IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: MWAMBEGELE, J.A., KEREFU, J.A. And MAIGE, J.A.)

CIVIL APPEAL NO. 425 OF 2020

VODACOM TANZANIA PUBLIC LIMITED COMPANY
(Formerly VODACOM TANZANIA LIMITED) ..... APPELLANT

VERSUS
COMMISSIONER GENERAL, TANZANIA REVENUE AUTHORITY ..... RESPONDENT

(Appeal from the Judgment and Decree of the Tax Revenue Appeals Tribunal, at Dar es Salaam)

(Twaib, J. - Chairman)

dated the 10th day of November, 2017
in
Tax Appeal No. 22 of 2015
.....

JUDGMENT OF THE COURT

28th October & 5th November, 2021.

MWAMBEGELE, J.A.:

Vodacom Tanzania Public Limited Company, formerly known as Vodacom Tanzania Limited, appeals against the decision of the Tax Revenue Appeals Tribunal (the Tribunal) in Tax Appeal No. 22 of 2015 handed down on 10.11.2017 in which the decision of the Tax Revenue Appeals Board (the Board) was upheld. In that decision, the appellant was ordered to pay the Commissioner General of Tanzania Revenue Authority (the respondent) the sum of Tshs. 1,028,644,778/87 and Tshs.

1,917,171,792/= as, respectively, withholding tax and penalties on the services and royalty for the years of income from 2001 to 2004.

The background to the appeal before us can be stated in brief. The appellant is a company registered under the laws of Tanzania dealing with telecommunication network and wireless services. The respondent is a revenue collector for the Government of Tanzania. On 10.11.2006, the respondent served on the appellant preliminary audit findings after he had conducted a tax audit earlier on. A meeting between the parties was convened to consider the appellant's misgivings on the preliminary audit findings after which the respondent revised the preliminary audit findings on 24.04.2007. The revised preliminary audit findings did not make the appellant happy. Another meeting was thus reconvened and the issues of complaint by the appellant with regard to the revised preliminary audit findings were addressed. As a result, on 29.12.2007, the respondent issued a final audit report, which did not make the appellant happy either. She thus appealed to the Board. Her main complaint before the Board, as can be gleaned from the statement of appeal appearing at p. 119 of the record of appeal, was that the respondent ought not to have required her to pay withholding tax on payments made for acquisition of software licence granted to her exclusively for her data transmission purposes.

The Board disagreed with the appellant. It held that the respondent was entitled to withholding tax for payments she made to her supplier for the software licence. Aggrieved, the appellant appealed to the Tribunal which, though for somewhat different reasons, upheld the decision of the Board. Still aggrieved, the appellant has lodged this appeal on five grounds of complaint, namely:

1. The Honourable Tax Revenue Appeals Tribunal grossly misdirected itself and erred in law in holding that payments for the right to use software should attract royalty;
2. The Honourable Tax Revenue Appeals Tribunal erred in law in arriving at its decision by holding that the Tax Revenue Appeals Board had determined and well settled that payments for the right to use the software constituted a royalty;
3. The Honourable Tax Revenue Appeals Tribunal erred in law in holding that payments for the right to use the software are chargeable to tax in the form of withholding tax under section 34 (1) (c) of the Income Tax Act, 1973;

4. The Honourable Tax Revenue Appeals Tribunal erred in law by its failure to give effect to the correct interpretation of the word 'royalty' as use under section 2 of the Income Tax Act, 1973; and
5. The Honourable Tax Revenue Appeals Tribunal erred in law by its failure to strictly interpret a taxing provision contrary to the cardinal principle governing interpretation of taxing statutes.

At the hearing of the appeal before us, the appellant appeared through Mr. Yohanes Konda and Dr. Erasmo Nyika, learned advocates. On the other hand, Mr. Juma Kisongo, learned Principal State Attorney, assisted by Messrs. Harold Gugami and Marcel Busegano, learned Senior State Attorneys, joined forces to represent the respondent. Both parties had earlier on filed written submissions in support of their respective positions which they successfully sought to adopt as part of their oral arguments before us.

