THE COURT OF APPEAL OF TANZANIA
AT DODOMA

CIVIL APPEAL NO. 24 OF 2018

(CORAM: JUMA, C.J., MWARIJA, J.A., And MZIRAY, J.A.)

TULLOW TANZANIA BV ..... APPELLANT
VERSUS
THE COMMISSIONER GENERAL TANZANIA REVENUE AUTHORITY..... RESPONDENT

(Appeal from the Judgment and decree of the Tax Revenue Appeals Tribunal)

(Mataka Vice Chairman.)

dated the 15th day of August, 2013
in
Tax Appeal No. 7 of 2013

JUDGMENT OF THE COURT

27th June & 5th July, 2018

MZIRAY, J.A:

The appellant, Tullow Tanzania BV, is challenging the decision of the Tax Revenue Appeals Tribunal (the Tribunal) in Tax Appeal No. 7 of 2013, in which the said Tribunal dismissed Tax Appeal No. 10 of 2011 originating from the Tax Revenue Appeals Board (the Board) sitting at Lindi. Having been unsuccessful in the first and second appeal, the appellant lodged this appeal seeking to reverse the decisions of the Board and the Tribunal.

The facts of this case are straight forward. As reflected in the record of appeal, in between 18th November, 2010 and 1st February, 2011 the respondent carried out an audit on the appellant's accounts with the purpose of verifying its VAT refund claims and along with the said audit, it also audited the appellant's compliance with withholding tax, employment tax and corporate tax. Upon completion of the said audit, the respondent issued three certificates demanding Tshs. 792,394,929/18, Tshs. 29,429,113/09 and Tshs. 4,298,960/26 being withholding tax, PAYE and VAT respectively. The appellant paid immediately both the PAYE and VAT as assessed but disputed the demand for payment of Tshs. 792,394,929/18, the withholding tax, contending that the supplier of the services was non-resident companies and therefore the payments for the services had no source in Tanzania, hence not liable to the withholding tax.

The respondent on the other hand consistently insisted that the payments made by the appellant to the non-resident companies for services performed outside Tanzania had a source in Tanzania, for that reason, liable to withholding tax. The dispute was not resolved.

Following the disagreement, the appellant unsuccessfully challenged the assessment in the Board and opted for an appeal in the Tribunal where she also lost. She then filed this appeal.

In this appeal, the appellant under the service of Mr. Wilson Mukebezi, learned counsel, filed a Memorandum of Appeal containing four grounds namely:-

"1. *The Tax Revenue Appeals Tribunal erred in law when it held that the appellant was the provider of employment to the professionals involved in the work for which payment was made and that fees generated by the employment services were subject to withholding tax under section 6(1) (b), 69(i)(i) and 83(1) (b) of the Income Tax Act,2004.*

2. *The Tax Revenue Appeals Tribunal erred in law when it relied on section 9 of chapter XVII-B of the Indian Income Tax Act (as amended in 2010) which made fees for technical services rendered outside India by non-resident persons liable to withholding tax in India to conclude that if the services are utilized in Tanzania withholding tax should apply.*

3. *The Tax Revenue Appeals Tribunal erred in law when it held that extraneous considerations did not influence the Tax Revenue Appeals Board's interpretation of law.*

4. *The Tax Revenue Appeals Tribunal erred in law when it held that the judgment of the Tax Revenue Appeals Board as legal and sound instead of allowing the appeal and dismissing the order for costs.*

On the above grounds, the learned counsel prayed that the decision of the Tribunal be reversed and the appeal be allowed with costs.

To support their respective positions, both parties filed written submissions in compliance with Rule 106(1) and sub-rule (8) of the Tanzania Court of Appeal Rules, 2009 which were adopted by the learned counsel at the hearing of the appeal. During the hearing of the appeal, the appellant was represented by Mr. Allan Kileo assisted by Mr. Wilson Mukebezi, learned Advocates and the respondent enjoyed the services of Mr. Juma Salum Beleko, learned counsel.

Submitting in support of the appeal Mr. Kileo, learned Advocate in the first place asked this Court to adopt a purposive approach as suggested by the respondent's learned counsel based on the principle that tax statutes are to be construed according to the clear words of the statute.

He argued that a purposive interpretation of a statute envisages a consideration of the content and scheme of the relevant Act as a whole and its purpose. He stated that in so doing a true perspective of the law can be achieved and as such will avoid creating a situation which is not contemplated by the legislature. He made reference to the following decisions of this Court in support of his argument – **Commissioner General of TRA v. Pan African Energy,** Civil case No. 146 of 2015 and **BP Tanzania v. Commissioner General,** Civil Appeal No. 125 of 2004 (both unreported). He submitted that in the case at hand as services were rendered in Dublin, Ireland and South Africa which are outside the United Republic, then there is no obligation to withholding income tax on such payments.

