

CSE (PVT) LTD
versus
ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
MTSHIYA AJ
HARARE, 1 December 2020 and 1 June 2021

Income Tax Appeal

D. Moyana, for the appellant
L. Chipateni, for the respondent

MTSHIYA AJ: This appeal seeks to determine whether or not it was proper for the Respondent to disallow appellant's claims for the tax periods between 2010 and 2014. The answer lies in the interrogation of certain claims and expenses claimed by the appellant. That is necessary in order to determine if the said claims and expenses are allowable deductions according in terms of s 15(2) of the Income Tax Act [*Chapter 23:11*] (the Act).

The Facts

The appellant, CSE, is a duly registered company, trading as PFS. It is registered with the Respondent as a taxpayer. The appellant is also an associate of DI (Pvt) Ltd, trading as CL.,

In 26 September 2014, the respondent, an administrative authority tasked with, inter alia, the collection of income tax in Zimbabwe, carried out an audit on the appellant. The audit was carried out in order to verify income tax payable by the appellant for the periods between 2010 and 2014. Subsequent to the audit, there was correspondence between the appellant and respondent.

On 7 July 2017, the respondent released audit findings which had a bill of \$1 940.57 as payable income tax inclusive of a 100% penalty.

On 4 December 2017, the appellant received a demand for payment of the tax debt without detailed assessments. The appellant made an urgent chamber application to the High Court (HC11879/17). However, the court's finding was that the assessments had been delivered to a previous address of the appellant.

On 18 December 2017, the appellant lodged, with the respondent, its objection to the additional assessments. In the objections, which are correctly captured by the respondent, the appellant raised several issues. In fact, in order to fully appreciate the dispute between the parties, I feel compelled to reproduce the summaries of both sides as correctly presented by the respondent.

In the main the respondent presents the objections of the appellant in the following manner:

“7.

- 7.1 We chose to minimize our tax liability by legally utilizing tax incentives granted by statutes by making an election of Special Initial Allowance (SIA) instead of wear and tear when calculating capital allowances. The legislation allows taxpayer who qualifies as Small Medium Enterprises (SMEs) to claim capital allowances in 2010 of 150% on cost incurred in purchasing fixed assets. This means our company had claimed capital allowances of 100% of the cost in 2010 and 50% of the cost from 2011 to 2012, hence losses. Although capital allowances for qualifying assets according to the officer, no adjustments were done in the audit report.
- 7.2 Incorrectly taxed bank deposits, not all deposits were sales as part was loan totaling \$20, 050.00 secured from Joubert Crushers and Transport (Joubert Crushers).Secondly, in 2014 we sold fixed assets, which had been used for transport business from 2010 to 2013 for a total of \$15,100.00.These are capital receipts, which arise from disposal of fixed assets. Further, debtors balance from normal trading activities is \$4,136.55 and the other balance is total amount loan receivable of \$24,139.00 advanced to Daniel Mahonye for the purchases of assets and related costs.
- 7.3 Charged withholding tax of \$3,900.00 whilst no withholding tax was withheld from C. Mwandimutsira.
- 7.4 Incorrectly disallowed accounting services and advisory services offered by C Mutangadura.
- 7.5 Disallowed expenses on altered invoices whilst the company did not alter.”

On 6 April 2018 the respondent considered and rejected the appellant’s objections. In dismissing the objections, the respondent in part, commented as follows:

“8.

- 8.1.1 According to the information before Respondent, the Appellant was granted special initial allowances on capital assets for the periods where documentary evidence was submitted. In terms of section 63 of the Income Tax Act the burden of proof that any amount is exempt from or not liable to the tax or is subject to any deduction in terms of this Act or credit, shall be upon the person claiming such exemption, non-liability, deduction or credit.
- 8.1.2 In the absence of acceptable evidence that expenditure was incurred, Respondent had no option but to disallow.
- 8.1.3 This ground of objection was therefore disallowed in full.

- 8.2
- 8.2.1 The Respondent was in agreement with the Appellant that transacting between related companies is not prohibited at law. However, such transactions should be done at arm's length. The Respondent has mentioned earlier, the burden of proof lies with the Appellant not the Respondent that the transactions were at arm's length.
- 8.2.2 According to information submitted, the Appellant failed to produce documentary evidence to substantiate that the amounts reflected in the bank statements were not sales.
- 8.2.3 The respondent therefore disallowed the second ground of objection in full.
- 8.3
- 8.3.1 According to information before the Respondent, the Appellant wrote a letter dated 29 September 2015 to C. Mandimutsira advising him that \$3,900 had been withheld by Clear Sky Enterprises. There is no reason for one to doubt that the amount was withheld.
- 8.3.2 Based on that, The Respondent disallowed the 3rd ground of objection in full.
- 8.4
- 8.4.1 Accounting fees were disallowed because of the inconsistency of the documents submitted. According to documents submitted C. Mutangadura was the Appellant's employee. In the Respondent's view, it was impossible for him to perform both as a Consultant and as an employee.
- 8.4.2 The Respondent therefore disallowed the 4th ground of objection in full."

It is important to note that before rejecting the objections the respondent fully considered all the issues raised by the appellant. It then gave its reasons for dismissing the objections, paying particular attention on each ground of objection that had been raised. I do not intend to repeat those reasons, except to say the reasons were never fully rebutted by the appellant. Furthermore, having gone through the appellant's evidence, I am, unable to reject the appellant's case as given in the papers before the court.

On 18 April 2018 the appellant filed its notice of appeal citing the following grounds:

- “ 1. The Commissioner General erred at law by taking the loan facility of \$20 050 which was extended by Joubert Crushers & Transport (Pvt) Ltd to Appellant as sales and thus taxable income yet in terms of s8(1) of the Income Tax Act such amount is of a capital nature and ought to have been excluded from taxable income especially given that the loan agreement, bank statement, ITF12 returns for 2014 and acknowledgement of debt confirmed the credit facility.
- 2. The Commissioner General misdirected himself by taking the proceeds of sale of fixed assets(motor vehicles) in the sum of \$15 100.00 as taxable income when such proceeds are

of capital nature and are not taxable and this was further notwithstanding that there was plausible evidence *vis a viz* the sale of Appellant's fixed assets.

3. The Commissioner General further erred at law by treating government rebates from ZIMDEF as sales and thus income yet s8 and s14 as read with the Third Schedule of the income Tax Act exempts these rebates from taxable income.
4. The Commissioner General misdirected himself at law but taking into account debts owed to Appellant as gross income.
5. The Commissioner General erred at law by applying an improper rate for capital allowances which did not resonate with the rate applicable for the years under scrutiny.
6. The Commissioner General further erred at law by disallowing capital allowances which Appellant was entitled to in terms of s15 (2) c as read with the Fourth Schedule of the income Tax Act.
7. The Commissioner General misdirected himself by disallowing the expenses incurred towards the services offered by a consultant, Mr. C.C Mutangadura, notwithstanding that overwhelming evidence of the relationship and payments thereof was submitted.
8. The Commissioner General erred at law and in fact by raising a sum of \$3 900 as withholding tax remittances plus penalties purported to have been deducted from Mr Mandimutsira in 2014 when Appellant never withhold the said amount and it was apparent that the document he relied upon was a product of fraud and further Mr Mandimutsira in 2014 denied in his affidavit that Appellant was his tenant.

Wherefore the dismissal of the objection by Respondent be and is hereby set aside and substituted with the following;

- a. The appeal be allowed with costs; and
- b. All the additional assessments raised against the Appellant are set aside."

The issues

Notwithstanding the long list of the grounds of appeal indicated above, at the pre-trial hearing on 3 November 2020, the parties agreed that the issues for determination by the court were the following:

- “1. Whether or not the deposits amounts reflected in the Appellant's bank account were all gross income and are taxable.
2. Whether or not the debts owed to Appellant are gross income and taxable.
3. Whether or not Respondent erred in disallowing capital allowances claimed by the Appellant.
4. Whether or not the Respondent erred in calculating the rate of capital allowances claimed by the Appellant.
5. Whether or not the Appellant withheld tax in the sum of \$3900 from Mr Crispen Mwandimutsira.
6. Whether or not the Respondent erred in disallowing expenses claimed by the Appellant.

7. Whether or not Respondent erred in the computation of tax due and chargeable to the Appellant.”

Point in Limine

However, before dealing with the above issues, it is necessary to consider the point *in limine* that was raised by the respondent.

During the hearing and in submissions, the respondent raised a point *in limine* in the following manner:

“The Twelfth schedule of the Income Tax Act has no provision for the filing of the Appellant’s reply. There is no provision whatsoever which allows an appellant to file reply to the Commissioner’s case. The appellant’s reply which has been filed by the appellant is improperly before the court and it should be expunged from the record. The appellant cannot create its own rules, it is bound by the twelfth schedule. It follows therefore that the appellant cannot make any reference to the documents contained in the so called appellant’s reply.”

Admittedly, the appellant had, *in casu*, filed a detailed reply to the respondent’s case, arguing that same was permitted in terms of Rule 1 of the Twelfth schedule as read with Order 19 Rule 125 of the High Court Rules 1971. I disagree.

I am in agreement with the respondent that, High Court Rules shall only be adopted where the rules of the Special Court do not specifically deal with the procedure or practice to be adopted as stated in the 12th schedule to the Income Tax Act. The procedure or practice to be adopted is clearly spelt out in the guiding schedule. That being the case I am unable to accept the position adopted by the appellant. I therefore uphold the point *in limine* raised by the respondent. Accordingly, the reply in question is expunged from the record.

The Law and Consideration of Issues.

Given the fact that virtually all the issues submitted for determination are based on deductibles, a consolidation of those issues lands us on one main issue, namely:

“which of the appellant’s expenses and claims are, in law, allowable deductions for the purposes of determining payable income tax by the appellant.”

The answer to the above question is to be found in sections 15(2) and 63 of the Act.

Section 15 of the Act provides as follows:

“ 15 Deductions allowed in determination of taxable income

- (1) For the purpose of determining the taxable income of any person, there shall be deducted from the income of such person the amounts allowed to be deducted in terms of this section.....
- (2) The deductions allowed shall be.....

(a) expenditure and losses to the extent to which they are incurred for the purposes of trade or in the production of the income except to the extent to which they are expenditure or losses of a capital nature;”

It is imperative, that before any deductibles are made a tax payer should satisfy the requirements of s 15(2) quoted above. (see **SB LIMITED versus ZIMBABWE REVENUE AUTHORITY, HH 731-20**).

Section 63 of the Act also provides as follows:

“63 Burden of proof as to exemptions, deductions or abatements

“...In any objection or appeal under this Act, the burden of proof that any amount is exempt from or not liable to the tax or is subject to any deduction in terms of this Act or credit, shall be upon the person claiming such exemption, non-liability, deduction or credit and upon the hearing of any appeal the court shall not reverse or alter any decision of the Commissioner unless it is shown by the appellant that the decision is wrong.”

The appellant *in casu*, has not, in my view fully discharged the burden placed on it by the law to prove entitlement to the claimed deductibles. The appellant in some way concedes that this is the case in the sense that it agrees that, all though it alleges use of unauthenticated documents, it however does not dispute the fact that the respondent relied on documents that were availed to it. There was no proof that the respondent tempered with any of the appellant’s documents. The appellant did not give any evidence to support the argument that the said unauthenticated documents should indeed have been rejected by the respondent due to the alleged tempering.

The appellant further admits that the alleged loan which the respondent disputed was only submitted to the respondent after the additional assessments had already been made. In its submissions, the appellant states:

“After the tax assessments were issued the loan agreement was attached to the objection”

It is because of the above that the respondent then concluded that the alleged existence of a loan was a scheme intended to benefit the appellant in terms of tax and was therefore not genuine. We cannot blame the respondent for using the documents that were before it when the assessments were made. (See *SB LIMITED*, supra).

As already stated all the issues raised are centred on whether or not certain expenses and claims are allowable deductions according to section 15(2) of the Act. Apart from rejecting the existence of a loan the respondent also noted that the appellant’s evidence also consisted of

vexatious accusations of the respondents representatives who were accused, without clear evidence being given, of being impartial and unprofessional in their dealings.

With respect to ownership of assets i.e vehicles, the appellant dismally failed to prove that it indeed owned the vehicles that it then claimed to have sold as assets of the company (appellant). The appellant further failed to fully dismiss charges of in- house loans and false information relating to status of one employee namely Mr Mutangadura .

I also notice that in relation to evidence submitted the schedule dated 2 November 2017 from K Charangwa for the Head Audits in Mutare has altered invoices for the period under audit. This is conduct that the respondent could not ignore when dealing with the entire evidence of the appellant.

In addition to sections 15(2) and 63, section 47 of the Act gives authority to the respondent to make additional assessments. The section provides as follows:

“ 47 Additional assessments

- (1) If the Commissioner, having made an assessment on any taxpayer, later considers that –
 - (a) an amount of taxable income which should have been charged to tax has not been charged to tax; or
 - (b) in the determination of an assessed loss-
 - (i) an amount of income which should have been taken into account has not been taken into account; or
 - (ii) an amount has been allowed as a deduction from income which should not have been allowed;

(c) any sum granted by way of a credit should not have been granted;

he shall adjust such assessment so as to charge to tax such amount of taxable income or to reduce such assessed loss or to withdraw or vary such credit, and if any tax is due either additionally, or alternatively, call upon the tax-payer to pay the correct amount of tax:

- (2) If the Commissioner, having made an assessment on any taxpayer, later considers that –
 - (c) an amount of taxable income which should have been charged to tax has not been charged to tax; or
 - (d) in the determination of an assessed loss-
 - (iii) an amount of income which should have been taken into account has not been taken into account; or
 - (iv) an amount has been allowed as a deduction from income which should not have been allowed;

(c) any sum granted by way of a credit should not have been granted;

he shall adjust such assessment so as to charge to tax such amount of taxable income or to reduce such assessed loss or to withdraw or vary such credit, and if any tax is due either additionally, or alternatively, call upon the tax-payer to pay the correct amount of tax:”

It is clear from the above provision of the law that the Commissioner has a right to detect and enforce how tax liabilities shall be conducted and calculated. However, *in casu*, as already pointed out, there is indeed no evidence brought before me by the appellant to prove its case as required by section 63 of the Act.

I wish to re-state that all the grounds of appeal, point to the issue whether or not certain claims and expenses claimed by appellant are allowable deductions according to Section 15(2) of the Income Tax Act. With the appellant having failed to satisfy the burden imposed on it by section 63 of the Act, this appeal falls to be dismissed with each party bearing its own costs.

I have no reason to interfere with the penalty imposed by the respondent.

Disposition

I therefore order as follows:-

1. The appeal is dismissed; and
2. Each party shall bear its own costs.

Legal Services Division, respondent's Legal Practitioners