It was Dr. Nyika who submitted for the appellant. He argued grounds 1, 3 and 4 conjointly and the remaining grounds 2 and 5 were argued separately.

The essence of the appellant's arguments on grounds 1, 3 and 4 in the written submissions and the oral arguments by Dr. Nyika before us, is that it was an error for the Tribunal to hold that payment for the right to

use software constitutes royalty and thus subject to withholding tax. It is the appellant's contention that the Tribunal wrongly interpreted the term "royalty" under section 2 of the Income Tax Act, 1973. Dr. Nyika was of the contention that **acquisition of software** is different from **acquisition of a copyright in the software**. In the former, he submitted, a person only obtains the permission to use the software in running computers of the purchaser. He argued that software is a commodity and its use expires upon the expiry of the licence. It was submitted that in this appeal the appellant acquired the right to use the software, she did not acquire the right to use a copyright of the software. According to him, the right to use the software does not attract tax as distinct from the right to use a copyright of the software which does.

In the circumstances, it was argued, the Tribunal improperly defined the term "royalty" under section 2 of the Income Tax Act, 1973 and improperly applied the provisions of section 34 (1) (c) of the Income Tax Act, 1973.

The respondent's answer to the appellant's submissions, in the written submissions and the oral address through Mr. Juma Kisongo before us, is essentially that the payment on the purchase of the software constituted a royalty which attracted payment of withholding tax on it as

per section 34 (1) (c) of the Income Tax Act, 1973. It was submitted by the respondent that most software purchase agreements are titled software licence agreement rather than software purchase agreement. It was argued that as per section 34 (1) (c) of the Income Tax Act, 1973, payment made for acquisition of computer software is payment for lease, therefore royalty subject of withholding tax. He added that the issue whether such payment for the purchase of software is a royalty is not novel as it was traversed by the Court in **Celtel Tanzania Ltd v. Commissioner General, Tanzania Revenue Authority**, Civil Appeal No. 56 of 2018 (unreported) in which the Court took the view that payment for using a software is a royalty thus subject to withholding tax. The respondent added that the position was reiterated in **National Microfinance Bank Tanzania Limited v. Commissioner General, Tanzania Revenue Authority**, Civil Appeal No. 168 of 2018 (unreported).

Rejoining, Dr. Nyika reiterated his stance in the submissions-in-chief and added that **Celtel Tanzania Ltd** (supra) was distinguishable in that the Court relied on the decision of the Court of Appeal of Kenya in **Kenya Commercial Bank Limited v. Kenya Revenue Authority** [2016] eKLR,

which dealt with a different provision of law; not *in pari materia* with the section under discussion.

We have considered the rival arguments by the learned counsel for the parties. Having so done, we think the issue we are called upon to decide that arises from grounds 1, 3 and 4 is whether the payment made by the appellant to M/S Siemens Telecommunication (Pty) Ltd for purchase of computer software constitutes royalty. We find it appropriate, at the very outset of our determination, to define the meaning of the term as can be gleaned from our legislation. The term "royalty" is defined by section 2 of the Income Tax Act, 1973 which was applicable then as under:

> *""royalty" means any payment made as a consideration* ***for the use of, or the right to use-***
> *(a) any copyright of literary, artistic or scientific work; or*
> *(b) any cinematograph film, including film or tape for radio or television broadcasting; or*
> *(c) any patent, trademark, design or model, plan, formula or process; or*
> *(d) any industrial, commercial or scientific equipment;*
> *or for information concerning industrial, commercial or scientific equipment or experience, and includes*

gains derived from the sale or exchange of any right or property giving rise to such royalty".

[Emphasis supplied].

The appellant placed emphasis on the words "for the use of, or the right to use" shown in the bold expression above. We shall revert to this point later in this judgment.

The Tribunal agreed with the finding of the Board. However, despite the fact that the Tribunal observed that it agreed with the Board on its reasoning and verdict, we are afraid, the verdict of the Tribunal and the Board's were the same but not the reasoning thereof. We say so because, while the Board held that the payment made by the appellant to M/S Siemens Telecommunication (Pty) Ltd for purchase of computer software is taxable in terms of section 34 (1) (c) of the Income Tax Act, 1973, that is, as "**any rent, premium or like consideration for the use or occupation of property**", the Tribunal held that the same was taxable under, purportedly, the same section 34 (1) (c) of the Income Tax Act, 1973, as "royalty". To unveil the somewhat contradiction by the Board and Tribunal in their reference to the same paragraph and sub-section (1) of section 34, we find it apt to reproduce section 34 (1) (c) of the Income Tax Act, 1973, which was applicable then. It reads:

"34.-(1) Every person shall, upon payment of any amount to any non-resident person not having a permanent establishment in the United Republic in respect of-

(a) any management or professional fee;

(b) any royalty;

(c) any rent, premium or like consideration for the use or occupation of property;

(d) any dividend;

(e) any interest; or

(f) any pension or retirement annuity,

which is chargeable to tax, deduct therefrom tax at the appropriate non-resident withholding tax rate."

[Emphasis supplied].

After a close look at the provisions of the law referred to, we think, the Board and the Tribunal used different vehicles to arrive at the same destination. Likewise, having closely looked at the judgment of the Tribunal, especially when it observed at p. 565 of the record of appeal that "the issue related to royalty was well settled" by the Board, with respect, we think the Tribunal misconceived the reasoning of the Board. What the Board held, in our view, was that the payment made by the appellant to M/S Siemens Telecommunication (Pty) Ltd for purchase of computer software is taxable in terms of section 34 (1) (c) of the Income Tax Act,

1973, that is, as "**any rent, premium or like consideration for the use or occupation of property**". It did not mean to refer to "**royalty**" which is under paragraph (b) of that version of the Income Tax Act. We think the Tribunal used the 2002 Revised Edition of the Income Tax Act while the Board used the Income Tax Act, 1973 as it was before the Revised Edition of 2002. For easy reference, we reproduce the 2002 version of the Income Tax Act. It reads:

> *"34. (1) Every person shall, upon payment of any amount to any non-resident person not having a permanent establishment in the United Republic in respect of–*
>
> *(a) any management fee;*
>
> *(b) any professional fee which is not a fee for the provisions of technical services;*
>
> ***(c) any royalty;***
>
> ***(d) any rent, premium or like consideration for the use or occupation of property;***
>
> *(e) any dividend;*
>
> *(f) any interest;*
>
> *(g) any pension or retirement annuity;*
>
> *(h) [Repealed by Act No. 25 of 1997 s. 28.];*
>
> *(i) business insurance claims;*

(j) the provision of technical services to a person carrying on mining operations;

(k) annual fees payable to a director other than a whole time service director of a corporation for serving as a member of the Board,

which is chargeable to tax, deduct therefrom tax at the appropriate non-resident withholding tax rate."

[Emphasis supplied].

Thus, the "**any rent, premium or like consideration for the use or occupation of property**" used by the Board to hold that the payment made by the appellant to M/S Siemens Telecommunication (Pty) Ltd was taxable, appears in para (d) of the 2002 Revised Edition whereas it appears in para (c) in the 1973 version.

Be that as it may, both the Board and the Tribunal arrived at the same conclusion that payment made by the appellant to M/S Siemens Telecommunication (Pty) Ltd was taxable. The appeal before us is against the decision of the Tribunal which held that the payment was taxable as royalty in terms of section 34 (1) (c) of the Income Tax Act, Cap. 332 of the Revised Edition, 2002.

As rightly put by the Tribunal, the issue whether payment made by a person for the purchase of computer software is taxable in terms of section

34 (1) (c) of the Income Tax Act, is not a virgin territory; it has been traversed before. In **Celtel Tanzania Ltd** (supra), referred to us by the respondent and whose facts are in all fours with the facts in the case the subject of the appeal at hand, we were confronted with a similar scenario. In **Celtel Tanzania Ltd**, like in the present, the appellant, Celtel Tanzania Limited, currently known as Airtel Tanzania Limited, made two payments to two foreign companies, Alcatel France and Ericsson AB for purchase of software and software licence at an amount not relevant for the determination of this appeal. In 2008, Tanzania Revenue Authority, after conducting a tax audit in respect of the appellant's accounts for the relevant years in which the above payments were made, demanded, *inter alia*, Tshs. 217,905,341/= as withholding tax in the form of royalty arising from the payments made to the two foreign companies for the purchase of the software and software licence. The appellant objected to the demand on the ground that the payments did not constitute royalty. We subscribed to the position taken by the Court of Appeal of Kenya in **Kenya Commercial Bank Limited** (supra) in which it was held that payment for the right to use a computer software constitutes royalty. At p. 26 of the judgment, we recited the following excerpt from the Kenyan case;

"... the agreement between the parties was for grant of a licence to the bank to use Infosys ***computer software program*** *and for provision of other services. The agreement specifically provided,* ***inter alia*** *that Infosys would at all times retain all title, copyright and other proprietary rights in software and that the bank would not acquire any rights other than those specified in the agreement .... It is plain from the agreement that the payment of licence fees was a consideration for the right to use Infosys intellectual property in the form of computer software program which is within the definition of royalty under clause (c) of S. 2 of the Act."*

We subscribed to the position taken in our neighbouring jurisdiction in **Kenya Commercial Bank Limited** (supra) as depicting the correct position of the law in our jurisdiction as well.

In our another decision of **National Microfinance Bank Tanzania Limited** (supra) we took the same view that payment for software and to use the software is a royalty and therefore subject to withholding tax. We observed at p. 19 of the typed judgment:

"... what was transferred to the appellants is only a licence to use the software which was to be

supplied by Neptune under certain terms and conditions. To that extent, on a proper construction, we do not entertain a flicker of doubt that the SLA constituted a lease within the definition of the term under section 3 of the ITA, 2004. Likewise, we are just as well fully satisfied that the payment of the licence fees was a consideration for the right to use software which is within the definition of a "royalty" under clause (a) of its definition under section 3 of the ITA, 2004."

In the case the subject of this appeal, the "Agreement for Purchase and Sale" between the appellant and M/S Siemens Telecommunications (Pty) Ltd stipulates at clause 2.2 thereof appearing at p. 53 of the record of appeal reads:

> *"2.2 The Purchaser shall have the option to renew this Contract for such further periods as it may require from time to time, until the expiry of its License, provided that the Purchaser shall give written notice to the Seller of its intention to exercise such option not later than 3 months prior to the expiry of the initial period or any extension thereof, as the case may be."*

What we discern from the above clause is that the appellant was accorded the right to use the software. That right was non-exclusive and non-transferable. That, in our view, is a hallmark of a royalty subject to withholding tax and the Tribunal was justified to so hold. And, as if clinch the matter, the clause is similar with such clauses in **Celtel Tanzania Ltd** (supra) and **National Microfinance Bank Tanzania Limited** (supra). Guided by the position we took in **Celtel Tanzania Ltd** (supra) and **National Microfinance Bank Tanzania Limited** (supra), we do not see any legal justification to depart from that position. We are not persuaded by the argument advanced by Dr. Nyika that **Celtel Tanzania Ltd** (supra) is distinguishable, for the obvious reason that we took the same view in **National Microfinance Bank Tanzania Limited** (supra) without even referring to **Celtel Tanzania Ltd** (supra) which Dr. Nyika would have us hold is distinguishable. We are of the settled view in our mind that the two cases depict a correct position of the law in this jurisdiction and thus see no sound legal reason why we should depart from that sound standpoint. In the premises, we find and hold that the payment made by the appellant to M/S Siemens Telecommunication (Pty) Ltd for the purchase of computer software was in the nature of, and is taxable as, royalty in terms of section 34 (1) (c) of the Income Tax, Cap. 332 of the Revised Edition, 2002. The

Tribunal rightly so held. We find no legal justification to meddle with its decision. The three grounds of appeal, that is grounds 1, 3 and 4 therefore collapse.

Next for consideration is ground 2 which seeks to challenge the Tribunal for holding that the Board had determined and well settled that the payment by the appellant to M/S Siemens Telecommunication (Pty) Ltd constituted a royalty. The determination of this issue should not detain us, for we have partly discussed it when considering grounds 1, 3 and 4 above. We have made ourselves clear that the Board found that the payment under reference fell within the scope of section 34 (1) (c) of the Income Tax Act, 1973; "**any rent, premium or like consideration for the use or occupation of property**". It did not determine it as falling under section 34 (1) (b) of the Income Tax Act, 1973; "**any royalty**". For clarity we will let the Board speak for itself through p. 369 of the record of appeal:

> *"The respondent insists that the payment on the purchase of the software constitutes a royalty .... This honourable Board by looking at section 2 of the same Act [the Income Tax Act, 1973] which defines the word royalty, it goes without saying that the purchase of software does not constitute a royalty.*

For a payment to qualify as a royalty the asset for which usage is paid has to be copyrighted which is not the case in this instant appeal."

Then the Board analysed the contents of clause 16 of the Agreement and went on:

" *... the Honorable Board still has the findings that the payments amount to a license fees as he was given royalty free license by the Seller. Therefore, the payment made by the appellant to the seller does not constitute a royalty as alleged by the respondent."*

In view of the above, it is our considered opinion that the Tribunal slipped into error when it stated at p. 565 of the record of appeal that "it is obvious that the issue relating to royalty was well settled"; that the payment by the appellant to M/S Siemens Telecommunication (Pty) Ltd constituted royalty. On the contrary, as we have already stated, the Board did not find the payment under reference to constitute royalty but to be a consideration for the use of the property of M/S Siemens Telecommunication (Pty) Ltd. We have already explained the source of the confusion as being brought about by using different versions of the Income Tax Act. There is merit in this complaint in the second ground of appeal and we so find.

The last ground of appeal seeks to fault the Tribunal that it did not strictly interpret a taxing provision, which was contrary to the cardinal principle governing taxing statutes. The learned counsel for the appellant argued that the Tribunal ought to have interpreted the word "royalty" without according to it an adulterated meaning. On strict interpretation of taxing statutes, counsel referred us to the principle enunciated in **Cape Brandy Syndicate v. Inland Revenue Commissioner** [1921] 1 KB 64, wherein it was held at page 71:

> *"In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about tax. There is no presumption as to tax. Nothing is to be read in and nothing to be implied."*

On the other hand, the respondent argued that the Tribunal did not offend any principle of interpretation of taxing statutes.

We have read the judgment of the Tribunal and fail to comprehend the appellant's complaint in this regard. As we have stated above when considering grounds 1, 3 and 4 of the grounds of appeal, the Tribunal well interpreted the statutes under consideration. We do not see any intendment, presumption, equity nor interpolation on the part of the Tribunal. If anything, the Tribunal looked at the statute as clearly said by

the relevant provisions. We find this ground of appeal lacking merit and dismiss it.

For reasons that we have endeavoured to assign above in which we have found all grounds of appeal, except the second, as lacking substance, this appeal is, ultimately, wanting in merit. It stands dismissed with costs.

DATED at **DODOMA** this 5th day of November, 2021.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

This Judgment delivered this 5th day of November, 2021 in the presence of Ms. Consolatha Andrew, Principal State Attorney for the Respondent and holds brief for Dr. Erasmo Nyika, learned Advocate for the Appellant, is hereby certified as a true copy of the original.

H. P. NDESAMBURO
DEPUTY REGISTRAR
COURT OF APPEAL