DELTA BEVERAGES (PVT) LTD
versus
ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 25 July 2013 and 29 January 2015

Opposed Application

A P de Bourbon SC, for the applicant
T Magwaliba, for the respondent

MAKONI J: The applicant (Delta) approached this court seeking a declaration in the following terms:-

> "1. It is declared that the provisions of the proviso to section 72(7) of the Income Tax Act [Chapter 23:06] prior to the repeal of that proviso by section 3(a) of the Finance Act 2012 obligated the Commissioner –General of the Respondent to waive any interest due by the Applicant in respect of any underestimation of its profits for the years 2009 and 2010, and in respect of any underpayment of provisional tax in respect of those two years.
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> 2. It is declared that the Applicant has no liability to pay the sum of $698 864-48 demanded by the Respondent in respect of interest on the underpayment of provisional tax for the years 2009 and 2010.
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> 3. The Respondent shall pay the costs of this application."

The facts of the matter are that the applicant (Delta) is a tax payer. In terms of s 72 (2) of the Income Tax Act [*Chapter 23:06*] (The Act) the applicant was to pay provisional tax based on estimates of its profit per every quarter of the year. During the 2009 and 2010 financial years, Delta underestimated its profits resulting in an underpayment by it of amounts of provisional tax if regard is had to the assessment made as to the total tax payable by it in respect of both years. In each of the years, in question, the margin of error in the underestimation of the amount of provisional tax payable exceeded 10 percent and that the

forecast of profits by Delta did not fall within a 10 percent margin of error.

ZIMRA, by letter dated 15 August 2012 demanded the payment of interest in respect of the underpayment of amounts due as provisional tax in terms of s 72 (7) of the Act. It demanded a total of US$698 864-48. Delta disputes liability to pay the interest as claimed and it filed the present proceedings.

The dispute between the parties concerns the interpretation of the proviso to s 72 (7) of the Act.

By the time this matter was heard, the proviso had been repealed by s 3(a) of the Finance Act 2012. The issues at hand were dealt with more fully in a substituted subs 11 to s 72. The amendments did not have a retrospective effect.

It is important at the outset to set out terms of the proviso. It provides:-

> "Provided that, for the avoidance of doubt, the Commissioner shall waive interest under circumstances where the taxpayer fails to forecast profits within a ten percentum margin of error."

It is the Delta's contention that the clear meaning of the proviso requires the Commissioner to waive interest in the circumstances of this matter on the underpayment of provisional tax for 2009 and 2010. ZIMRA's contention is that such a result fails to punish tax payers such as Delta who underestimated their taxable income in advance and therefore underpay provisional tax. ZIMRA contends that this leads to an absurdity. It contends that the proviso must be looked at as though two critical words "fails to" were not there.

A historical context in relation to coming into effect of the proviso will assist in the determination of the matter and in particular ZIMRA's contention regarding punishing those who underestimate their taxable income. The proviso came into effect on 1 January 2005 through the Finance (No 2) Act 2006. S 72 (7) of the Act was repealed and substituted and the original word "penalties" was substituted by the word interest.

Mr *de Bourbon* submitted that interest cannot be regarded as a punishment as contended by ZIMRA. Interest is a payment made for use of money or upon the late payment of monies due whereas a punishment by its very nature imputes improper or unlawful conduct. He referred to *Scoin Trading (Pty) Ltd* v *Bernstein NO* 2011 (2) SA 118 SCA at 121 (para 14) following *Bellairs* v *Hodnet & Anor* 1978 (1) SA 1109 (A) at 1145 where PILLAY AJA had this to say:-

> "If a debtors obligation is to pay a sum of money on a stipulated date and he is in *mora* in that he failed to perform on or before the time agrees upon the damage. They follow naturally from such failure will be interest a *tempore morae* or *mora* interest. The purpose of mora interest is to place the creditor in the position he would have been if the debtor had performed in terms of the undertaking."

I agree entirely with the submissions by Mr *de Bourbon*. The legislature changed the concept in the proviso from one being a penalty to one requiring the payment of interest. This must have been for a purpose which will become clearer later on in this judgment. This is taking into account that these amendments were introduced just before the hyper inflationary environment.

Mr *de Bourbon* further submitted that the wording of the proviso is such that, adopting the plain meaning of the words, leads to the understanding that there is no doubt on the matter between the Commissioner and the taxpayers. The Commissioner must waive interest on any outstanding amounts of provisional tax not paid on the due instalment date if the taxpayer fails to forecast his yearly profits within a 10 percent margin of error. The interpretation by ZIMRA creates the doubt that the legislative intended to avoid. He further submitted that the position adopted by the respondent, in effect, asks the court to re-write legislation with this court cannot do.

He further submitted that in the interpretation of tax legislation which is uncertain the contra *fiscum maxm* applies.

Mr *Gwaliba* submitted that the interpretation of the proviso to s 72 (7) ascribed to it by the applicant is too literal as to lead to an absurdity and unconscionable results as would never have been contemplated by the legislative. He further submitted that the interpretation ascribed to the proviso by Delta arises as a result of poor draftmanship which the legislature has subsequently clarified.

He contended that ZIMRA, cognisant of the fact that the estimates of provisional tax may not always be accurate, provided a margin of error of 10 percent in respect of which the taxpayer would not be liable to interest. For errors above this margin the taxpayer would be liable for interest as a penalty for the error.

He urged the court to look at the context in which the proviso was enacted. He urged the court to look at the provisions of s 72 (9), s 72(11) as read with s 71(2). The construction of subs 11of s 72 must therefore be such as to be in harmony with the provision in s 72. He

contended that the contra *fiscum* rule does not apply in this matter as to do so would be to use it as a tool to escape clear liability.

He contended that to clarify the proviso, parliament in the Finance Act (No 4) 2012 repealed the proviso to subs 72 and makes it clear that interest is payable on provisional tax unless a waiver has been granted special circumstances.

The golden rule of interpretation of statutes is that where the language used in a statute is plain and unambigious it should be given its ordinary meaning unless that would lead to some absurdity or inconsistency with the intention of the legislature. This is trite.

From the nature of the dispute before me, it is clear that the proviso to s 72(7) is capable of two constructions. The one contended by the Delta and the other suggested by ZIMRA where it suggests the court ignores certain words in reading the proviso. In *ex parte* Minister of Justice: In re; *R* v *Jacobson Rhevy* 1931 AD 466 at 480 it was stated:-

> "The function of the court of law is to construe the language of the legislature and arrive at its intention in that way; it has no power to re-draft or alter the language. But intention is not to be ascertained by surmise however probable such surmise may be."

This approach was adopted by GUBBAY JA (as he then was) in Mxumalo & Ors v Guni 1987 (2) ZLR (1) (SC) at 8 where he stated:-

> "The language used is plain and unambigious and the intention of the Law Society is to be gathered there from. It is not for a court to surmise that the Law Society may have had an intention other than that which clearly emerges from the language used."
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> 'To similar effect are the statements by Shearer J IN Ex parte Lynn and Others 1987
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> (1) SA 797 (N) at 802-803. There the learned judge said:
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> The test to be applied has been authoritatively laid down by Innes CJ in *Venter v R* 1907 TS 910 at 914, 915:
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> '…it appears to me that the principle we should adopt may be expressed somewhat in this way – that when to give the plain words of the statue their ordinary meaning would lead to absurdity so glaring that it could never have been contemplated by the Legislature, or where it would lead to a result contrary to the intention of the Legislature, as shown by the context or by such other considerations as the Court is justified in taking into account, the Court may depart from the ordinary effect of the words to the extent necessary to remove the absurdity and give effect to the true intention of the Legislature.'
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> In *R* v *Patel and Another* 1944 AD 379 at 388 Centlivres JA, referring to *Venter's* case supra, *R v Jaspan and Another* 1940 AD 9 and *Storm & Co v Durban Municipality* 1925 AD 49, said:
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> 'These cases are, however, authorities for cutting down or restricting the

> language used by the Legislature when that course is justified by a consideration of the intention and object of the Legislature. They are not authorities for adding to the language used by the Legislature.'

To the same effect is the judgment of De Villiers JA in *Principal Immigration Officer v Hawabu and Another* 1936 AD 26 at 31:

> 'It is true that, even where the words of an Act are capable of one meaning only, there is an exceptional class of extreme cases in which courts of law have felt themselves compelled to "modify" or "cut down" or "vary" the words used by the Legislature. In a sense this might be called amputation rather than interpretation.'

These are general rules of interpretation but *in casu*, we are dealing with interpretation of tax legislation. In the case of ambiguity arising during the interpretation of fiscal legislation, the *contra fiscum* rule will be applicable. The *contra fiscum* rule is a common law principle stipulating that should a taxing statutory provision reveal ambiguity, the ambiguous provision must be interpreted in a manner that favours a taxpayer. See Badenhorst v CIR 1955 (2) SA 207 (215). Put in simple terms, where a tax provision is capable of two constructions, the court will adopt the construction that imposes the smaller burden on the taxpayer. See *Endeavour Foundation & Anor v Commissioner of Taxes* 1995 (1) ZLR 339 (SC) at 362 D-E where GUBBAY CJ (as he then was) stated:-

> "To put it at its highest for the Commissioner, para 10 of the Thirteenth Schedule reveals a manifest ambiguity with regard to whether the amount for the payment of which the employer is liable is a "tax" or simply "an amount". Consequently, the *contra fiscum* principle must be applied and the provision interpreted so as to impose the smaller burden on the Company. For s 47 allows the Commissioner a summary remedy for the recovery of tax, whereas under para 10 he has to institute action in a court of competent jurisdiction. See *Est Reynolds & Ors v CIR* 1937 AD 57 at 70; *Israelsohn v CIR* 1952 (3) SA 529 (A) at 540 F-H; *Sekretaris van Binnelandse Inkomste v Raubenheimer* 1969 (4) SA 314 (A) at 322D.

See also *Meman & Anor v Controller of Customs and Excise* (1) ZLR 170 (SC) at 174 G-H and 175A. In view of the above, I am inclined to agree with the interpretation by Delta which imposes a smaller burden on it.

It must be borne in mind that it is within the Commissioners powers to approach parliament to have taxing legislation amended to avoid an ambiguity such as happened *in casu* and parliament has the power to make any such amendment retrospective. Parliament was approached to amend the proviso to s 72 (2) but it determined that the proviso be repealed and the issue be dealt with in a substituted subs (11) to s 72. It did not choose to make those changes retrospective. Delta submits that this was deliberate as the Commissioner was already appraised of the dispute existing this matter. What this means is that the existing

rights as given in terms of the proviso to s 72(7) cannot be affected. This position was made clear in *Pretorius* v *Minister of Defence* 1980 ZLR 395 A at 401 where FIELDSEND CJ stated:-

> "…The well recognised principle relied upon …that statutes will not be held to take away existing rights retrospectively unless they so provide expressly or by necessary intendment. Such a principle applies with increased force where, as here, a right is created by a statute, and is purported to be taken away by subsidiary legislation made under that statute which gives no specific power to legislate retrospectively."

The respondents relying on the memorandum to the Finance Bill, contends that the amendments made to s72 by s 3 of the Finance Act 2012 are simply to clarify the existing law. This assertion is not correct if regard is had to the fundamental changes introduced by the amendments. Had it been a simple matter of clarification then the words ZIMRA wished to be ignored could simply have been deleted from the proviso. In its opposing affidavit ZIMRA proposes that the words "fails to" in the provision to s 72(7) be rejected and be disregarded by the court as surplus age. In its heads of argument ZIMRA suggests that the "literal interpretation of the word "shall" in the proviso must be modified to mean "may" in which event the proviso read together with the rest of the section and in particular subs 11 will mean the Commissioner General may upon consideration of the circumstances set out in subs 11, waive interest that was otherwise due in terms of subs 9."

ZIMRA has asked this court to do what it cannot do. See *Car Rental Services (Pvt) Ltd* v *Director of Customs & Exercise* (1) ZLR 402 (SC) at 409 where GUBBAY JA (as he then was) had this to say:-

> "It is not for the Courts to legislate or to attempt to improve on the situation achieved by Parliament through the language it has chosen in its enactment. Effect must be given to what the Act says or permits and not to what it may be thought it ought to have said or prohibited. If there is a *casus omissus* in the Act, and if it could lead to undesirable consequences, the Court has no power to fill it. It is a matter for the Legislature."

From the above I am inclined to agree with the position advanced by Delta that the proviso to s 72 (7) must be given it ordinary meaning namely that where the underestimation of profits is more than 10 percent of the final figure, the Commissioner is obligated to waive interest. I am fortified in this view by the fact that the legislature found in it fit in the Finance (No 2) Act 2006 to repeal the word penalty and substitute it with interest. The legislature removed the punishment element taking into account that the country was getting into a hyper inflationary environment where taxpayers might have problems to estimate their provisional

tax with some accuracy.

Accordingly, I will make the following order:-

"1. It is declared that the provisions of the proviso to section 72 (7) of the Income Tax Act [*Chapter 23:06*] prior to the repeal of that proviso by section 3(a) of the Finance Act 2012 obligated the Commissioner-General of the Respondent to waive any interest due by the Applicant in respect of any underestimation of its profits for the years 2009 and 2010, and in respect of any underpayment of provisional tax in respect of those two years.

2. It is declared that the Applicant has no liability to pay the sum of $698 864,48 demanded by the respondent in respect of interest on the underpayment of provisional tax for the years 2009 and 2010.

3. The Respondent to pay the costs of this application."

Gill, Godlonton & Gerrans, applicant's legal practitioners
Legal and Corporate Service Division, respondent's legal practitioners