MW (PVT) LTD
versus
ZIMBABWE REVENUE AUTHORITY

SPECIAL COURT FOR INCOME TAX APPEALS
KUDYA J
HARARE, 21 November 2017 and 9 December 2019

Income Tax Appeal

D Tivadar, for the appellant
S Bhebhe, for the respondent

KUDYA J: This is an appeal against the disallowance of the deduction of a donation to a charitable organisation in the sum of US$400 000 from the appellant's income by the respondent for the tax year ended 31 December 2014 together with the corresponding penalty of 60% imposed on the principal tax computed from the disallowance.

The background

The respondent conducted a routine investigation into the tax compliance of the appellant company for the years of assessment 2010 to 2014, which culminated in the issuance of a Notice of Amended Assessment number 010000486399 for the year ended 31 December 2014 on 24 August 2016. The respondent added back the sum of US$400 000, which the appellant had donated to a religious and charitable cultural organisation, the Institute, to the appellant's 2014 tax year income and imposed a penalty of 60% in addition to the principal tax due and interest on such principal of 10% *per annum*.

On 19 September 2016, the appellant objected to the disallowance and penalty. The objection was dismissed by the respondent on 8 November 2016. On 23 November 2016 the appellant lodged a notice of appeal against the respondent's decision and filed its case on 23 January 2017. The respondent filed the Commissioner's case on 24 March 2017. The mandatory r 11 documents were filed by the respondent on 15 June 2017 and thereafter, a pre-trial hearing was held on 2 August 2017. At that pre-trial hearing the parties agreed to proceed by way of a statement of agreed facts, which was duly filed on 13 October 2017.

The facts

The relevant facts were that the appellant, a company registered in terms of the laws of Zimbabwe, made donations in the aggregate sum of US$400 000 during the 2014 tax year to the Institute for no consideration. The Institute or Society as encapsulated in its Constitution, was registered as a welfare organisation in terms of the Welfare Organisation Act [*Chapter 93*] on 26 June 2002 and governed by a Constitution. In terms of clause 3 of its Constitution, some of the objects of the Institute, referred to in the Constitution as "the Society" were to:

(a) Promote the religious, cultural, educational and social welfare interests in and aims of all AMs, CMs, Ss and their descendants (the target group), of Harare and surrounding districts.
(b) Provide for the exercise of and to encourage the development of the religion and hence to promote and to provide for the religious education amongst the target group.
(c) Promote, establish and or assist charitable organisations and funds amongst and for the benefit of the target group.
(d) Promote unity and brotherly feelings amongst the specified community.
(e) Operate a proper and systematic functioning of school of religious education for the children in attendance.
(f) Raise funds for all or any of the above purposes.
(g) Invest any monies received by the Society and utilize the income or capital or both for the Society's objects.
(h) Acquire land and buildings, furniture, equipment for the Institute.
(i) Engage and dismiss staff.
(j) Do all such other things as are incidental or conducive towards the objective set out above.

The constitution further stipulated that the operations of the Institute were to be carried out for no profit. The parties further agreed that "the Act in terms of which the Institute is registered as a welfare organisation was administered by the Minister responsible for social welfare." It was further agreed that the appellant disallowed a donation of US$400 000 made in the 2014 tax year which the appellant had claimed as an allowable deduction and penalty of 60% imposed on the principal tax arising from the donation.

The funds of the Institute were derived from annual subscriptions of members and donations. The Institute was administered by an Executive Committee, consisting of 18 members, whose functions were clearly outlined. Biennial general meetings were to be held and the quorum for such meetings was to be not less than 25% of the total registered members.

In terms of clause 20 of the Constitution, no funds or assets of the Institute could be defrayed, whether as a result of liquidation or amalgamation, either voluntarily or compulsorily to any institution other than an s 13 (2) (s) of the Income Tax Act, 1954 institution approved by the Minister of Finance. Apparently, any amendments to the Constitution also required prior written approval of the Minister of Finance. In terms of clause 21 (b), the Executive Committee could "make any amendment to the constitution required by the Treasury for the purposes of approving the Society as a society whose members are entitled to income tax relief in terms of any income tax legislation in force from time to time."

