IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUGASHA, J.A. LEVIRA, J.A., KITUSI, J.A.)

CIVIL APPEAL NO. 81 OF 2019

PAN AFRICAN ENERGY TANZANIA LTD.....APPELLANT

VERSUS

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

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

(Twaib, J.)

dated the 19th November, 2017
in
Tax Appeal No. 9 of 2016

JUDGMENT OF THE COURT

24th February & 6th March, 2020

MUGASHA, J.A.:

The appellant, **PAN AFRICAN ENERGY TANZANIA LTD** is a company registered in Tanzania dealing in natural gas production and supply of gas for power generation at Ubungo Power Plant in Dar-es-salaam, it supplies natural gas to both industrial and commercial customers in Dar-es-salaam city. Also, it supplies compressed natural gas for use in motor vehicles.

Before April 2013, the respondent Tanzania Revenue Authority (TRA) conducted an audit on the appellant's tax affairs including Pay As You Earn commonly known as PAYE and gathered that the appellant used the grossing up method in PAYE and remitted to the respondent without withholding the same from the employees' taxable income from the employment earnings. On this account, the respondent issued to the appellant a notice to demand PAYE accruing from the salary and other benefits paid to employees. This prompted the appellant to lodge an objection which was dismissed by the respondent. As such, on 19/12/2013 the respondent issued to the appellant certificates indicating a liability in respect of PAYE at a tune of TZS. 1,166,197,808/= comprising the principal sum of TZS. 677,194,295 and interest thereon TZS. 489,003,513/=.

Aggrieved, the appellant appealed to the Tax Revenue Appeals Board (the TRAB), where the crucial issue for determination was the propriety or otherwise of the respondent's decision to disallow the grossing up method on the PAYE and imposition of interest on the assessed tax. Guided by the provisions of sections 81 (1) and (2), 7 (2) (a) to (g), 100 (1), 103 (1), of the Income Tax Act, 2004 the TRAB partly disallowed the appeal having concluded at page 287 to 288 that, the appellant had applied gross up

method to pay PAYE which is not recognized under the Tax laws of Tanzania. As for the interest, the TRAB found no justification to have the appellant penalized because she had not willfully neglected or attempted to evade tax. As such, the interest of TZS. 489,003,513/ = was waived in favour of the appellant.

Discontented, the appellant appealed to the Tax Revenue Appeals Tribunal (the TRAT) faulting the TRAB for holding that the grossing up method on PAYE is tantamount to giving taxable benefits to employees. Having considered the provisions of sections 7 (1), (3) (a) to (i) and 81(1) and (2) of the Income Tax Act, the TRAT dismissed the appeal concluding at page 629 to 130 as follows:

> *"An individual's income from employment is the total gain or profit of that individual. In the present case the grossing up method of PAYE applied by the appellant provided tax benefits to the employees who would have collected a lesser take home pay, except for the employer's sympathy by footing the tax bill. Hence the relief granted by the employer to the employee was a gain to the employee, and as such gain it was a benefit which attracted tax, as it is not exempted within the meaning of section 7 (3)*

(a) to (i) of the Income Tax Act. The employer was duty bound to withhold it within the meaning of section 81(1) and (2) of the Income Tax Act... "

Still undaunted, the appellant has appealed to the Court raising two (2) grounds of complaint namely:

1. That the Tax Revenue Appeals Tribunal grossly erred in law by holding that the grossing up method used by the appellant for the purposes of computation of PAYE for its employees is not justifiable in law.

2. That the Tax Revenue Appeals Tribunal grossly erred in law by holding that the grossing up method of PAYE applied by the appellant provided tax benefits to its employees which are not exempted under section 7 (3) (a) to (i) of the Income Tax Act, 2004.

Parties filed written submissions containing arguments for and against the appeal which were adopted at the hearing of the appeal. The appellant had the services of Messrs. John Kamugisha, Abel Mwiburi, FAyaz Bhojan and William Mang'ena, learned counsel. The respondent was

represented by Ms. Alice Mtulo, Mr. Daniel Nyakiha, (both learned State Attorneys) and Mr. Harold Mugami, legal counsel of the respondent.

