

DELTA BEVERAGES (PRIVATE) LIMITED
versus
THE ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE, 22 January 2016 & 22 June 2016

Opposed Matter

Ms D Ndawana, for the applicant
T Magwaliba, for the respondent

FOROMA J: The applicant in this matter filed an application against the respondent seeking the following declaratur – (1) it is declared that the respondent is obliged to pay interest to the applicant at the rate of 10% per annum on the sums and for the period calculated in Annexure J to the founding affidavit. (2) it is ordered that the respondent pay the costs of this application. Annexure J is a schedule of interest calculation which is reproduced below :–

Delta Beverages P/L

Delta v ZIMRA HC 9715/12 Interest Refund

Interest CALCULATION

Date Paid	Refund Date	Amount	Days	Rate	Interest
11 September 2012	25/03/15	\$232 954-83	925	10%	\$59 036-50
12 October 2012	25/03/15	\$232 954-83	893	10%	\$56 994-15
13 November 2012	25/03/15	\$232 954-83	362	10%	\$55 015-63
		<u>\$698 864-49</u>			<u>\$171 046-29</u>

The facts of this matter are largely common cause between the parties and relatively straight forward. The applicant summarizes them as follows:

- (a) In December 2011 the respondent contended that the applicant had under estimated its provisional tax payments for the years 2009 and 2010 and demanded the payment of interest on the under estimated provisions.
- (b) The respondent calculated the total interest to be outstanding to be US\$698 864-48 and demanded payment of that sum under threat of garnishing the applicant's bank account and thereby removing the sum of money from the applicant.
- (c) To avoid the consequences of garnishee the applicant paid the demanded interest in three instalments in September, October and November 2012.
- (d) Shortly after paying the last instalment and as a result of the applicant's view that it did not owe the respondent the interest demanded a position which the respondent persistently disputed the applicant challenged in the High Court the right to the respondent to payment of the interest demanded under case No. HC 9715/12. In its judgment delivered in case No. HC 9715/12 on 29 January 2015 the High Court held that the applicant had no obligation to pay the interest and held that the respondent was as a matter of law obligated to waive payment of that interest.
- (e) The High Court judgement has not been appealed against by the respondent and remains extant.
- (f) Respondent has credited the applicant with the amount of that interest but has resisted to pay the applicant interest on the amount which the applicant was wrongfully required to pay by the respondent in 2012.

The applicant stated the issue for determination as follows – Whether or not in the light of the ruling made by the High Court on 29 January 2015 the respondent is obliged to pay not only the interest unlawfully demanded from the applicant but whether in addition the applicant is entitled to receive interest on those unlawfully demanded amounts whether at the 10% per annum rate set out in the Income Tax Act [*Chapter 23:06*] or at the rate of 5% per annum set out in the Prescribed Rate of Interest Act [*Chapter 8:10*].

The respondent captured the issues for determination by the court as follows:

- (a) Whether or not the amount of interest paid by the applicant in 2012 and refunded by the respondent in March 2015 is a tax.

(b) Whether or not the respondent is liable to pay interest on the refund made to the applicant. As can be observed the parties are agreed on the issue as cast by the applicant. That issue encompasses the respondent's issue number (b) as reflected above.

It is important to note that the respondent's issue (a) above was not persisted with as the respondent conceded that the interest demanded by the respondent in the sum of \$698 864-49 was indeed a tax in terms of s 58 of the Income Tax [*Chapter 23:06*] as read with s 207 of the said Act. Therefore only one issue as indicated above remains for determination.

The respondent's argument is that there is no interest due on the refundable tax as such interest refund was made within the 60 day period from the date of claim in terms of the applicable legislation which for the avoidance of doubt is argued to be 14 March 2015 considering that the High Court judgement was only brought to its attention on 20 February 2015 after the applicant's demand of the unlawfully demanded interest on 19 February 2015. The applicant considers that the respondent is liable to *mora* interest in terms of the Common Law. The dispute between the parties relates to the interpretation of s 48 (3) of the Income Tax Act. The section reads as follows:

“(3) The Commission shall pay interest calculated at a rate to be fixed by the Minister by Statutory instrument on any amount of tax over paid that is not refunded by him or her within sixty days of the date when the tax payer claimed the refund or the date of completion of the assessment whichever is the latter date unless the over payment was due to an incomplete or defective return or other error on the part of the tax payer, and not to an error on the part of the commissioner.”