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 Income Tax Act. The respondent 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.

The issues

At the pre-trial hearing held on 2 August 2017, the following issues were referred on appeal for determination:

1. Whether the Institute is a charitable trust administered by the Minster responsible for social welfare for the purposes of s 15 (2) (r) of the Income Tax Act
2. Whether the registration of the Institute as a private voluntary organisation, PVO, excludes it from being construed as a charitable trust for the purposes of the Income Tax Act.
3. What should be the appropriate penalty in this matter

The resolution of the issues

Whether the Institute is a charitable trust administered by the Minster responsible for social welfare for the purposes of s 15 (2) (r) of the Income Tax Act

It was common cause that the Institute is a charitable "private voluntary organisation", PVO, registered in terms of s 9 (5) of the Welfare Organisation Act [*Chapter 93*][1] before its repeal by the Private Voluntary Organisations, PVO, Act *[Chapter 17:05]*. The appellant's contention that it was a charitable trust, contemplated by s 15 (2) (r) (iii) of the Income Tax Act was, however, disputed by the respondent.

[1] Certificate of registration on p 39 of the r 11 documents

The legislative provisions

The legislative provisions relevant to the determination of this issue are s 15 (2) (r) (ii) and the definition section, s 2 of the Income Tax Act which defines "trustee", and construes "trust", "property the subject of a trust" and "income the subject of a trust" in conformity with "trustee" as so defined and further defines "trust instrument". In addition, the definition of a PVO in s 2 of the PVO Act is also relevant.

In s 2 (1) of the PVO Act, a PVO is defined thus:

> "private voluntary organization" means any body or association of persons, corporate or unincorporate, 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; or

And in terms of s 2 of the Income Tax Act:

> "trust instrument" means a deed, will, contract of settlement or 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 a 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, *fidei commissum* or other limited interest;
> and "trust", "property the subject of a trust" and "income the subject of a trust" shall be construed accordingly;

Lastly, section 15 (2) (r) (iii) states:

> "(2) The deductions allowed shall be—
> (*r*) any amount paid by the taxpayer during the year of assessment, without any consideration whatsoever, to—
> (iii) a charitable trust administered by—
> A. the Minister responsible for social welfare; or
> in his capacity as such, or by any official in his Ministry, in his official capacity;"

The section 2 (1) of the Income Tax definitions, in their present form, have been part of our Income Tax Acts since 1954[2], including [*Chapter 181*], the precursor to the present Act. Notwithstanding their existence, GUBBAY CJ authoritatively and categorically stated in *Endeavour Foundation & Anor* v *Commissioner of Taxes* 1995 (1) ZLR 339 (SC) at 346E that:

"There is no definition within the Act of the word "trust".

This pithy little statement disposes of the argument advanced by the respondent during the investigations, in its pleadings and by its counsel, Mr *Bhebhe* in both his oral and written submissions that the term "trust" is defined in the Income Tax Act by reference to these s 2 (1) definitions. It is not. We must therefore look to the common law for the definition of "trust".

Case law

In *Endeavour Foundation & Anor* v *Commissioner of Taxes*, *supra,* at 346F-347C the LEARNED CHIEF JUSTICE approved the sentiments expressed by VAN WINSEN J, as he then was, in *Thorne & Anor NO* v *Receiver of Revenue* 1976 (2) SA 50 (C). VAN WINSEN J said that the word "trust" must be accorded its ordinary meaning. GUBBAY CJ said:

"He described a trust, correctly in my respectful view, as follows at 53F-54A:

> "It is, I think, to be deduced from the authorities that in general a trust is created by contract, very often by a contract of donation or in virtue of an antenuptial contract or by way of a will. It is created in respect of defined property transferred to a trustee, who is burdened with the obligation to administer the property for the benefit of a third person, the latter being accorded a right against the trustee to enforce the trustee's compliance with his obligations towards the beneficiary concerned. Generally trusts contemplate an extended continuation of the administration of the trust property in favour of the beneficiary until terminated on the happening of some specified future event. A trust can also, of course, be created by statute . . .They may vary in certain respects without detracting from the essential concept of a trust. But I think it is clear that a trust in the above sense does not, in proper parlance, have reference to the situation where, for example, a curator is administering the property of a mentally defective patient. Although it may well be regarded as creating a situation analogous to one consequent upon a trust, it is not a trust in the accepted sense of the word."

Now, we can understand, as correctly contended by Mr *Tivadar*, for the respondent that the extended statutory definition of "trust" as a derivative of "trustee" constituted the legislative recognition that these five additions, perhaps with the exception of (b) and (e), fell outside the common law definition of a "trust". It is clear from this definition that the three requisites for a trust are "sufficient words that raise it, a definite subject and a certain or ascertainable

[2] Unlike counsel for the appellant, I did locate the 200 paged Income Tax Act, No 16 of 1954 in the Judges' Library ensconced after p 206 in the "The Statute Law of the Federation of Rhodesia and Nyasaland, 1963, which showed the reference in clause 20 (b) of the Institute's Constitution as s 13 (2) (s), which limited deductions to payments made without consideration to ecclesiastical, charitable or educational institutions of a public character in the Federation approved by the Minister of Finance by virtue of or in consequence of any disposition (which expression included any trust, covenant or agreement) to £7 500.

object"[3]. A careful reading of the Constitution of the Institute clearly demonstrates that the Institute did not fall into any one of the s 2 (1) of the Act supplementary definitions of a "trust" as derived from the additional meaning of "trustee".

In *Estate Kemp* v *Macdonald's Trustee* 1915 AD 491, INNES CJ defined Trustees as "persons entrusted (as owners or otherwise) with the control of property with which they are bound to deal with for the benefit of others". In that vein, the Zimbabwean common law on trusts accords with the strict or narrow sense and not the wide sense. The former arises when "the creator or founder of the trust has handed over or is bound to handover to another the control of property which, or the proceeds of which, is to be administered or disposed of by the other (the trustee or administrator) for the benefit of some person other than the trustee as a beneficiary, or for some impersonal object." The latter arises whenever "any legal arrangement by which one person is to administer property, whether as an office-holder or not, for another or for some impersonal object."[4]

The academic writers

In applying the principles derived from the analyses of academic writers and especially the 5th ed of *Honoré's South Africa Law of Trusts*, I have been careful to ignore the sentiments and cases based on statutory provisions in discord with the common law on trusts that govern the recognition, creation, operation and administration of "trusts" in South Africa. I have rather sought guidance from those cases that were based on the common law.

Shrand in his book, *Trusts in South Africa (*1976) poignantly and dramatically introduces the topic of "trusts" thus:

> "The English concept of a trust which denotes a severance between the legal and equitable interests in property i.e. a dichotomy of legal and equitable ownership, was not adopted in South African law… trusts in South Africa fall to be juridically interpreted according to whether they are created *mortis causa i.e.* a testamentary trust or by act *inter vivos."*

This introduction was based on such cases as *Lucas' Trustee* v *Ismail and Amod* 1905 TS 239, *The Princess Estate and Gold Mining Co. Ltd* v *The Registrar of Mining Titles* 1911 TPD 1066 at 1075, *Estate Kemp* v *Macdonald's Trustee* 1915 AD 491, *van der Plank NO v Otto* 1912 AD 335, *Adam* v *Jhavary 1926 AD 147, Mahomed* v *Insolvent Estate du Toit* 1975 (3) SA 555 (AD) and *CIR* v *Estate Merensky* 1959 (2) SA 600 (AD). In Appendix II, page 350 of his book, Shrand, provides a pro forma Trust Deed "in current use" containing the usual trust provisions of an atypical narrow trust *inter vivos (*trust created by a living person)[5], which is completely

[3] Per HOLMES et MILNE JJ in *Standard Bank of South Africa Ltd NO v Betts Brown* 1958 (3) SA 713 (N) at 720E
[4] The two distinctions appear on p 2 of *Honoré's South African Law of Trusts* 5th ed, *infra,*
[5] *Honoré's South African Law of Trusts*, 5th ed 2002 by Cameron et al at p 3

at odds with the Constitution of the Institute. And at p 329, he defines a charitable trust in the following manner:

> "A charitable trust may be defined as a gift *ad pias causas* which embraces bequests devoted to religious, educational and charitable purposes as well as for the public benefit".

Apparently the phrase *ad pias causas means* "for charitable purposes*"* or pious causes. The term was thus defined by HOLMES et MILNE JJ in *Standard Bank of South Africa Ltd NO* v *Betts Brown* 1958 (3) SA 713 (N) at 721E in the following terms:

> "The Appellate Division has held that the Roman law expression '*ad pias causas'* has over the centuries come to mean 'for charitable purposes''. *Marks* v *Estate Gluckman,* 1946 AD 289 at 311…admittedly the expression has a wide connotation and does not admit of a precise definition."

Honoré's South African Law of Trusts 5th ed at page 1 defines a trust as:

> "a legal institution in which a person, the trustee, subject to public supervision, holds or administers property separately from his or her own, for the benefit of another person or persons or for the furtherance of a charitable or other purposes."

It appears to me that the Constitution of the Institute falls into the category of a strict or narrow trust, adopted and approved in the *Endeavour Foundation* case, *supra,* as constituting our common law, rather than the wide sense advocated by Mr *Tivadar* in para 21 of the appellant's case and in his written and oral submissions. In that light, while the Constitution creates a charitable organisation, it lacks a founder or settlor and trustees. The promoters of the Institute interchangeably identified it as a "Society" and not a "Trust". They sought and obtained registration thereof originally as a welfare organisation and then on 26 June 2002 as a private voluntary organisation. The original definition of a welfare organisation in the Welfare Organisation Act *[Chapter 93]* was similar in content to the definition of "private voluntary organisation" in [*Chapter 17:05*]. In fact, the words "private voluntary" were substituted for "welfare" in the Welfare Organisation Amendment Act No 6 of 1995, which came into effect on 21 April 1995. The effect of registration was that the Institute complied with the requirements enumerated in the definition of a PVO. It was also an admission that the Institute was not a trust established directly by any enactment or one that was registered with the High Court.

It is for these reasons that I hold that the Institute was not a charitable trust. Accordingly, the appellant cannot therefore benefit from the provisions of s 15 (2) (r) (iii) of the Income Tax Act.

Was the Institute administered by the Minister Responsible for Social Welfare?

The appellant, without defining the word "administered", contended that the Institute was administered by the Minister responsible for Social Welfare. In the determination appealed against, and in para 27.2, 27.3, 29.1 and 30.1 the respondent explicitly disputed that the Institute was administered by the Minister responsible for social welfare as a charitable trust. In para 30.3 and 33.2 of the Commissioner's case, the respondent averred that:

> "Respondent is of the view that the Institute is administered by the Minister of Social Welfare as a PVO in terms of the PVOA but not as a charitable trust in terms of the Income Tax Act. This is because the PVOA does not give powers to the Minister of Social Welfare to administer trusts but to administer PVOs.
> ……..
> On the other hand, the Minister of Social Welfare administers the Institute by virtue of her being the administrator of the PVOA."

To the allegation in para 24 of the appellant's case that the respondent conflated the issues of administration and management of the Institute between the Minister and the Executive Committee, the full response of the respondent was as follows:

> **"Ad Paragraph 24:**
> This is denied. The respondent does not confuse nor conflates the issues of administration and management. The respondent clearly distinguishes the administrative functions of the Minister over the Institute as a PVO and its management by the Executive Committee in terms of the Institute's Constitution. The role of the Minister over the Institute is only administrative and in terms of s 21 of the PVOA, the Minister is given the powers to suspend the Executive Committee if need arises. The Minister does not have a management role over the Institute but her role is administrative. However, the issue of administration by the Minister and the management by the Executive Committee of the Institute are not in dispute. Respondent's contention is based on the fact that the Institute, while it is registered as a PVO in terms of the PVOA, cannot give reprieve to the appellant for it to claim those donations as allowable deductions in terms of section 15 (2) (r) (iii) A of the Income Tax Act as registration as a PVO is distinct from being a charitable trust."

The bases for the respondent's contention that the Institute was administered by the Minister were firstly that the Institute was registered pursuant to the Welfare Organisations Act, which in terms of "The Assignment of Functions (Minister of Public Service, Labour and Social Welfare) Notice SI 269 of 1992 was correspondingly administered by the Minister Responsible for social welfare. The second was the concession in response to para 24 of the appellant's case. The purported administration of the Institute arising from the PVO Act was predicated upon the powers of the Minister to register a PVO, the potential exercise of the power to inspect a PVO's books of account and records and of suspending members of the Executive Committee.

It appears to me from a reading of the respondent's averments on this aspect, in context, that it conceded that the Minister responsible for social welfare administered the Institute. It

was persuaded by the appellant's pleaded position that firstly, "administered by the Minister" in the assigning statutory instrument carried the same meaning as "administered by the Minister" in s 15 (2) (r (iii) of the Income Tax Act and secondly that the "administered" envisaged by the provision did not bear the same meaning as management. 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. Indeed, in his oral argument, Mr *Bhebhe* abandoned the concession and vehemently argued that the Minister responsible for social welfare did not administer the Institute.

I accept that the facts showed that the only thing that the Minister did was to register the Institute as a PVO. There was no evidence availed during the investigation 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 PVO Act in regards to the inspection and examination of the accounts of the Institute, the suspension of the Executive Committee and the appointment of trustees in their stead. So, it does not appear that as matter of substance that the Minister ever "administered" the Institute in the sense contemplated by the appellant and admitted, only in the pleadings, by the respondent.

The meaning of "administered" is not defined in s 15 (2) (r) (iii) of the Act. According to the *Shorter Oxford English Dictionary*, the word means "to manage as a steward", "to carry on" "to manage and dispose the estate of a deceased person either under a will or letters of administration"", "to execute", "to dispense with". In the light of these definitions, it does not appear to me that the distinction sought to be drawn by the appellant and conceded to by the respondent in the construction of the words "administration" and "management" carry any weight. These words bear the same ordinary and grammatical meaning.

In *Ex parte Courteney Selous School Parent Teachers Association* 1957 (1) SA 256 (SR) 256 at 259 F-G MURRAY CJ implicitly equated "administered by the Minister of Education" conferred by the Education Act in relation to a testamentary bequest made to the governing body of the school by a deceased testator to "carrying on of the trust". The case of *Minister of Higher Education* v *Border Timbers Ltd* 1999 (1) ZLR 555 (H) at 559G also implicitly demonstrates that the meaning of "administered by the Minister" in relation to an Act of Parliament, the Manpower, Planning and Development Act [*Chapter 28:02*], to be equivalent to the word "constant and direct control by the Minister of the composition and operations" of the Zimbabwe Manpower Development Fund. The same position was adopted

in *PTC v Modus Publications (Pvt) Ltd* 1997 (2) ZLR 492 (SC) at 501B where the phrase was equated to the "extensive control" conferred on the Minister.

Indeed, the definition of a "trust" set out in *Honoré's, supra,* actually regards the Minister's functions as "supervision" and the activities of the trustees as administration. In my view, thus even if the Constitution of the Institute were regarded as a trust in the wide sense of the word, the powers conferred on the Minister would amount to a mere supervision by a public official and not to the administration of the Trust. The Executive Committee, rather than the Minister, had extensive constant and direct control of the Institute. I would have found that the Minister responsible for Social Welfare did not administer the Institute as required by the provisions of s 15 (2) (r) (iii) of the Income Tax Act.

Whether the registration of the Institute as a PVO excludes it from being construed as a charitable trust for the purposes of the Income Tax Act.

The definition of a PVO excludes from its application any trusts established directly by any enactment or those that are registered at the High Court. In para 31 of his written heads Mr *Bhebhe* contended that all trusts in Zimbabwe were established through registration by the Registrar of Deeds in terms of the Deeds Registries Act [*Chapter 20:05*] or by the High Court and submitted that the definition of a PVO in s 2 (iii) of the PVO Act specifically excluded any trust established directly by any enactment or registered with the High Court. He did not provide the relevant Deeds Registry Act provision to this effect. However, the definition of a PVO does not appear to preclude the registration of a trust, which is not directly enacted under any enactment or registered with the High Court, as a PVO. It did not appear to me, for the reasons set out in the consideration of the first issue that the Institute was established as a trust. It was, therefore, precluded from being regarded as a charitable trust for the purposes of the Income Tax Act.

The appropriate penalty

In the objection, the appellant sought a full waiver of the penalty of 60% on the grounds that it had a demonstrable history of timeous and accurate payment of all its tax dues. It was a good corporate citizen, which contributed its fair share to the economic development of the country and had been co-operative with the investigators. In addition, it was facing liquidity challenges in tandem with the rest of the economy. It had admitted to shortfalls of US$485 798.48, which it attributed to computational mistakes occasioned by the huge transaction volumes associated with its business operations. In disallowing the penalty objection, the respondent conceded that the appellant had not made any deliberate misstatement or wilful

non-disclosure or exhibited any fraudulent intent and took into account the mitigatory factors raised but still maintained the penalty at 60%.

On appeal, the appellant raised the same grounds and sought a full waiver of the penalty. Mr *Bhebhe* maintained that the penalty was appropriate but conceded that the issues raised were arguable and not frivolous. It is trite that it will be in very rare occasions where a full waiver will be granted against penalties for failing to pay the correct amount of tax. Such a failure always constitutes an aggravating feature, which calls for some measure of penalty. The nature of the offence and the interests of society are entwined in this matter. Society requires all taxpayers to pay their fair share of the tax burden. The appellant appears to have paid the 60% penalty on the admitted shortfalls that were unearthed by the audit. I have agonised over whether I should differentiate the penalty between the admitted infractions, which were not appealed against and the donations, which were appealed against. In the exercise of my own discretion on appeal, I believe that the present appeal raised the important question of whether a charitable trust should be construed in the narrow sense or wide sense. I adopted the former view.

In the exercise of my discretion, I therefore believe that this is an appropriate case to impose a penalty of 20% on the appealed principal tax due.

Costs

I agree with both counsel that the claim was not unreasonable and the grounds of appeal frivolous. In terms of s 65 (12) of the Act I will order each pay to pay its own costs.

Disposition

Accordingly, it is ordered that:

1. The notice of amended assessment number 010000486399 issued by the Commissioner against the appellant on 24 August 2016 for the tax year ended 31 December 2014 be and is hereby set aside.
2. The Commissioner shall issue a further amended notice of assessment for the tax year ended 31 December 2014 reducing the penalty for the principal tax due on the donation made by the appellant to the Institute in the sum of US$400 000.00 at the rate of 20%.
3. Each party shall bear its own costs.

Gill, Godlonton and Gerrans, the appellant's legal practitioners
Kantor and Immerman, the respondent's legal practitioners.