In arguing the two grounds of appeal together, it was submitted for the appellant that, it was a misconception on the part of the TRAT to conclude that, the method of grossing up invoked by the appellant in computing PAYE for its employees, eventually provided taxable benefits to those employees. Besides, since the appellant had entered into employment contracts with its employees on net salary basis the grossing up method on PAYE was justified because the practice is internationally accepted and it is not prohibited by the law as it does not adversely impact on the employees' liability to PAYE regardless of the modality of the withholding which was not appreciated by the TRAT. To back up this argument the appellant's counsel referred us to the case of **HARTLAND VS DIGGINS HL** (926) AC 286.

It was further contended that, the approach adopted by the appellant is supported by the practice in other Commonwealth jurisdictions namely: Kenya, South Africa, Ireland and United Kingdom whereby apart from nonexistence of specific legislative provisions regulating gross up, the

principle is applicable. In this regard, it was argued that, since in Tanzania grossing up is not prohibited, the law does not in any way place the respondent at a disadvantage in collecting the expected PAYE from employment earnings.

Apart from faulting the criteria used by the TRAT to be absurd as it increases a marginal income rate of 35.7 % as opposed to the maximum rate in Tanzania which is 30 %, it was submitted that the PAYE made by the appellant did not result to additional benefit to the employees. However, it was contended that, though having entered into a net of tax arrangement with its employees the appellant had obligation to withhold and remit net taxes, duties levy and other imposition on behalf of the employees, the appellant still paid PAYE to honour its duty as a withholding agent in terms of the provisions of section 81 of the Income Tax Act.

It was the appellant's view that, with the grossing up method, the total amount paid and withholding portion deducted was a genuine and legitimate expenditure incurred wholly and exclusively in the production of income. The appellant's counsel urged us to take inspiration in another TRAT's decision in **COMMISSIONER GENERAL TRA vs KILOMBERO SUGAR**

LIMITED Tax Appeal No 32 of 2013 whereby the method of grossing up was applied on the expenditure of management fees.

When probed by the Court on the legal basis of the grossing up method Dr. Mwiburi submitted that, though it is not prohibited, the mode of collection and remission of PAYE is similar to that of withholding tax.

On the other hand, in opposition of the appeal it was submitted that, whereas the chargeable income tax from the employment earnings is a creature of provisions of sections 6 (1) and 7 (1) of the Income Tax, section 81 (1) of the Act, makes the employer an agent of the respondent and is duty bound to withhold tax from the employee's earnings and remit the same to the respondent. Thus, though it was improper for the appellant not to withhold on what accrued as benefits to employees as required under section 7 (1) and (3) of the Income Tax Act, the method shifted the employee's obligation to pay tax from chargeable income from the employment earnings which is as well, against the law.

It was also argued that, the net of tax contracts of employment was contrary to the Income Tax Act and the net of tax amount on the salary and the appellant's obligation to deduct and withhold tax and remit it to

the respondent was not waived by grossing up method which is prohibited under the provisions of section 81 (2) of the Income Tax Act.

On the case law and Employers' tax guides of other Commonwealth jurisdictions, Ms. Mtulo distinguished the case of **HARTLAND VS DIGGINS** (supra) arguing the same to be applicable in England which allows net tax arrangement as opposed to Tanzania whereby the law does not allow such arrangements. On the Employers' Tax Guides, she contended the same not to be in favour of the appellant's case and instead it cements the respondent's position. Finally, it was the respondent's conclusion that, since the grossing up method on PAYE does not feature in the Income Tax Act, the appellant contravened the provisions of the law regulating PAYE and the appeal is not merited and it deserves to be dismissed with costs.

In rejoinder the appellant's counsel reiterated the earlier submission adding that, the instruments on tax guide from Kenya and South Africa supports the appellant's case. It was thus reiterated that the appeal be allowed.

We have carefully considered the submissions by the learned counsel and the entire record before us and the issue for determination is the

propriety or otherwise of the grossing up method invoked by the appellant in the computation of PAYE which the appellant had paid to the respondent. Prior to that, it is crucial to scrutinize in relation to the employment, the law regulating the income tax base; taxing of the chargeable income, modality of collection and remission to the Tanzania Revenue Authority in relation to the employment earnings.

