W C of ZIMBABWE (PVT) LTD
versus
ZIMBABWE REVENUE AUTHORITY

V F S L H (PVT) LTD
versus
ZIMBABWE REVENUE AUTHORITY

SPECIAL COURT FOR INCOME TAX APPEALS
MAFUSIRE J
HARARE, 17 March 2022

Income tax appeals

Assessors: Mrs C Mutunhu & Mr C Maredza

Date of written judgment: 11 May 2022

Mr *J. Muchada*, with him, Mr *M.D. Muchada*, for the appellants
Mr *S. Bhebhe*, for the respondent

MAFUSIRE J

[a] **Introduction**

[1] These are two appeals from the decision of the respondent's Commissioner lodged in terms of s 65 of the Income Tax Act [*Chapter 23:06*] ("***the Act***"). They have been heard together for convenience. The issues for determination are identical. The legal representatives for both parties are the same. In practical terms, a decision on one is a decision on the other. In both matters the central question, in paraphrase, is whether or not the appellants wrongly refrained from withholding the tax, and concomitantly failed, to remit it to the respondent, from the payments received by certain tourist agents or independent intermediaries, from foreign or non-resident tourists coming to Zimbabwe to enjoy certain tourist facilities offered by the appellants in circumstances in which such payments were made by such foreign tourists to such foreign tourist agents outside Zimbabwe, with the appellants physically receiving only the net of those amounts after the independent intermediaries had withheld or deducted amounts from the payments. Naturally, the problem question has to be broken down to its constituent components for clarity. That is for later.

[b] **Background facts**

[2] The background facts are common cause. In fact, the parties have filed a statement of agreed facts. They are these. The appellants are registered companies in Zimbabwe. They are resident in Zimbabwe. They offer a wide range of tourist activities in Zimbabwe. These include accommodation at safari camps, game viewing, wildlife trekking, game drives, scenic flights, bush dinners, canoeing, fishing, and the like. Their tourist clientele comprises, among others, local visitors or walk-in-customers and foreign or non-resident tourists who pay through non-resident intermediaries. The whole dispute in this matter is about the receipts from these foreign or non-resident tourists who pay through these non-resident intermediaries.

[3] The dispute aforesaid arises because the appellants charge and receive different rates in respect of the local or walk-in client from the non-resident tourist. It works like this. In almost all countries in the tourist industry, there are independent middlepersons. They are called travel agents or tour operators or tour consolidators. They are the intermediaries between the providers of tourist activities such as the appellants, and the non-resident tourist. They connect the non-resident tourist with the appellants. The different charges and receipts on the two types of tourist income arises from the fact that the resident, walk-in client who pays for the tourist activity directly to the appellants pays what is called a rack rate. This is the full charge for the tourist activity selected by him or her. But the appellants' receipts from the non-resident tourist which are paid via the intermediary are based on what are called the net rate. The net rate is marginally lower than the rack rate. The difference may range from ten *per centum* (10%) to thirty *per centum* (30%).

[4] Through marketing channels such as the internet, media placements, general advertising, newsletters, and so on, the appellants inform its world clientele of the tourist activities that they provide and the rates thereof. Furthermore, the appellants' personnel or appointed representatives attend the local, regional and international trade shows or consumer shows in the source markets to spread awareness of the tourist facilities available. The Government also publicises the country's tourist attractions.

[5] The lower rate of charges, the net rate, that is offered to the non-resident tourist is influenced by a variety of factors. These include market forces, bulk bookings, seasonal variations, under-utilisation of facilities, repeat business, country of origin, size of the

intermediary and other market dynamics. In all the cases relevant to the present dispute, the foreign tourist enquires and receives from the intermediary information on the kind of tourist activity offered by the appellants and the corresponding charges thereto. The intermediary negotiates with the appellants for a lower rate, the net rate. Once agreed, the intermediary books the foreign tourist for the activity selected by him or her. The tourist pays via the intermediary. He or she does not pay the net rate. They pay the rack rate. The intermediary eventually forwards the money to the appellants. The appellants do not receive the rack rate. They receive the net rate. The intermediary retains the difference. That is his or her payment or fee or remuneration or charge or income or reward for their services. The categorisation of this retention is important because it is hotly contested. The appellants argue that the retention is not a fee and is therefore not taxable. On the other hand, the respondent says it is a fee and therefore taxable. More about this later.

[6] On payment to the intermediary, the non-resident tourist is issued with a voucher. He or she presents it to the appellants at the check-in desk. The voucher is their permit or passport to the enjoyment of all the tourist activities booked by them. The appellants say they do not know the actual amount charged to the foreign tourist by the intermediary. They say it all depends on the negotiations between the tourist and the intermediary. The appellants only get to know the net rate received by them upon which they issue invoices.

[7] In these cases, in respect of the amounts retained by the intermediaries, no tax was withheld by the appellants. Thus, there was no remittance to the respondent. The respondent says the appellants ought to have withheld a non-resident tax on fees [NRTF] and remit it to it in terms of s 30 of the Act, as read with the Seventeenth Schedule thereto. The appellants disagree and argue that no such tax is due because such retention is neither a fee nor an accrual from a source within Zimbabwe. They say it is not them that pay the intermediary but the non-resident tourist. Furthermore, such payments are made outside Zimbabwe in respect of services rendered outside Zimbabwe. Again, more about these arguments later.

[8] The respondent, a central collector of taxes set up as a statutory body in terms of the Revenue Authority Act [*Chapter 23:11*], conducted a tax audit on the appellants on the years 2010 – 2015. According to it, since the only information available was on the net rates received by the appellants, it invoked s 45 of the Act and estimated the fee on which the NRTF should have been withheld. It issued tax assessments to the appellants for those years, resulting in a

tax shortfall by the appellants in an amount in the sum of ZWL307 776-16. The respondent initially imposed a 100 % penalty. However, it subsequently reduced it to 50%, and ultimately to 20 %. Part of the dispute in these proceedings is whether or not, under these circumstances, the respondent had the power to invoke s 45 of the Act and estimate the tax allegedly due. The penalty is also contested *in toto*.

[c] **Facets of the dispute**

[9] As already indicated, the principal question in these proceedings is whether or not, given the factual compendium above, the appellants were obliged to withhold NRTF on the difference between the amounts actually received by them, namely the net rates, and those amounts actually received by the intermediaries from the non-resident tourist, the rack rates, and remit it to the respondent. From this central issue are several other facets. At the pre-trial hearing the parties agreed on them as follows:

- whether the non-resident tour operator / consolidator / travel agent ["***the non-resident tour operator***" or "***intermediary***"] provides services to the appellants in return for remuneration payable by the appellants;

- whether the amounts retained by the non-resident tour operator are 'fees' as defined in the Seventeenth Schedule to the Income Tax Act, payable by the appellants to the non-resident tour operator;

- whether the source of the alleged fees was Zimbabwe;

- whether it was competent for the respondent to invoke s 45 of the Act to estimate the 'fees' on which the NRFT was charged;

- when the due date for the payment of the NRFT should be reckoned in the circumstances, and

- whether the imposition of a 20% penalty was justified in the circumstances.

[10] The parties are agreed that the resolution of the central question aforesaid practically resolves all the other surrounding issues.

[d] **Appellants' argument**

[11] The appellants' overall contention can be paraphrased as follows. The respondent has got it all wrong. The starting point is determining what is sought to be taxed in terms of s 30 of the Act. It is "fees". It is just not any fees. It is fees as defined by the Act's own internal dictionary contained in para 1(1) of the Seventeenth Schedule. This dictionary defines "fees" as any amount from a source within Zimbabwe. *In casu* none of the amounts was from a source within Zimbabwe. They were all from outside. The payer of such amounts was the non-resident tourist. He or she was resident outside Zimbabwe. He or she paid outside Zimbabwe. The services for which he or she paid was the information availed to them by the non-resident tour operator and the subsequent bookings and other arrangements made for them by this intermediary. Such services were rendered outside Zimbabwe. The intermediary received the money outside Zimbabwe. Thus, the amount in question was not fees as contemplated by legislation.

[12] The appellants' argument continues like this. Cases such as *Z (Pvt) Ltd*[1], *M Co (Pvt) Ltd*[2], *G Bank*[3]and *Standard Chartered Bank*[4] are either distinguishable or they were wrongly decided. They are distinguishable because in those cases, when the courts looked at the originating cause for the payment of such kinds of amounts, they came to the conclusion that the originating cause were services rendered in Zimbabwe. *In casu*, the services were rendered outside Zimbabwe. It is cases such as *Sunfresh Enterprise (Pvt) Ltd*[5] that correctly interpreted the law. All the others that have come to the contrary conclusion were decided incorrectly. They have wrongly departed from the correct precedent set by earlier cases such as *Shein*[6] and *K v Commissioner of Taxes*[7] which held that generally the source of an income is the place where the service for which that income paid is rendered.

[13] Regarding the respondent's right or power to make an estimate in terms of s 45 of the Act, the appellants argue that the Commissioner has wrongly extended her power. The

[1] *Z (Pvt) Ltd v Commissioner-General Zimbabwe Revenue Authority* 2016 (1) 1 (FAC)
[2] *M Company (Pvt) Ltd v Zimbabwe Revenue Authority* HH 661-16
[3] *G Bank Zimbabwe Ltd v Zimbabwe Revenue Authority* 2015 (1) ZLR 348 (H)
[4] *Standard Chartered Bank Zimbabwe Ltd v Zimbabwe Revenue Authority* 2018 (1) ZLR 269 (S)
[5] *Sunfresh Enterprises (Pvt) Ltd t/a Bulembi Safaris v Zimbabwe Revenue Authority* 2004 (1) ZLR 506 (H)
[6] *Commissioner of Taxes v Shein* 1958 R & N 384 (FSC)
[7] *K v Commissioner of Taxes* 1990 (1) ZLR 191 (HC)

appellants were not obliged to provide any assessments, and therefore to withhold any tax. The appellants were not involved in the transactions and subsequent payments between the non-resident tourist and the non-resident intermediary. They do not know what amounts were actually paid and received. All they received was the net which they fully accounted for and paid tax on. The power reposed in the respondent is limited to assessing a taxpayer's taxable income or losses. It was wrong to extend it to an assessment of the possible fee payable under the Seventeenth Schedule.

[14] Regarding the penalty levied by the respondent, the appellants argue that it is unjustified. The alleged failure to withhold the alleged tax was not a wilful or intentional effort to evade tax. It arose from a genuine and honest belief that the appellants were not obliged to withhold any tax on such income, especially as they never actually or physically received it. It was not possible for them to know what amounts they were. They could not withhold, let alone remit, that which never passed through their books.

[e] **Respondent's argument**

[15] The respondent's argument, also in paraphrase, is this. The question whether the amounts retained by the non-residents intermediaries is a fee or not for the purposes of s 30 of the Act and the Seventeenth Schedule, and the question whether or not such intermediaries are agents of the resident taxpayer such as the appellants, are now settled. The amounts are a fee. The intermediaries are agents of the appellants. The appellants should have withheld the NRFT. That is the import of decisions in cases such as *Z (Pvt) Ltd*, *G Bank*, *Standard Chartered Bank* and *VFSL (Pvt) Ltd*[8]. *Standard Chartered Bank* is a Supreme Court decision. It is actually a dangerous argument by the appellants to agitate that this court should depart from it. The doctrine of *stare decisis* does not permit such conduct.

[16] The services that are the subject of the tax in question are the marketing services rendered by the non-resident tour operators on behalf of the appellants. There need not be a written contract in every situation. But clearly there was a contract between the non-resident tour operators and the appellants. It is because of the existence of such a contract that the

[8] *VFSL (Pvt) & Ors v Zimbabwe Revenue Authority* HH 23-19

appellants received less than their standard charges despite providing the full facilities and activities to the non-resident tourist. Call it by whatever name you will, the retained amount was a 'fee' for the purposes of s 30 of the Act. The originating cause for the payment, or the retention, was in Zimbabwe. It was the tourist facilities provided by the appellants. But for such services, no income would accrue to the appellants.

[17] Regarding its power to invoke s 45 of the Act to make estimates, the respondents argues that it correctly exercised it. The estimate was made easy by the available data. The appellants knew the net amounts received by them. They knew their rack rates. The difference which was retained by the intermediaries was the amount to be taxed. It was a fee. The arrangement whereby the intermediaries deduct their fee off-shore from the payment by the foreign tourist satisfies the payment modalities contemplated by para 1(2)(c) of the Seventeenth Schedule. It refers to fees being deemed to have been paid where, among other things, they are so dealt with that the conditions under which the payee is entitled to them are fulfilled.

[18] Regarding the due date when the NRFT should have been remitted, the respondent argues that it was within ten days of the appellants receiving the net amounts from the intermediaries in terms of para 2(1) of the Seventeenth Schedule.

[19] Regarding the imposition of a 20% penalty, the respondent argues that it is justified. It says the appellants knew they ought to have been withholding this tax and remitting it. The failure or neglect to do so was deliberate, especially in the light of the decision in *VFSL (Pvt) Ltd*. The appellant in the second case herein was the same person in that case. Furthermore, both appellants have at their disposal professionals such as accountants and lawyers to advise them on tax matters. Above all, they could have easily approached the respondent for a tax directive.

[f] **Synthesis**

[i] *Whether the non-resident tour operator provides services to the appellants in return for remuneration payable by the appellants*

[20] The formulation of this issue, at first brush, seems to skirt the central question for determination. But it is the central question. Put differently, the issue is whether the amount retained by the non-resident tour operator is a fee for the purposes of s 30 of the Act, as read

with the Seventeenth Schedule thereto. In both their written arguments and oral submissions, the parties have approached the matter in the same way. Accordingly, I proceed to determine this central question.

[21] Section 30 of the Act and the Seventeenth Schedule thereto govern the levying of NRTF. The words or phrases underlined have generated the most heat during argument. Section 30 reads:

> "**30 Non-residents' tax on fees**
>
> There shall be charged, levied and collected throughout Zimbabwe for the benefit of the Consolidated Revenue Fund a non-resident' tax on fees in accordance with the provisions of the Seventeenth Schedule at the rate of a tax fixed from time to time in the charging Act."

[22] Para 1(1) of the Seventeenth Schedule defines "fees" as follows:

> "'fees' means any amount from a source within Zimbabwe payable in respect of any services of a technical, managerial, administrative or consultative nature, but does not include any such amount payable in respect of—
>
> … … … … … [*irrelevant*] … … … … …"

[23] There is a deeming provision in regards to the term '*from a source within Zimbabwe*'. In this regard, relevant provisions of para 1(2) of the Seventeenth Schedule read as follows, areas of contention still being underlined:

> "(2) For the purposes of this Schedule—
>
> (a) fees shall be deemed to be from a source within Zimbabwe if the payer is a person who … … is ordinarily resident in Zimbabwe;
>
> (b) in determining whether or not non-residents' tax on fees should be withheld, the question as to whether or not—
>
> (i) the payer is a person … … ordinarily resident in Zimbabwe; or
>
> (ii) the payee is a non-resident person;
>
> shall be decided by reference to the date on which the fees are paid by the payer;
>
> (c) fees shall be deemed to be paid to the payee if they are credited to his account or so dealt with that the conditions under which he is entitled to them are fulfilled, whichever occurs first;
>
> (d) … … … [*irrelevant*] … … … …;
>
> ***Payers to withhold tax***

2. (1) Every payer of fees to a non-resident person shall withhold non-residents' tax on fees from those fees and shall pay the amount withheld to the Commissioner within ten days of the date of payment or within such further time as the Commissioner may for good cause allow."

[24] Frankly, none of the arguments in these two appeals ploughs virgin land. The facts in cases such as *Z (Pvt) Ltd*, *VSL (Pvt) Ltd*, *G Bank*, *M Co (Pvt) Ltd* and *Standard Chartered Bank Ltd*, all above, are analogous to those of the present appeals. The situation is settled. None of these cases is distinguishable. In *Z (Pvt) Ltd* the appellant, a chrome mining company resident in Zimbabwe, had engaged an intermediary based in Switzerland, Centachrome, to market its chrome outside Zimbabwe. The Fiscal Appeal Court concluded that the fees payable by the appellant to Centachrome for the marketing services were deemed to be from a source within Zimbabwe paid by a payer in Zimbabwe and were therefore subject to value added tax [VAT] on which NRTF should have been withheld.

[25] The court, *per* HLATSHWAYO J, as he then was, held that the words 'any amount' as used in para 1(1) of the Seventeenth Schedule, are broad enough to include in their meaning the word 'fees' as defined. 'Any amount' includes a commission. 'Fees' includes any sum of money, by whatever name called, paid for services rendered of a technical, managerial, administrative or consultative nature, except those expressly excluded. That was the same approach in *M Co (Pvt) Ltd* above the facts of which were similar to those in *Z (Pvt) Ltd*. *M Co (Pvt) Ltd* has since been upheld on appeal[9]. In *G Bank* and *Standard Chartered Bank* above, the appellants were resident banks. As resident banks they pay fees to foreign correspondent banks for the services rendered by them in the operation and maintenance of the resident banks' foreign Nostro accounts. Such fees were held to be subject to NRTF. The decision in the *Standard Bank* case has been upheld by the Supreme Court.

[26] The contrary approach in *Sunfresh Enterprises* has not been followed. In that case, the court, per CHEDA J, as he then was, held that payment of a commission by a foreign client [wild game hunters from abroad] to a foreign marketing agent [the independent operator or middleperson] of a local safari operator outside the country did not constitute payment of fees from a source within Zimbabwe within the meaning of para 1(1) of the Seventeenth Schedule. Rejecting that approach, the Supreme Court said in the *Standard Chartered Bank* case[10]:

[9] *M Company (Pvt) Ltd v ZIMRA* SC 98-21
[10] At para 27

> "Regarding the Sunfresh case it would appear that the facts are distinguishable from those of the present matter. However, in so far as it conflicts with the Zimasco decision on the issues discussed above I would consider the Zimasco decision to be the correct exposition of the law."

[27] Whatever the *ratio decidendi* in cases such as *Shein* and *K v Commissioner of Taxes* might have been, this court is bound by the Supreme Court decision in *Standard Chartered Bank* and *M Co (Pvt) Ltd* above. In *VFSL (Pvt) Ltd*, the Fiscal Appeal Court, in respect of a dispute concerning value added tax [VAT] but emanating from facts almost identical to the facts of these appeals, except that the tour operators were resident locals, held that the amounts withheld by them for marketing the facilities and activities offered by fellow tour operators like the appellants herein, constituted a commission on which VAT was payable. That the kind of tax involved was VAT or that the intermediaries were locals is a distinction without a difference. It does not detract from the principle that the middleperson is an agent of the provider of the tourist facility and that the difference between the rack rate received by this middleperson, and the net rate eventually received by the service provider, constitutes a vatable amount.

[28] In the present appeals, I find the appellants' argument rather fragmented. To them, in interpreting words or phrases like 'service', 'income', 'source', 'fee' and the like, consideration should start and end only with the non-resident tour operator and the non-resident tourist and the transactions between them. It is argued that all that happens between them happens outside Zimbabwe. As such, so the argument goes, these players are beyond the reach of the Zimbabwean tax regime. I do not agree. And my reasons for disagreement are no different from those in the previous cases. I merely try and cast them somewhat differently.

[29] The appellants' argument ignores the fact that but for the service offered by the appellants in Zimbabwe, no transaction would happen between these non-residents. They may happen in regards to services offered by other tourist providers in other countries. But if they are in relation to tourist services offered by service providers in Zimbabwe, then such activities are not beyond the reach of the tax regime in Zimbabwe. They hinge on what activities are offered here, namely the accommodation, game viewing drives, bush dinners, canoeing, fishing and so on. These local activities cannot be divorced from those happening abroad in respect of the facilities to be offered here.

[30] From the factual compendium, the non-resident tourist operator is a marketing agent for the resident appellants. He or she also books the foreign tourist. He or she receives a commission. This commission is in the form of the retained amount. The parties may not call it a commission. They may not call it a fee. They may not call it a discount. They may not call it remuneration. They may call it by whatever name they please. But since it amounts to a diminution of the ultimate entitlement or benefit or accrual to the appellants for their facilities that they avail to the non-resident tourist, it is demonstrably '<u>any amount</u>' as contemplated by para 1(1) of the Seventeenth Schedule.

[31] The payment modalities or arrangement between the appellants and the non-resident tour operator should not cloud the issue. It is accepted that the non-resident tour operator does not bring to the appellant the entire collection from the non-resident tourist from which the appellants take their own dues. The appellants do not, after receiving full payment, pay back a commission to the non-resident tour operator. It does not happen that way. The retained amount never comes to Zimbabwe. The parties' payment arrangement is such that the retained amount stays off-shore. But that is irrelevant. By para 1(2)(c) of the Seventeenth Schedule, it is deemed to have been received by the appellants in Zimbabwe and paid back to the intermediary by way of a commission or a discount or a fee.

[32] As shown above, the appellants' arguments are running against the weight of authority. In tax law, the tax is what the legislature says it is. The legislature uses various devices to cast the tax net wider. One such device is to deem something to be what it is not. To use the analogy by Mr *Muchada,* for the appellants, during argument, a dog is not a cat. But if for certain purposes, say tax, the legislator says a dog shall be deemed to be a cat, then in spite of the characteristics only peculiar to it, a dog shall be taken as a cat. Thus, by reason of the definition of 'fee' as being '<u>any amount</u>' it is futile to go checking elsewhere what ordinarily a fee is. As to the term '*from a source within Zimbabwe*' there is now such a glut of authorities as to conclude that the position is now settled. The *locus classicus* is the *Lever Bros* case in 1946 in South Africa[11]. After reviewing several English and South African decisions WATERMEYER CJ concluded[12]:

[11] *Commissioner For Inland Revenue v Lever Bros & Anor* 1946 AD 441
[12] At p 449 – 450

> "The word 'source' has several possible meanings. In this section it is used figuratively, and when so used in relation to the receipt of money one possible meaning is the originating cause of the receipt of the money, another possible meaning is the quarter from which it is received. ……. [The] inference, which I think, should be drawn from those decisions is that the source of receipts, received as income, is not the quarter whence they come, but the originating cause of their being received as income and that this originating cause is the work which the taxpayer does to earn them, the *quid pro* which he gives in return for which he receives them."

[33] I consider that the situation of the intermediary in these appeals fits both the '*whence*' question and the '*originating cause*' aspect of the *Lever Bros* case. The '*quarter whence*' the receipts come from is the appellants in the form of the shortfall to the rack rate which is retained by the tour operator. The '*originating cause*' of these receipts are the facilities provided by the appellants. The purpose of s 30 of the Act is evidently to extend the tax net to non-residents who may derive an income from an activity associated with Zimbabwe. But for Zimbabwe's Victoria Falls, Zimbabwe's black and white rhinoceros and other wildlife, Zimbabwe's water features for boating, canoeing, fishing, and more directly, the tourist facilities offered by the appellants in Zimbabwe, the intermediary would not earn that income that is associated with these facilities. Section 30 says he or she must pay tax on it. The appellants are obliged to withhold and remit it to the respondent. If they do not, they become personally liable in terms of para 4 of the Seventeenth Schedule which reads:

> "***Penalty for non-payment of fees***
>
> 6. (1) Subject to paragraph (2), a payer or an agent in Zimbabwe who fails to withhold or pay to the Commissioner any amount of non-residents' tax on fees as provided in paragraph 2 or 3 shall be personally liable for the payment to the Commissioner, not later than the date on which payment should have been made in terms of paragraph 2 or 3 as the case may be, of—
>
> (a) the amount of non-residents' tax on fees which the payer … … … failed to pay to the Commissioner; and
>
> (b) a further amount equal to one hundred *per centum* of such non-resident's tax on fees."

[34] As indicated before, settling the principal question in contention settles the rest of the issues in these appeals. All that now remains is to bring closure to the rest of the questions by providing brief answers.

[ii] *Whether the amounts retained by the non-resident tour operator are a 'fee' as defined in the Seventeenth Schedule to the Income Tax Act, payable by the appellants to the non-resident tour operator*

[35] Yes, the amounts retained by the non-resident tour operator are 'fees' as defined in the Seventeenth Schedule to the Act.

[iii] *Whether the source of the alleged fee was Zimbabwe*

[36] Yes, the source of the amounts retained by the non-resident tour operator as fees is Zimbabwe.

[iv] *Whether it was competent for the respondent to invoke s 45 of the Act to estimate the 'fees' on which the NRFT was charged*

[37] Yes, it was competent for the respondent to invoke s 45 of the Act to estimate the fees on which the NRTF was charged. Section 45 reads:

> "**45 Estimated assessments**
>
> (1) In every case in which any taxpayer makes default in furnishing any return or information, or in which the Commissioner is not satisfied with the return or information furnished by any taxpayer, … … … … the Commissioner may make an assessment in which the taxpayer's taxable income or assessed loss is estimated either in whole or in part and thereupon shall give notice thereof to the taxpayer to be charged, and such taxpayer shall be liable to pay the tax upon same if any tax is chargeable."

[38] The appellants' argument that the power reposed in the respondent is limited to assessing a taxpayer's taxable income or losses and that it was wrong to extend it to an assessment of the possible fee payable under the Seventeenth Schedule is to try and draw an artificial distinction. The simple point is this. The appellants said they do not know what the non-resident tourist paid to the non-resident intermediary. But this is not decisive. What they do know and what information is available to them made the assessment by the respondent easy. The appellants do know their rack rates. They do know that the non-resident tourist paid this rack rate to the non-resident tour operator. They do know that out of that rack rate, the non-resident tour operator paid them the net rate and retained the difference for his or her services. The rack rate is the base charge. It is 100%. So, if the appellants received anything less than the 100%, the difference is what the respondent is interested in. It is what is taxable. No mathematics are involved. It is just simple arithmetic.

[v] *When the due date for the payment of the NRFT should be reckoned in the circumstances*

[39] The due date for the payment of the NRFT was ten days of the date the appellants invoiced the non-resident tour operator for the net rate. This is in accordance with para 2(1), as read with para 1(2)(b) of the Seventeenth Schedule quoted above.

[40] Thus, having settled the central question in favour of the respondent as set out above, it means that when the non-resident tour operator performed the services for which the non-resident tourist paid, they became entitled to their commission. The arrangement between the non-resident tour operator and the appellants is such that there is no physical or actual exchange of this money. But upon the appellants invoicing the non-resident tour operator and receiving the net rate, the deeming provisions of para 1(2)(c) above became fulfilled. The appellants are deemed to have paid the non-resident tour operator the commission in circumstances contemplated by this provision. So, the due date of the remittal of the NRFT to the respondent was ten days of the appellants' invoice.

[vi] *Whether the imposition of a 20% penalty was justified in the circumstances*

[41] The imposition of a penalty in situations of default like these is governed by para 6 of the Seventeenth Schedule part of which is quoted in Para [33] above. The rest of it reads:

Penalty for non-payment of fees

6. (1) … … … … [*see Para 33 above*] … … …

(2) The Commissioner, if he is satisfied in any particular case that the failure to pay to him non-residents' tax on fees was not due to any intent to evade the provisions of this Schedule, may waive the payment of the whole or such part as he thinks fit or repay the whole or such part as he thinks fit of the amount referred to in subparagraph (b) of subparagraph (1)."

[42] Part of the appellants' argument is that even from a consideration of the case law on the point, the situation is by no means clear whether or not a NRTF is due in circumstances such as these. The rest of the appellants' arguments have been summarised before. It seems to me that from the use of the word 'shall' in para 6 of the Seventeenth Schedule, once the Commissioner determines that the taxpayer has failed to withhold or pay within the stipulated period the NRTF in circumstances in which it is due, then not only does the taxpayer become personally liable for it, but also the respondent is obliged to levy a 100% penalty on it. The

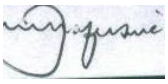
provision does not use the word 'penalty'. But it is now settled that this additional payment is indeed a penalty: *ITC 1351 (1982)* 44 SATC 58 and *ITC 1489* 53 SATC (1992) 75. The respondent has a discretion to waive this penalty in whole or in part. What triggers the exercise of this discretion is information by the taxpayer showing that the failure to pay the fee was not due to any intent on his or her part to evade it.

[43] For any appellate forum to upset the exercise of a discretion by a subordinate authority is often a gargantuan task. The exercise of discretion must be judicious. It must not be capricious or whimsical or influenced by irrelevant factors. But all that is easier said than done. The precise boundaries of these parameters are not easily locatable. What may not be done is for the appellate forum to substitute its own discretion for that of the lower forum. All the surrounding circumstances have to be considered to answer the question whether in any given situation the discretion was exercised properly. For example, in the present appeals, the respondent did not impose a 100% penalty, why? It initially imposed a 50% penalty but subsequently reduced it to 20%, why? Why did it not go all the way to reduce the penalty to zero?

[44] Such an enquiry as above is futile. Law is not mathematics where, for example, one plus one is two. Law is full of abstract notions the definitions of which sometimes defy precision. The exercise of a discretion cannot be measured by fine intellectual callipers. At the end of the day, it ends up being a value judgment. In the present matter, when I take into account the arguments for and against this penalty, I am not persuaded that the 20% penalty was unjustified. What has influenced this ultimate conclusion by myself is the fact that the appellants have relied on old authorities that have been expressly or effectively overruled. The law on the central question has evidently moved on. The appellants have either not moved on with it or they have dogmatically fastened to the old order. Part of their argument was such as to suggest or imply that this court could overrule the Supreme Court. These appeals have raised nothing novel or difficult questions of fact and or law. I would not upset the decision of the respondent to impose a 20% penalty, or upset the general approach on costs of suit. Costs follow the result.

[g] **Disposition**

[45] The appeals are hereby dismissed with costs.



Maguchu & Muchada, appellant's legal practitioners
Kantor & Immerman, respondent's legal practitioners