising a notional vendor funded mechanism to be facilitated by Amhold. The implementation of the Indigenisation Transaction will result in the Amhold Group being in compliance with the indigenisation Requirements for the duration of the Indigenisation Compliance Period."

Clause 9.2.1 of the agreement is also worth quoting as it provides as follows:

"... following the implementation of the Indigenisation Implementation Plan through the Indigenisation Transaction, each member of the Amhold Group shall qualify as, and shall for the duration of the Indigenous Compliance Period continue to qualify as, an Indigenous Entity in compliance with the Indigenous Act..." (emphasis added)

An Indigenous Entity is further defined in the agreement under clause 2.1.49 as follows:

"means a company in which issued shares are owned directly or indirectly by Indigenous Zimbabweans in the percentage proportion no less than that prescribed from time to time under the Indigenisation Act as the 'minimum indigenisation and empowerment quota'..."

Lastly clause 3.4 of the agreement provides for the indigenisation implementation plan which was submitted by Amhold and approved by the Minister of Youth Development, Indigenisation and Empowerment in accordance with the Indigenisation and Economic Empowerment Act. The collective effect of the provisions of the Heads of Agreement show that Amhold is the parent company which has subsidiary companies being the appellant and Southridge Limited. Further it can be deduced that it is the parent company which submitted an indigenisation implementation plan which was approved by the Minister. It should also be noted that it was an agreed provision between the parties to the agreement that the parent company was obligated to issue 51 per cent of its shares to indigenous entities in compliance with the Indigenisation and Economic Empowerment Act. The Heads of Agreement further make it clear that during the implementation of the indigenisation plan the subsidiary companies of Amhold were to be treated as indigenous companies owned by indigenous Zimbabweans.

21. It is thus apparent that the indigenisation laws and agreements placed an obligation on Amhold to issue 51 per cent of its shares in order to comply with the indigenisation laws of Zimbabwe. It was the parent company that was given that legal mandate as it is a foreign entity and not its subsidiary companies. It thus follows that the Heads of Agreement and indigenous implementation plan were made for and on behalf of Amhold so that it is able to fulfil its legal obligations, as a foreign company. Having arrived at this conclusion, the Court must determine whether or not the appellant, as a subsidiary of Amhold, had a legal obligation to make the payment of US\$10 million.

Clause 5.3 of the Heads of agreement provide as follows;

“5.3 It is hereby recorded that as part of the indigenisation implementation plan, Amhold has donated US\$ 10 000 000.00 to the Community Trust for purposes, inter alia funding community projects”.

The Heads of Agreement show that the US\$10 million was donated by Amhold, the holding company of the appellant to the Trust for purposes of funding community projects. It is quite apparent from the record that Amhold is a separate company from its subsidiary companies. Consequently, the appellant could not claim a deduction, based on the donation, because it was not incurred by it but by the holding company. It is trite that a holding company is a separate legal entity for income tax purposes. (See *GC (Pvt) Ltd v Commissioner-General ZIMRA* 2015(2) ZLR 116).

In the Amhold revised indigenisation implementation plan dated 5 June 2012 it was stated that:

“... in November 2011, Unki donated US\$ 10 million as seed capital to the Tongogara Rural District Community Share Ownership Trust (“TSOT”)”

22. The revised plan further showed that the Anglo American Platinum Limited (through its subsidiaries the appellant and Southridge Limited together being Amzim) donated US\$10 million and further implemented a phase allocation of shares which would amount to 51 per cent. In the implementation of the phase allocation of the shares the appellant retained 100 per cent of its shares and Southridge limited retained 88.8 per cent. It is thus clear, from the revised plan, that the US\$10 million payment made by the appellant was made on behalf of its parent company.
23. In *GC (Pvt) Ltd v Commissioner General, Zimra (supra)*, the principle was laid down that a taxpayer is not entitled to make deductions in respect of expenses incurred by other companies in the same group. Each individual company must be assessed according to its own taxes. Thus, the argument that the appellant paid the US\$10 million to comply with the indigenisation laws of Zimbabwe is without merit as it had no legal obligation

to do so. It was Amhold, the holding company, that was required by law to transfer 51 per cent ownership shares as a foreign-owned company to indigenous entities. The fact that the appellant paid the money on behalf of Amhold is of no moment.

24. There was no legal obligation on the appellant in any way for it to donate US\$10 million to the Trust. If there was, the appellant has not provided the basis mandating it to do so. The donation was an agreed amount that foreign mining companies pledged to donate to give effect to the indigenisation and empowerment schemes initiated by the GOZ.
25. The main object of the Trust was to use the proceeds of the Trust Assets to undertake various development programmes for the benefit of the residents of the area. It is for this reason that it was Amhold which submitted the indigenisation implementation plan as required by the indigenisation laws. The entity which should have obtained an indigenisation clearance certificate is Amhold and not the appellant. Hence the agreement records that it was Amhold that donated the US\$ 10 million to the Community Share Ownership Trust through the appellant.
26. In this vein, it cannot be said that the court *a quo* erred in reaching the conclusion that the indigenisation implementation plan was that of the holding company and that the appellant made the payment for Amhold in fulfilment of obligations it had committed to meet under that plan.
27. In our view, the decision arrived at by the court *a quo* cannot be faulted. The provisions of the Indigenisation and Economic Empowerment Act and its Regulations did not place a legal obligation on the appellant to donate to a Community Trust for it to be indigenous

compliant. The parent company was obligated at law to comply with the indigenisation legislation by disposing of 51 per cent of its shareholding to indigenous partners which it did in its revised indigenous implementation plan which was approved by the Minister of Youth Development, Indigenisation and Empowerment.

28. Having, concluded that the appellant had no legal obligation to comply with the indigenous laws and be indigenous compliant so as to enable it to continue operating its special mining license, it follows that the appellant did not have a legal obligation to pay the US\$10 million. It is our view, that, in these circumstances, it is not necessary to determine whether or not the payment was of a capital or revenue nature in order to dispose of this appeal. In the same vein it was also not necessary for the court *a quo* to have determined this issue.
29. Moreover, even if, the appellant had made the payment on its own behalf it was not entitled to claim such a deduction of the donation under the Income Tax Act in 2011 because, at that time it was made, the law did not allow for such a deduction. The provisions of s 15(2) (ii) only came into force on 1 January 2013 and hence it would not have been applicable to the appellant's case as it did not have retrospective effect.

DISPOSITION

30. It is our view that the judgment of the court *a quo* cannot be impugned. The donation of USD \$10 million was paid by the appellant on behalf of its holding company Amhold, which is a separate legal entity. The appellant had no legal obligation to comply with the Indigenisation and Economic Empowerment Act. The appeal is thus devoid of merit. The respondent has been successful in resisting the appeal and is therefore entitled to costs.

In the result, it is accordingly ordered as follows:

The appeal be and is hereby dismissed with costs.

UCHENA JA I agree

MAKONI JA I agree

Gill Godlonton and Gerrans, appellant's legal practitioners

Zimbabwe Revenue Authority Legal and Corporate Services Division, for the respondent