In terms of section 5 of the Income Tax Act, the total income of a person is the sum of the person's chargeable income for the year of income from each employment. According to the provisions of section 6 (1) (b) of the Income Tax Act, the chargeable income of a person for a year on income from any employment shall be, in case of a resident person, the income from employment and for a non-resident, the person's income from employment to the extent that the income has a source in the United Republic of Tanzania. What constitutes the chargeable income of an employee is stipulated under section 7 (1) of the Income Tax Act which provides:

> *"An individual's income from an employment for a year of income shall be the individual's gains or*

profits from the employment of the individual for the year of income"

According to the provisions of section 7 (2) of the Income Tax Act, subject to exceptions prescribed under subsections (3), (4) and (5), what is to be included in the calculation of individual's gains or profits from the employment comprises: payment of wages; salary; payment in lieu of leave, fees, commissions, bonuses, gratuity or any subsistence travelling entertainment or other allowances received in respect of employment or service rendered. The employer's obligation to deduct, withhold and remit the tax in question to the Tax Authority is regulated by the provisions of section 81 (1) and (2) which stipulates as follows:

"81 (1) – A resident employer who makes a payment that is to be included in calculating the chargeable income of an employee from employment shall withhold income tax from the payment at the rate provided for in paragraph 4 (a) of the First Schedule.

(2) The obligation of an employer to withhold income tax under subsection (1) ***shall not be reduced or extinguished because the employer has a right or is under obligation to deduct and withhold any other amount from the payment or because of any other law that provides that an employee's income from employment shall not be reduced or subject to attachment."***

[Emphasis supplied]

Black's Law Dictionary Eighth Edition, Bryan A. Garner, Editor in Chief defines the word extinguish as follows:

" 1. To bring to an end; to put to an end; 2. to terminate or cancel; 3. to put out or stifle"

Having withheld the PAYE, then, in terms of section 84 (1) of the Income Tax Act, the employer as agent of Tanzania Revenue Authority must remit the withheld sum within seven days after the end of each calendar month and file with the Commissioner within 30 days after the

end of six months a statement specifying among other things, the name and address of the withholdee and income tax withheld from each payment. According to subsection (4), a withholding agent who fails to withhold income tax, must nevertheless pay the tax that should have been withheld in the same manner and at the same time as that tax is withheld.

It is not in dispute that, the appellant invoked the grossing up method and paid PAYE to the respondent on behalf of its employees. However, parties locked horns on the legality of computation of the taxable income of the employees by grossing up method and the appellant's option to pay PAYE to the respondent without deducting and withholding it from the employee's earnings. This in our considered view, constitutes a crucial point of law on which the appeal lies in terms of section 25 (2) of the Tax Revenue Appeal Act [**CAP 408 RE. 2004**] which is the domain of the Court in respect of Tax Appeals.

It was the appellant's contention that, the grossing up of PAYE and paying it to the respondent was for the purposes of honouring its obligation under the law. We found this argument wanting because in terms of section 81 of the Income Tax Act, the appellant was mandatorily

obliged to withhold PAYE from the employees' salary and other benefits and remit the same to the respondent. Therefore, apart from not having honoured his statutory obligations the appellant was not justified to invoke the grossing up method on PAYE on the basis of the employment contracts which cannot in any way supersede the law regulating chargeable tax from the individual's gains and profit from the employment. We are fortified in that account on the basis of what we said in in the case of **MBEYA CEMENT COMPANY LIMITED VS COMMISSIONER GENERAL,** Civil Appeal No 160 of 2017 (unreported). In that case, the appellant, instead of deducting withholding tax amounting to 2% franchise fee due to Lafarge South Africa, the appellant paid from other sources of its income. The Court held:

"The law on how withholding tax should be paid is clear. It is provided under section 83 (1) (b) of the Act. It reads:

> *"83 (1) Subject to subsection (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."

If payment was not paid in accordance with the foregoing provision, the course of action, certainly offended the law and amounted to grossing up."

The stated principle which frowns on the grossing up method is applicable in the present matter and the appellant ought to withhold the PAYE from the employee earnings and remit it to the respondent instead of paying from own appellant's pocket or other sources of income which was irregular. Therefore, appellant's reliance on the case of **HARTLAND VS DIGGINS** (supra) apart from, with respect, being cited out of context, in that case **one,** there was no written letter on the employment contract from which to discern the actual employment earnings of the employee. This is not the case in the instant case whereby the employees' letters of engagement mention the salary whereas the living allowances, House benefit, School fees and car benefit were specifically stated in the extract of the appellant's payroll which constitute Exhibit R1**. Two,** the Employers

Tax Guides in the United Kingdom presuppose existence of a prior understanding between the Revenue Authority and the Employer and as such, it does not automatically give a lee way to the employer to invoke grossing up method as suggested by the appellant. **Three,** the law applicable in Tanzania is the Income Tax Act which defines and regulates the chargeable tax and the manner of withholding and remitting the same to the Tax Authority. This is further clarified in the TRA Employer's Tax Guide which provides the modality of calculating amounts to be included in calculating employment income of monthly pay.

The existence of the said domestic legal instruments in Tanzania regulating the taxable income rules out the applicability of the Employer's Tax Guide in respect of United Kingdom, Kenya and South Africa. However, they cement the respondent's case as correctly argued by Ms. Mtulo because they avail to the employers the following guidance in respect of withholding tax and the consequences of the Employer paying PAYE from own sources as hereunder reflected.

The South African Revenue Service Guide on Taxation of foreigners working in South African 2010/11 in para 9.7 is on the employees' tax paid on behalf of an employee is to the effect that:

> *"Certain employers contractually agree to settle an employee's tax liability whilst that employee is on secondment in a foreign country. The objective is to ensure that the seconded employee remains tax neutral and is in no worse position than if secondment had not been accepted. This practice encourages employees to accept secondment assignments in foreign countries known as tax equalization.*
>
> ***A taxable benefit arises if an employer pays part or full of the foreign employee's South African tax liability. Should the employer choose to settle the normal tax on this benefit. A further taxable benefit will arise. This will continue on a recurring basis until a final a normal tax liability is determined."***

The bolded expression is similar to what obtains in Tanzania on what amount to tax benefit under the item which falls under paragraph 3.5.2 of

the Tanzania Revenue Authority, Employer's Guide on Pay As You Earn as follows:

> *"Tax benefit occurs when the employer pays tax on behalf of the employee. In this case, the amount of tax paid is treated as benefit in kind in hands of the employee that is tax on tax."*

In relation our neighbour Kenya its Revenue Authority Employer's Tax Guide on Pay As You Earn in paragraph 5.4 improvises as follows:

> *"5.4* ***An employer should always deduct tax from pay unless they are otherwise advised by Revenue****. If an employee makes payment on a "free tax basis" the pay for PAYE purposes is the amount which, after deduction of the correct tax and PRSI, would give the amount actually paid to the employee, i.e.* ***the amount actually paid to the employee should be regressed to arrive at the figure of pay to be taken into account for PAYE purposes."***

The essence of guide is to the effect that, an employer should always deduct tax PAYE is similar to section 81 (1) and (2) of the Income Tax

which mandatorily requires the employer to withhold tax from the employment earnings of the employee.

In the circumstances, in the present case, the appellant's obligation to withhold the tax in question remained intact and it was not at any time extinguished in terms of section 81 (2) of the Income Tax Act. In addition, the appellant's obligation remained intact by virtue of section 84 (3) (4) (5) of the Income Tax Act regardless of the appellant's default to withhold income tax in accordance with the law.

We now have to resolve the appellant's concern to the effect that grossing up is not expressly prohibited under the Income Tax Act. This really taxed our minds. We asked ourselves if the legislative intent is in favour of the appellant who instead of withholding the PAYE from the salaries and benefits paid to the employees, unilaterally applied the grossing up method to calculate the PAYE and proceeded to pay it to the respondent from own sources. Our answer is in the negative and we shall give our reasons. We have deemed it crucial to borrow a leaf on what is reflected from page 26 to 27 of that book on "Law and Practice of Income Tax" by Kanga, Palkhivala and Vyas Volume 1 ninth Edition which contains

a collection of principles on tax cases based on Indian Tax Law discussing rules of construction of taxing statutes. From page 26 to 27 of the book the author states as follows:

> *"While construing a provision that creates a right, the court must always lean in favour of a construction that saves the right rather than one which defeats the right...**However, the interpretation should lead only to the logical end; it cannot go to the extent of reading something that is not stated in the provision. Full effect should be given to the language used in the provision** and a rigid or restricted interpretation must be avoided.*
>
> [Emphasis supplied]

Similarly, in the case of **CAPE BRANDY SYNDICATE VS INLAND REVENUE COMMISSIONERS** [1921] 1 KB 64 it was held:

> *" .... In taxing clear words are necessary in order to tax the subject. Too wide and fanciful construction is often given to that maxim, which does not mean that words are to be unduly restricted against the Crown, or that there is to be any discrimination against the Crown in those Acts. **It simply means that in taxing one has to look merely at what is clearly said. There is no room for intendment. There is no equity about tax. There is no presumption***

as to a tax. Nothing is to be read in, nothing is to be implied....."

[Emphasis supplied]

The said position was emphasized in the case of **CHARLES HERBERT WITHERS BROTHERS- PAYNE VS THE COMMISSIONER OF INCOME TAX,** Civil Appeal No. 55 of 1968 EACA (unreported) where the Court categorically said:

"The statutes enacted for imposition and collection of income tax must be strictly construed."

We fully subscribe to the aforesaid position because in the familiar canon of statutory construction of plain language, when the words of a statute are unambiguous, judicial inquiry is complete because courts must presume that a legislature says in a statute what it means and means in a statute what it says there. As such, there is no need for interpolations, lest we stray into the exclusive preserve of the legislature under cloak of overzealous interpretation. See – **REPUBLIC VS. MWESIGE GEOFREY AND ANOTHER,** Criminal Appeal No. 355 of 2014 and **RESOLUTE TANZANIA LIMITED VS COMMISSIONER GENERAL,** TRA Civil Appeal No. 125 of 2017 (both unreported).

Thus, we are of settled mind that, in view of the clear language used in the provisions of sections 7, 81 and 84 of the Income Tax Act, the employer is mandatorily required to withhold the employees' chargeable tax from the employment earnings and remit the same to the TRA. Thus, the appellant's suggestion on non-prohibition of the grossing up is interpolations of what is not stated in the law. Besides, the appellant's argument on there being no harm on the appellant using own sources to pay the PAYE on behalf of the employee in effect is reading what is not stated in the law and it negates the principle of giving full effect to the language used in the law.

Given the circumstances, as earlier pointed out, we are satisfied that the appellant contravened the provisions of sections 7 (1) (2) and 81 (1) and (2) of the Income Tax Act under which she was obliged to deduct and withhold PAYE and remit the same to the respondent. As such, we do not find sound reasons to vary the decision of the TRAT because it was justified to treat tax paid by the employer on behalf of the employees as benefit in kind in the hands of the employee and it was subject to tax.

In view of what we have stated herein above, the appeal is not merited. We uphold the decision of the TRAT and order the appellant to pay the demanded tax and accordingly dismiss the appeal with costs.

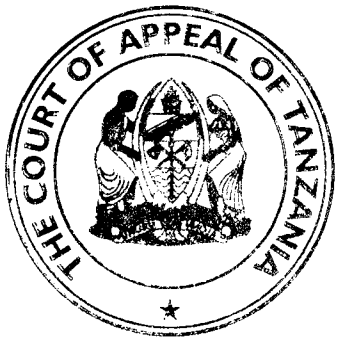
DATED at **DAR ES SALAAM** this 4th day of March, 2020.

S.E.A. MUGASHA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

I.P. KITUSI
JUSTICE OF APPEAL

The Judgment delivered this 6th day of March, 2020 in the presence of Ms. Anitha Kimario for the Appellant, and Ms. Jacqueline Kinyasi State Attorney, for the respondent is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL