IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KIMARO,J.A., ORIYO,J.A., And MWARIJA, J. A.)

CIVIL APPEAL NO. 146 OF 2015

COMMISSIONER GENERAL, TRA...APPELLANT

VERSUS

PAN AFRICAN ENERGY TANZANIA LIMITED......................RESPONDENT

(Appeal from the judgment and decree of the Tax Revenue Appeals Tribunal sitting at Dar es Salaam)

(Twaib, J. (Chairman))

dated 24th July 2015

in

Tax Appeal No.11 of 2015

....

JUDGMENT OF THE COURT

17th February & 16th May, 2016

KIMARO, J.A.:-

The respondent is a limited liability company registered in Tanzania. Its major activities are exploration, production, distribution and marketing of natural gas at Songosongo fields in Lindi Region. The company operates a gas processing plant for Songas Limited under an operatorship agreement. As part of its business, the respondent also conducts seismic work aimed at finding more gas and to better understand the gas reservoir. It drills

wells, manages other wells owned by Songas, performs reservoir performance studies, including geological and geographical, marketing research and other related activities. The above services are performed in the United Republic of Tanzania.

The gas produced is supplied to the Songas Plant at Ubungo and it is used to produce electricity which is sold to Tanzania Electricity Supply Co. (TANESCO). The respondent uses various technical service providers both resident and non-resident in undertaking its operations. The services procured fall into three categories. One, services performed in Tanzania by technical service providers based in Tanzania. Second, services performed abroad by technical service providers who do not come to Tanzania. Third, technical services performed partly in Tanzania and partly outside Tanzania.

A dispute arose between the appellant and the respondent in respect of an omission by the respondent to withhold tax for technical fees paid to its non-resident consultants. Samples were drilled and sent to non-resident consultants in the United Kingdom for analysis and issuance of report. This was done and the non-resident consultants paid. In the course of doing an audit on the respondent, the appellant discovered that the respondent omitted to withhold tax on technical fees that was paid to the non-resident

consultants for the analysis of the drilled samples and report writing, work that was done in the United Kingdom. The appellant was of the opinion that since the samples were drilled in Tanzania and payment originated from Tanzania, the respondent was required to withhold tax on such payment. The appellant issued a withholding tax certificate to the respondent demanding payment of Tshs.3,640,903,416/=. The respondent on the other hand consistently believed that withholding of tax on their consultants for work that was done outside the country, in the United Kingdom, was not applicable under the Income Tax Act because the services performed by the consultants were done outside the United Republic of Tanzania. The parties failed to resolve the dispute.

The respondent lodged an appeal in the Tax Revenue Appeals Board. The Board was divided on its decision. The majority opinion which included the Chairman of the Board was that payments made by the respondent to non- resident consultants have a source in Tanzania because the services of the analysis of the samples done in the United Kingdom cannot be dissociated from the drilling activities that were carried out in Tanzania. Further aggrieved, the appellant went to the Tax Appeals Revenue Tribunal.

The Tax Appeals Revenue Tribunal differed with the decision of the Tax Appeals Board. It held that the appellant was not liable to withhold tax for the service fees it paid to its non-resident consultants abroad because the work was done in England and the consultants were residents in England. The Tribunal relied on section 69(i)(i) of the Income Tax Act 2004. In support of its decision the Tax Appeals Tribunal relied on the persuasive case of **Ishikawajima-Harima Heavy Industries V Director of Income Tax,(2007)** ITR 408 (SC). The case was decided in India. The Tribunal said it was persuasive because section 9(i)(vii) of the Indian Income Tax Act, is in "*pari materia*" with section 69 of the Income Tax Act, 2004. In the Indian case, the Supreme Court held that tax is paid for services that are not only utilized in India but are rendered in India.

The Tribunal was satisfied that since the consultants who were paid the service fee were residents in the United Kingdom and the whole work of samples analysis was done in England, the appellant was not liable to withhold tax on the service fees she paid to the consultants.

The appellant was aggrieved by the decision of the Tax Revenue Appeals Tribunal and filed three grounds of appeal:

1. That the Tax Revenue Appeals Tribunal erred in law by wrongly construing provisions of section 83(1) (c) of the Income Tax Act, 2004.
2. That the Tax Revenue Appeals Tribunal erred in law by wrongly construing provisions of section 69(i)(i) of the Income Tax Act, 2004.
3. That the Tax Revenue Appeals Tribunal erred in Law by holding that the Respondent was not liable to pay the assessed withholding tax.

Before the Court, at the hearing of the appeal, the parties were represented by learned counsel Mr. Juma Beleko, assisted by Mr. Adelard Alfred for the appellants while the respondents were represented by Dr. Kibuta assisted by Mr. Wilson Mukebezi and Mr. Fayez Bhojani.

After the filing of the memorandum of appeal, both parties complied with sub rules (1) and (8) of Rule 106 of the Court of Appeal Rules 2009 by filing written submissions to support the respective position of the parties in the appeal.

The learned counsel representing the parties adopted the respective filed written submissions to support their positions. In clarifying the written submission in support of the appeal, Mr. Adelard Alfred learned counsel for the appellant said the issues the Court has to determine in the appeal are two:

(i) Whether or not the payments made by the respondent to non-resident persons are liable to withholding tax.

(ii) Whether or not the respondent is liable to pay withhold tax not withheld.

The learned advocate submitted correctly that the dispute has to be resolved by a proper interpretation of sections 69(i)(i) and section 83(1)(c) of the Income Tax Act. He said a correct interpretation of section 69(i)(i) justifies the appellant to demand payment of the tax that was not withheld by the respondent when it paid the service fee to its consultants abroad. He opined that a proper interpretation of section 69(i)(i) would have been that so long as the payments were made from Tanzania the place where the samples were drilled and sent to the consultants, the place where the analysis was done was immaterial.

The learned advocate faulted the Tribunal for holding that section 69(i)(i) does not require the payer to withhold tax when making payment of service fee to a non- resident payee stationed outside Tanzania. He said that is not a correct interpretation of the section. The learned counsel said what was important for consideration by the tribunal was that the services were delivered to a recipient in the United Republic of Tanzania and payments were made in consideration of such services. The payments were therefore subject to withholding of tax under section 83(1)(c). The learned advocate for the appellant faulted the tribunal for being inconsistent with the principle of "territorial nexus" where tax liability is fastened on the income sourced within the geographical borders of the taxing territory within the geographical borders of the taxing jurisdiction. He further blamed the tribunal for failure to make a proper distinction between a private company payer in section 69(i)(i) and government in section 69(i)(ii). The learned advocate concluded that section 69(i) (i) read with section 83(1) (c) of the Income Tax Act 2004 makes it obvious that so long as the respondent who is a resident of Tanzania paid service fees to non- residents but the money had source in Tanzania the respondent was obliged by the law under section

83(1)(c)to withhold tax for the service fee paid. The learned advocate for the appellant prayed that the appeal be allowed with costs.

Dr. Kibuta, learned advocate for the respondent conceded with the learned advocate for the appellant on the issues the Court has to resolve in this appeal. His counter submissions are that the Tax Revenue Appeals Tribunal decided the appeal fairly. He cited sections 6(1), 6(2) 69 (and in particular 69(i) (i)) and 83(1) (c) and said the conclusive effect is that –

> "*...as long as there were activities being performed in the United Republic (partly or wholly) to accomplish the contract service; then payment made for such services* ***have as source in the United Republic and accordingly the whole of such payment should be subjected to withholding tax*** *scheme as required by section 83(1)(b) (See section TAB 3) of the Income Act, Cap. 332 [as amended]*.