He argued that the way section 69(i)(i) of the Income Tax Act, 2004 (the Act) is constructed, due consideration should be placed where utilization of that economic activity occurs and not otherwise. He was firm that section 83(1)(b) imposes an obligation for withholding tax on payments to non-residents where the source of payment is the United Republic but only if the services are performed in Tanzania which is not the case of our instant case. He considered the decision in **Pan African**

Energy (supra) as a good law and asked us to follow it in arriving at our decision.

Mr. Beleko learned counsel vehemently opposed this appeal. He submitted that the essence of charging tax on the part of the appellant is that she defaulted paying tax liable to be paid by a non- resident person. He stated that in terms of section 83(1)(b) of the Act any person who effect payments to a non- resident shall withhold income tax and that the payment of tax has to go with the source principle as per section 69(i)(i) of the Act. He submitted further that the appellant is a resident of Tanzania and the economic base on which the tax is paid is in Mtwara, Tanzania, therefore the appellant bearing in mind the source principle in effecting payment to a non-resident companies, ought to have withheld tax and remit the same to the respondent.

Commenting on the **Pan African case** (supra), the learned counsel cautioned that the said decision should not be relied upon as the same was erroneously decided. He urged this Court to depart from the decision. He maintained that in **Pan African Energy case** (supra) the payment effected had a source in Tanzania in terms of section 69(i)(i) of the Act. As

to the purposive approach in interpreting tax statutes, Mr. Beleko readily conceded that the approach is the best as correctly applied in **BP Tanzania case** (supra).

In the rejoinder submission Mr. Kileo submitted that in **BP Tanzania case** (supra) the scenario is quite distinct from the instant case in that BP Tanzania was interpreting section 69(e) on royalties for using assets in Tanzania which is quite different from service fees. He rested his submission by insisting that **Pan African Energy case** (supra) was rightly decided in terms of section 69(i)(i) of the Act.

At the outset we have to state that we quite agree with the proposition that the purposive approach may be appropriate in interpreting tax legislations. Our reasons for supporting this approach in this appeal will shortly be seen in the course of arriving at our decision in this appeal.

We have meticulously gone through the entire record of appeal and our main focus has been to determine how the Board and the Tribunal below dealt with the matter in issue and arrived at their respective decisions. Considering the memorandum of appeal before us, we find that the crux of the matter as pointed out in the first ground of appeal, which

we consider as the main decisive ground, is on the interpretation of sections 6(1) (b), 69(i)(i) and 83(1) (b) of the Act on which the decisions of the Board and the Tribunal in interpreting the said provisions consensusly concluded that the appellant was the provider of employment to the professionals involved in the work for which payment was made and that fees generated by the employment services were subject to withholding tax.

We propose to deal with this appeal by arguing the four grounds of appeal jointly hoping that in the course of deliberating on the first ground of appeal, we will be able to answer questions posed in the remaining three grounds of appeal. We say so because the issues raised in the remaining grounds of appeal originated from the first ground and in one way or another they are interconnected.

We begin with what withholding tax entails. This is a tax that is required to be withheld by the person making "payment" of certain amounts to another person in respect of goods supplied or services rendered to satisfy the recipients' tax liability. Section 6 of the Act provides

for what is a chargeable income. Section 6(1)(b) speaks of what is chargeable income to a non-resident person. It provides, we quote;

> *"6.-(1) subject to the provision of sub-section (2), the chargeable income of a person for a year of income from any employment business or investment shall be*
> *(a) ..... N/A*
> *(b) In the case of a non-resident person, the person's income from the employment, business or investment for the year of income, but only to the extent that the income has a source in the United Republic."*

This sub-section imposes the **source principle** in that a non-resident person's income is subject to taxation under the Act only if the income has a source in the United Republic of Tanzania.

Section 69, defines in clear terms payments with a source in the United Republic of Tanzania. And section 83(1)(b) imposes an obligation for withholding tax on payments to non-residents to the extent and only where the **source of payment** is in the United Republic of Tanzania. The section reads;

> *"S.83.–(1) subject to sub-section (2), a resident person who*

(a) ..... N/A

(b) Pays a service fee or an insurance premium with a source in 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."

It was submitted by the appellant's learned counsel in the Tribunal at page 195 of the record of appeal that service fees to non-residents has a source in Tanzania only if the services for which the payment is made was rendered/performed in the United Republic of Tanzania. This is exactly the wording of section 69(i)(i) of the Act referred above. It provides specifically that:

"The following payments have a source in the United Republic.

(a) (h) .....N/A

(i) Payments, including service fees, 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 ..."*

Reading sections 6(1)(b), 69 (i)(i) and 83 (1) (b), all together gives two conditions for a payment to a non-resident to be subjected to withholding tax. These are: **(1) the service of which the payment is made must be rendered in the United Republic of Tanzania, and (2) the payment should have a source in the United Republic of Tanzania.**

The withholding obligation under section 83(1)(b) of the Act applies to a payment for service fee with a source in the United Republic of Tanzania and section 69 stipulates what payment have a source in the United Republic of Tanzania.

It is our strong view that the word **rendered** used under section 69(i)(i) is synonymous to words "supplied" or "delivered". In this regard, a non-resident who provides services to a resident, has delivered/supplied services to a resident of the United Republic of Tanzania. The recipient of the service is actually the payer for such services, in which case, "source of payment" cannot be any other place except where the payer resides. In other words as the services of which the payments were made were consumed or utilized by the appellant in the United Republic of Tanzania for purposes of earning income in the United Republic, then payments

made for such services **had a source** in the United Republic of Tanzania, and the respondent had to withhold tax under section 83(1) (c) of the Act.

As opposed to the Indian Income Tax Act 1961 (as amended in 2010), where its section 9 provides for **"income deemed to have a source in India,"** section 69 of Tanzania Income Tax Act deals with **"source of payments."** These are two distinct concepts and it is our considered view that one cannot rely on an interpretation of section 9 of the Indian Income Tax 1961 (as amended) in interpreting section 69 of the Tanzanian Income Tax Act, 2004. While **"Income is earned," "payments are made,"** in which case the rules for determination of where a particular income is earned cannot be the same as the rules in determining where a particular payment originates. Payment ordinarily originates from where the payer is, regardless of where such payments are effected.

The Act imposes a withholding obligation on a service fee based on the source of payment of such fees, this being the case therefore we see no ambiguity on section 69(i)(i). The key question that the Court is invited

to look into is not the nature of the payment, but rather, the source where the payment originated.

In our view, the Court's finding in respect of the case of **Pan African Energy** (supra) was much influenced by the findings of the Tribunal that section 9(1)(vii) (c) of the Indian Income Tax Act is *in pari materia* with section 69 of Tanzania Income Tax Act.

Section 9(I)(vii)(c) of the Indian Income Tax Act, provides as follows:-

> *"9..(1) – the following incomes shall be deemed to accrue or arise in India.*
> *(i) (vi).....N/A*
> *(vii) Income by way of fees for technical services payable by*
> *(a) ..... N/A*
> *(b) A person who is a non-resident, where the fees are payable in respect of services utilized in a business or profession carried on by such person in India or for purposes of making or earning any* ***"income from any source in India."***

It is clear from the wording of the provisions above that they are substantially different from section 69(i)(i). While the Indian Act talks of

the source of income, on the other hand section 69(i)(i) talks of source of payment. The case of **Pan African Energy** (supra) is therefore distinguishable as it relied on the interpretation of section 9(1)(vii) (c) of the Indian Income Tax Act to arrive at a finding that the said provision, as it was, was in *parimateria* with section 69(i)(i) of the Act.

We think it is worth to note here that sections 69 and 68 of the Act were meant to deal with cross-border payments. The two provisions are therefore anti-avoidance provisions as far as cross-border payments are concerned. The modern approach of interpretation to an anti-avoidance provision is the purposive approach. This approach was taken by the Court in the case of **BP Tanzania** (supra) while interpreting section 69 (e) of the Act. In doing so the Court gave effect to the purpose for which the section was enacted. This Court, in the above cited case, stated at page 19 and 20 of the judgment:

> *"In the premises, the focus in the construction of section 69(e) of the Income Tax Act (supra) is whether the payment of a royalty was for the purposes of business, or earning any income from any source in the United Republic or services are utilized in Tanzania. The moment these conditions are met, irrespective of*

whether payment is done by a resident or non-resident, the income would be taxable in the United Republic. Also irrespective of the place of rendering services, if utilized in United Republic shall be taxable in the United Republic."

Again in the case of African **Barrick Gold PLC v. Commissioner General,** Tax Appeal No. 16 of 2015, which we take inspiration, the Tax Revenue Appeals Tribunal extensively elaborated the modern approach to interpretation of anti-avoidance provisions. The Tribunal after drawing inspiration from various cases from England, had this to say on page 14 of the judgment:

"The break through on both fronts came with the decision of House of Lords in W.T. Ramsay Ltd v. IRC [1982] A.C. 300 at 323 C-D. In that case, Lord Wilberforce recognized the general rule that tax statutes are to be construed according to the clear words of the statute. But he posed the question "what are clear words," and answered it to the effect that the court is not contained to a literal interpretation. He added; "There may, indeed should, be considered the context and scheme of the relevant Act as a whole, and its purpose may, indeed should, be regarded."

From the above therefore, the respondent's learned counsel is right in inviting this Court to opt for a purposive approach which would derive this Court into holding the decision by the Tribunal in the case at hand, that irrespective of the place of rendering services, as the payment was made by a person resident in Tanzania, for services utilized in the United Republic, then the payments made are subject to withholding Tax under the Provisions of sections 6 (1)(b), 69(i)(i) and 83(1)(b) of the Income Tax Act, 2004.

For the reasons aforementioned, we dismiss this appeal with costs.

DATED at **DODOMA** this 4th day of July, 2018.

I. H. JUMA
CHIEF JUSTICE

A. G. MWARIJA
JUSTICE OF APPEAL

R. E. S MZIRAY
JUSTICE OF APPEAL

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

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL