ZIMASCO (PRIVATE) LIMITED
versus
THE COMMISSIONER GENERAL OF THE
ZIMBABWE REVENUE AUTHORITY

IN THE SPECIAL COURT FOR FISCAL APPEALS
HLATSHWAYO J
HARARE, 21 July 2009, 23 January 2015 & 23 February 2016

Fiscal Appeal

A P de Bourbon, for the appellant.
A Moyo, for the respondent.

HLATSHWAYO J: On 23 January 2015 after hearing counsel and having gone through papers filed of record, and the parties having failed to settle the matter on the basis of recent precedent I gave an order dismissing the appeal with costs and indicated that reasons thereof will follow in due course. I now proceed to set them down below.

The facts of this matter are common cause. By correspondence dated 13 March 2007 the respondent made a ruling that the appellant was obliged to withhold and remit non – resident tax on fees paid to an entity known as Centachrome, an agent based in Switzerland. Centachrome was appointed "sub-agent" in an agreement entered into by and between the appellant ("producer"), the Minerals Marketing Corporation of Zimbabwe (MMCZ) ("marketing agent") and Centachrome. Centachrome was supposed to facilitate the selling of ferrochrome produced by the appellant, but sold through MMCZ in terms of the Minerals Marketing Corporation of Zimbabwe Act, [*Chapter 21:04*] which requires that all minerals mined in Zimbabwe are marketed by and through MMCZ.

On 11 May 2007, the appellant wrote to the respondent objecting to the ruling. By letter dated 15 November 2007 the respondent disallowed the objection but reduced the penalty to 60% from the initial 100% it had stipulated.

Aggrieved by the decision of the respondent, the appellant noted an appeal to this Court challenging the decision of the respondent on grounds that may be summarised as follows:

a) The appointment of Centachrome had the effect of making it an agent of MMCZ and not an agent of the appellant.

b) The appellant was not obliged to pay withholding non – resident tax since the money paid to Centachrome was commission and commission is not fees as defined in terms of the 17th schedule of the Income Tax Act [*Chapter 23:06*].

c) The money paid to Centachrome was not derived from a source within Zimbabwe as stipulated by 17th Schedule of the Income Tax Act [*Chapter 23:06*].

WHOSE AGENT WAS CENTACHROME?

While the preamble to the agreement creates the impression that Centachrome is the agent of the MMCZ, the rest of the agreement and the facts on the ground clearly show that the appellant was the real principal for Centachrome. The MMCZ only appears as principal to fulfil the requirements of the law on the sale of minerals, and nothing more. The appellant is ultimately responsible for the payment of Centachrome's commission from the proceeds of its chrome; the Swiss firm places orders with both 'principals'; the investigations into chrome content are done by the appellant and Centachrome with MMCZ approving any agreement reached and finally, in terms of the Process Flow Chart, the payment confirmation is sent directly to the appellant and only copied to MMCZ. Both in its heads of argument and in the presentation in court of its case, the appellant did not place much store on this argument, and rightly so, in my view. It is simply not sustainable.

FEES OR COMMISSION?

The next issue is whether money paid to Centachrome as commission constituted "fees" in accordance with the 17th Schedule of the Income Tax Act.

The appellant contended that it did not pay any fees or monies to Centachrome. Rather, it argued that Centachrome would deduct all charges and commissions from monies earned from the sale of ferrochrome on behalf of the appellant and remit the balance to the appellant.

On the other hand the respondent averred that the money paid by the appellant to Centachrome was indeed commission for the services rendered and even if the court agreed with the appellant that Centachrome had deducted the monies itself, such amounts constituted fees in terms of the 17th Schedule of the Income Tax Act and in the premises appellant was obliged to withhold non – resident tax on them.

The respondent further pointed to clause 3.6 of the agreement entered into by the appellant, MMCZ and Centachrome which provides that "3.6 The selling Agent/Producer will pay the Sub Agent a commission of 2.0% (two percent) on gross invoice value sale." This, the respondent argued meant that appellant was charged with the obligation of payment of commission.

In resolving this dispute one can look no further than to the 17th Schedule of the Income Tax Act, which defines "fees" as follows:

> "1. (1) In this Schedule, subject to subparagraph (2)—"fees" means **any amount** from a source within Zimbabwe payable in respect of any services of a technical, managerial, administrative or consultative nature, but does not include any such amount payable in respect of—…" (emphasis added).

The respondent submitted that the words "any amount" above give a broad definition to the term fees and contended that money paid as commission could be regarded as 'any amount' for the purposes of s 1(1) of the 17th Schedule. In my view, the respondent was correct in its interpretation of the words "any amount" to include commission. From the above definition, it is clear that the legislature intended "fees" to cover any sum of money, by whatever name called, paid for services rendered of a technical, managerial, administrative or consultative nature save for those that are expressly excluded.

As far as the *method* of payment is concerned, fees are deemed to have been paid to the payee if they "are credited to his account or so dealt with that the conditions under which he is entitled to them are fulfilled whichever occurs first" (section 1 (2) (c) of 17th Schedule). Thus, the fees in question can be held to have been directly paid to Centachrome or, at the very least, deemed to have been so paid by the appellant.

SOURCE OF COMMISSION

The appellant disputes that the source of the commission is from within Zimbabwe and seeks to rely for that proposition on the decision in *Sunfresh Enterprises (Pvt) Ltd t/a as Bulembi Safaris* v *Zimra* 2004 (1) ZLR 506 (H). In that case, Cheda J held *inter alia* that payment of a commission by a foreign client to a foreign marketing agent of a local safari

operator outside the country did not under para 1 (1) of the 17th Schedule of the Income Tax Act constitute payment of fees from within Zimbabwe even though the originating cause was the safari operation in Zimbabwe. In my view, however, the facts in this case are distinguishable from those in the *Sunfresh* decision. *In casu*, the appellant clearly qualifies as the "payer", i.e., "any person who or partnership which pays or is responsible for the payment of fees…" and is ordinarily resident in Zimbabwe, whereas in *Sunfresh* the payment of fees or commission was ostensibly done by foreign clients to a foreign marketing agent. I am also of the respectful view that even in *Sunfresh*, had the court addressed itself to why the fees or commission were paid it could well have concluded that it was for the services rendered by the foreign agent to the local safari operator and accordingly resolved the matter.

PENALTIES

In so far as penalties are concerned, the appellant submitted that it acted in good faith and on the basis of legal advice, without the intention of evading any liability to tax and that accordingly the respondent ought to have waived the penalties altogether and not merely reduced them by 40%. However, the respondent maintained it had taken into account those mitigating factors in arriving at the partial reduction of the penalty and that its decision was in line with previous cases of a similar nature. Unfortunately, I was not referred to any authorities to justify interference with a discretion exercised by the respondent. As for the costs, the general rule is that they follow the outcome and I was not moved to depart from it.

For these reasons, I dismissed the appeal with costs.

Gill Godlonton and Gerrans, appellant's legal practitioners
Zimbabwe Revenue Authority, respondent's legal practitioners