

IN THE REVENUE APPEALS TRIBUNAL

2006/RAT/DT/03

HOLDEN AT LUSAKA

BETWEEN:

ZAMBIA SUGAR PLC

1 ST APPELLANT

ILOVO GROUP MARKETING SERVICES LIMITED

2 ND APPELLANT

AND

ZAMBIA REVENUE AUTHORITY

RESPONDENT

QUORUM: Mr. F. Chishimba (Chairman), Mrs. G. Mazakaza (Member) and Mr. G. Nonde (Member)

FOR THE APPELLANT: Hon. E. Silwamba S.C. and J. Jalasi - Messrs Eric Silwamba, Jalasi and Linyama Legal Practitioners

FOR THE RESPONDENT: Mrs. K. Handia (Legal Officer) – Zambia Revenue Authority

[22nd December, 2015]

RULING

CASES REFERRED TO:

1. Wilfred Mweene v Zambia Revenue Authority -2014/HP/1734

LEGISLATION REFERRED TO:

1. Income Tax Act, Chapter 323 of the Laws of Zambia
2. Income Tax Amendment Act No 27 of 2011
3. Revenue Appeals Tribunal Act, No. 11 of 1998
4. Revenue Appeals Tribunal Regulation, Statutory Instrument No. 143 of 1998

This action was commenced in the Revenue Appeals Tribunal on 27th April, 2012. The Appeal is against a decision of the Acting Commissioner – Domestic Taxes, Mr. Chansa Shambuluma, determining on 28th March, 2012 that monies received by the 2nd Appellant from the 1st Appellant should be classified as management and consultancy fees subject to withholding tax.

The grounds of appeal are that:-

1. The Respondent erred when they determined that commissions paid by the 1st Appellant to the 2nd Appellant should be classified as management and consultant fees for withholding tax purposes.
2. That the Respondent only amended the provisions of the Income Tax Act, Volume 19, Chapter 323 of the Laws of Zambia by way of the Income Tax (Amendment) Act No 7 of 2011 with effect from 1st April, 2011 to deem income from commissions as being liable to withholding tax without retrospective effect.

On account of the numerous adjournments in this matter and the dissolution of the panel of the Tribunal that heard the viva voce arguments, the current Tribunal ordered that it would deliver its ruling on the basis of the written submissions by the parties who both obliged accordingly.

The facts of the matter are that the 1st Appellant is an agricultural company growing sugarcane in Mazabuka, Zambia. On 1st April, 2008 it entered into an Agency Agreement with the 2nd Appellant for the marketing, sale and distribution of its products. The Agency Agreement was marked exhibit 'LAE.1'. Under the agreement the 2nd Appellant was to be paid a commission of 2% of the gross value of the sales proceeds received in respect of the company's export products. Following their discussions with Zambia Revenue Authority, the Respondent, conceded in a letter dated 9th June, 2011 that the scope of services contained brokerage services to the extent of 22.05% of the total monies.

Both Appellants have argued that the services are rendered abroad and prior to the Income Tax Amendment Act No 27 of 2011, Section 18 of the Income Tax Act did not provide for such income to fall within the ambit of a source within the Republic of Zambia subject to Withholding Tax under Section 82A. The Appellants have cited a number of authorities to support their argument that the law as it existed then had no such provision. They have cited the amendment of Section 18 as a justification to show that the law as it stood prior to the amendment did not capture the commissions paid outside the Republic. The Income Tax Amendment Act No 27 of 2011 at Item 3 new provisos are that:

Section eighteen of the principal Act is amended in subsection (1):-

(c) by the insertion, immediately after paragraph (h) of the following new paragraph:

(i) Arises from a commission incurred in the production of income or in the carrying on of a business in the Republic, or paid directly or indirectly out of funds derived from within the Republic."

The Respondent has argued that the Income Tax provisions in Section 14 of the Income Tax Act provide that tax shall be charged on income received by every person from a source within or deemed to be within the Republic. The Respondent has argued that they have examined the Agency Agreement between the Appellants and have found that the said commission is in actual fact management and consultancy fees. They argue that they did not rely on the provisions of the Income Tax Amendment Act No 27 of 2011 but on the fact that in their view these monies are already subject to tax as management and consultancy fees in accordance with existing legislation at the time of agreement.

We have considered the arguments by both parties but for reasons below we will not delve into the merits or demerits of each argument.

#### OUR DECISION

The Appellants commenced the action on the 27th day of April, 2012 following their dissatisfaction with the decision of the Acting Commissioner – Domestic Taxes, Mr Chansa Shambuluma on 28th March, 2012.

The Tribunal has noted, with dismay, the growing trend by parties appearing before this Tribunal to rush matters to the Tribunal before the parties have fully exhausted the appeals procedures provided in the then Revenue Appeals Tribunal Regulations, Income Tax Act and other tax statute.

This cannot be allowed to continue. To come before the Tribunal and to argue the appeal based on decisions of officers other than the office provided for in the statutes defeats the purpose of the legislation that was intended to ensure that before matters come to the Tribunal parties fully discuss and agree their positions and only when they cannot come to a common understanding of their positions should they seek the decision of the Tribunal.

While this is not a matter for Judicial Review we will refer to the case of WILFRED MWEENE AND ZAMBIA REVENUE AUTHORITY where the High Court said that the applicant could not run to Court when they were failing to engage themselves with the Respondent.

In this particular case, we are fortified in this view by the provisions of the Income Tax Act Chapter 323 of the Laws of Zambia, Section 108 and Section 109 which states that:

108. Within thirty days of the date of service of notice of assessment, the person assessed may make to the Commissioner-General a written statement of objection to the assessment setting out the grounds of objection, and the Commissioner-General shall give that person written notice of his decision concerning that objection:

Provided that

(i) the Commissioner-General may determine that an objection may be made within a longer period than thirty days but where he does not so determine he shall give the person written notice of his determination and the person may appeal against the determination under section one hundred and nine without making an objection;

(iv) an amended assessment issued as a result of an objection shall, unless objected to, be the Commissioner-General's written decision concerning the objection.

109(1) If a person assessed is dissatisfied with the Commissioner-General's decision concerning his objection to the assessment, that person may, by written notice to the Chairperson, within thirty days of the date of service of the written notice of the

Commissioner-General's decision, appeal against the assessment to the Tribunal and shall send a copy of the notice to the Commissioner-General.

We have reviewed the record of proceedings and the affidavit evidence from both parties. There is no written notice of the Commissioner General's decision and the affidavit clearly states that the appeal lies from a decision of the Acting Commissioner – Domestic Taxes. The Tribunal is not satisfied that the Applicant has exhausted all the administrative appeals channels provided in the Income Tax Act and the Revenue Appeals Tribunal Act and Regulations for the resolution of this dispute.

This Tribunal will not interfere with the exercise of power which has been conferred on the Commissioner General by statute to have the final determination in tax disputes before they are brought to the Tribunal unless the power has been exercised in a manner which is not within his office's jurisdiction.

The Appellant is hereby directed to exhaust the appeal process provided in the statutes before bringing it before us.

As parties did not raise this matter amongst themselves each party will bear its own costs.

Leave to Appeal is hereby granted.

THUS delivered at Lusaka this .....of .....2015

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Mr. F. Chishimba  
(Chairperson)

.....  
Mrs. G. Mazakaza  
(Member)

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Mr. G. Nonde  
(Member)