This sub-section was inserted by Act 18 of 2004. Summarizing the effect of the above quoted section counsel for the respondent submitted as follows:

“It is submitted that the above provision shows a shift from the Kristiansten position on the part of the legislature. The above section now makes it palpably clear that the commissioner is now liable to pay interest on any refund of tax that was over paid due to the error of the commissioner”

This clearly is an express alteration of the Common Law position by the legislature which it has power to do.

The respondent's counsel further submitted that liability for interest on the part of the Commissioner arises only when the latter of either of two conditions are met namely (1) where the Commissioner fails to refund the overpaid tax within 60 days from the date of the refund is demanded by the tax payer or where the commissioner fails to pay the refund within 60 days

from the date of the completion of the assessment which would have established the refund due to the tax payer. In principle the parties appear to be agreed on the interpretation to be given to the applicable section which for the avoidance of doubt is that the Commissioner of Taxes is obliged to pay interest on the overpaid amount if he or she delays in effecting the refund to the tax payer beyond 60 days calculated from date of demand by the tax payer or date of assessment giving rise to the refund. The parties however seem to have both overlooked a third condition to the payment of interest on account of the delay beyond 60 days. It is that the overpayment should not be due to an incomplete or defective return or other error on the part of the tax payer and not to an error on the part of the Commissioner. Broken down to the essentials for Commissioner's liability for interest on the delay of the refund of over payment in terms of s 48 (3) of income Tax Act are:

- (1) There has to be over payment of tax by the tax payer.
- (2) The over payment of tax has to be refundable to tax – payer
- (3) The tax payer ought to have claimed refund of over payment
- (4) The Commissioner has failed to refund over payment within sixty (60) days of claim by taxpayer or of the date of the assessment establishing overpayment and
- (5) Over payment is not due to an incomplete or defective return or other error on the part of the tax payer and is due to an error on the part of the Commissioner.

The delay in the refund of any over payment of tax by the commissioner will not attract liability for interest on the part of the commissioner in the situations where over payment is a result of (i) an incomplete or defective return, (ii) other error on the part of the tax payer. This is the plain and unambiguous meaning of the language of the legislature which must be given effect ordinarily (see *McMain & Anor v Controller Customs Exercise* ZLR 170) in the absence of any ambiguity.

What was the cause of the overpayment in *casu*?

Put differently was the tax payer in any way responsible for the over payment either by filing incomplete or defective return or committing any other error. If the over payment cannot be attributed to the taxpayer in any of the above respects then the next relevant question is “was the overpayment due to an error on the part of the Commissioner.”

It is clear from the judgment of the High Court in HC9715/12 on that the Commissioner erred in levying interest on the underestimated provisional tax. However the error of the commissioner was as a result of an error on the part of the taxpayer in its estimation of its provisional tax. The underlying cause of the over payment is therefore the underestimation of the provisional tax. It is important to realize that the error whether by the tax payer or the Commissioner need not necessarily have been blame worthy.

The applicant was entitled to estimate his provisional tax as accurately as possible within an acceptable margin of error. There is no disputing that what prompted the Commissioner to levy on the applicant the overpayment was the error on the part of the tax payer in its estimation of provisional tax due.

The applicant in case No. HC 9715/12 concedes that in its assessment of its provisional tax (per QPD's) it under estimated its tax liability by a margin of error in excess of 10%.

This is apparent from par 6 of the applicant's founding affidavit in case HC 9715/13 in which the applicant deposed to the following:

“6 – I set out hereunder and the circumstances in which this dispute has arisen in the knowledge that the respondent disputes some of these assertions. However, it is the contention of applicant that it is unnecessary for this Honourable Court to determine the circumstances behind the demand for interest but to merely accept as fact (which is not disputed by the respondent) that in respect of both the 2009 and 2010 financial year there was indeed an under estimation of profits resulting in an under payment by the applicant of amounts of provisional tax when regard is had to the assessment made as to the total tax payable by the applicant in respect of both those years. In each of the years in question the margin of error in the under estimation of the amount of provisional tax payable exceeded 10% and that the forecast of profits by the applicant did not fall within a 10% margin of error.”

Clearly it is the error in the estimation of profits (under valuation of profits) with the consequent underestimation of the provisional tax payable which triggered the levying of interest (over payment of tax) by the respondent. For this reason the respondent is exempted from paying interest on the overpayment at the expiry of 60days aforesaid.

The findings I have made above make it unnecessary for the court to address the applicant's alternative argument that the respondent is liable to pay the applicant interest in terms of the Prescribed Rate of Interest Act [*Chapter 8:10*].

In the result I make the following order:

IT IS ORDERED THAT:

- (1) that the application be and is hereby dismissed.
- (2) that the applicant pay the costs of suit.

Messrs Gill Godlonton and Gerrans, applicant's legal practitioners