The learned counsel after being satisfied that the words *perform* and *render,* have the same meaning, came to a conclusion for services rendered

outside Tanzania under section 69(i)(i) the source rule would not apply. It would only apply if the government is the payer under sections and 69(i)(ii). Otherwise there would have been no need to have the two subsections which are drafted differently. He said in terms of section 83(1)(c)and 69(i)(i) the respondent had no obligation to pay withholding tax on the payments it made to non-residents for services performed outside Tanzania. That obligation would only arise where the services are rendered /performed in Tanzania. He further said that subjecting the income of non-resident service providers to tax by way of withholding tax in Tanzania is contrary to tax laws and internationally accepted tax norms. He cited the case of **Ishikawajima –Harima Heavy Industries Limited** (supra) which gives the position in India prior to the amendment of the law in 2010, a position which still prevails in Tanzania. Section 9(1)(vii) (c) of the India Income Tax Act is categorical that for non-residents to be taxed on income of services, such services needs to be rendered within India and has to be part of the business or profession carried out by such person in India.

The learned counsel said the position in India has now changed. The case of **Ashapura Minichem Ltd V ADIT [ITA No. 2508/Mum/08** cited by the learned counsel decided after the amendment of the Income Tax law

in India makes it clear that service fees paid to non-residents for service rendered without necessarily being performed in India are deemed to have source in India. As regards the submission made by the learned advocate for the appellant that laxity in interpreting section 69(i)(i) to the effect that services performed outside Tanzania although paid from Tanzania have no source in Tanzania will encourage tax evaders and evasion; create discrimination among tax payers; and deprive government revenue, the learned counsel said such a thinking is not lawyer like. He urged the Court, being the highest of the Land, to give a proper effect to what the Government had intended by enacting such law and to avoid putting into the provision what the government had not thought of. He cited the case of **Cape Brandly Syndicate V IRC** (1921) K B64 which reminded the courts to have a trite principle of strict interpretation of tax statutes. The learned counsel cited **Commissioner General and another V Mac Arthur and Baker International** [1999] L.L.R. (CAT);[2000]1E.A.33 to reminded the Court of the approach it took in having a strict interpretation of the statues. Another case he relied on also on the same subject matter is the case of **Hon. Attorney General and the Board of Trustees of Parastatal Pensions Fund V Nasoro Athunaman Gogo and Sessy William**

Lugiana Consolidated Appeals No. 105 and 81 of 2006 (unreported) where the Court held that the rule of construction is "to intend the legislature to have meant what they have actually expressed". He reiterated that the Tax Appeal Revenue Tribunal made no error in its decision. He prayed that the appeal be dismissed with costs.

In brief rejoinder both Mr. Beleko and Mr. Alfred reiterated that the source rule applies for services fees paid to non-residents consultants for sample analysis and report writing because the samples were drilled in Tanzania and the payment was made from Tanzania.

On our part we agree with the issues framed by the parties that they are the ones relevant for resolving the appeal before us. It is apparent that the parties are in agreement that respondents engaged non- resident consultants to render services of analysis of sample drilled from Tanzania and write a report in relation to gas exploration. There is no dispute that the respondent paid for the services. There is also no dispute that in the process of making payment the respondent did not withhold tax for the payment it made to the non-resident consultants. This brings us to the first issue agreed upon by the parties in this appeal. That is whether or not the payments made by the respondent to the non-resident persons are liable to

withholding tax. The parties through their advocates agreed that chargeable income of non-resident is regulated by section 6(b) of the Income Tax Act which provides:

> *"in case of non-resident person, the person's income from the employment, business or investment for the year of income,* ***only to the extent that the income has source in the United Republic of Tanzania."***

Section 83(1)(c) on the other hand imposes an obligation for withholding tax on payments to non-residents. The section reads:

> *"Subject to subsection (2), a resident person who pays* ***a service fee*** *or insurance premium* ***with a source in the United Republic to a non-resident person shall withhold income tax*** *from the payment at the rate provided for in paragraph 4(c) of the First Schedule."*

Did the service fee that the respondent paid to the non- resident consultants have source in Tanzania? The answer is found in section 69 of the Income Tax Act. Section 69(i)(i) provides as follows:

> "*The following payments have a source in the United Republic :*
>
> *(i) Payments including service fee, of a type not mentioned in paragraphs (g) or (h) or attributable to employment exercised, service rendered or a forbearance from exercising employment or rendering service –*
>
> *(i) in the United Republic , regardless of the place of payment; or*
>
> *(ii) where the payer is the Government of the United Republic, irrespective of the place of exercise, rendering of forbearance.* "

Payments in paragraphs (g) of section 69 are related to payments received by a person who conducts a business of land, sea, or air transport

operator, or charterer in respect of carriage of passengers, who embark on cargo, mail, or other movable tangible assets that are embarked in the United Republic other than as a result of transshipment or rental of containers and related equipment which are supplementary or incidental to carriage referred to in subparagraph (i). Payments in paragraph (h) are those received by a person who conducts a business of transmitting messages by cable, radio, optical fibre or satellite or electronic communication in respect of transmission of messages by apparatus established in the United Republic whether or not such messages originate in the United Republic of Tanzania. The cited paragraph (g) and (h) of section 69 are only relevant for purposes of showing what other payments is subject to payment of income tax which is spoken of in section 69(i)(i).

In this appeal what is at issue is the payment of service fees paid by the respondent to non-resident consultants. As already indicated the respondent did not withhold tax for the said payment. Was the respondent liable for withholding such income tax? Dr. Kabuta says no she was not because the services were not rendered in the United Republic. The appellant agrees that the services were not rendered in Tanzania but says the services were rendered in connection to samples drilled from Tanzania

and payment made in Tanzania. That is actually what took place but with respect to the learned advocates for the appellant, we do not think that they have grasped the real meaning of section 69(i)(i) of the Income Tax Act. **The section is clear that income tax is chargeable for service fee received for services rendered in Tanzania. What is stressed in the section is that the services must be rendered in Tanzania.** This could be a leeway for tax evasion for unfaithful businessmen or for unlawful transactions. All the same the Court is bound to interpret the law in its true perspective. The cases of **Cape Brandy Syndicate** (supra) and that of **Commissioner General Another V Mac Arthur and baker International**(supra) guide the court on interpretation of the statutes. We cannot create a situation in the statute that was not intended by the Legislature. Section 69(i)(i) makes a distinction between payments made by an individual person and that made by the government under section 69(i)(ii). Where the government is the payer, income tax is chargeable regardless of the place where the services are rendered. It is chargeable even when it is rendered outside the United Republic. This is not the case with section 69(i)(i). A private company like the respondent has no obligation to withhold tax where the services fee paid were for services rendered outside the

country. We think that the best way to remedy the situation of allowing loss of income to the government is to amend the law to cater for such situations as it happened in this case. Other jurisdictions, like the government of India changed the law and is now in a position to charge income even for services rendered outside India but payment made in India. See the case of **Ashapura Minishem Ltd** (supra).

Having given our views on what we consider to be the proper interpretation of the law relevant in our case at hand, we proceed now to answer the grounds of appeal raised. The first ground related to the construction of section 83(1) (c) of the Income Tax Act that it was erroneously construed by the Tax Appeals Tribunal. In our respectful view we do not think so. The construction of the section was tied to the place where the services for the respondent were rendered. Services were rendered in United Kingdom by persons resident in the United Kingdom. Section 69(i)(i) does not impose a liability on an individual company to withhold tax where service fee is paid in relation to services rendered out of the United Republic regardless of the fact that payment is made by a company registered in and is doing business in Tanzania. The situation would have been different if the respondent was government. This also

answers the issues that were raised by the parties that the payments that were made by the respondent to non-resident consultants were not liable for withholding tax. Since the payments were not liable for withholding tax, the respondents are not liable for payment of the tax that was withheld. We recommend to the Attorney General as the Advisor of the Government to look into the possibility of amendment of the law to remove leeway for loss on income to the government as it will be found appropriate. We dismiss the appeal but we make no order for costs.

DATED at DAR ES SALAAM this 9th day of May 2016.

N. P. KIMARO
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

J.R. KAHYOZA
REGISTRAR
COURT OF APPEAL