X

versus

ZIMBABWE REVENUE AUTHORITY

IN THE HIGH COURT OF ZIMBABWE
NDOU AJ
HARARE 20 January 2020, 20 April 2021& 19 January 2022

Assessors: Ms R. Kangai
Mr W. Mandinde

Income Tax Appeal

D. N. Erasmus with *J. Muchada*, for the appellant
T. Magwaliba, for the respondent

NDOU AJ: The respondent is a body corporate established in terms of the Revenue Authority Act [*Chapter 23:11*]. It is an administrative authority responsible for revenue collection, inter alia, in terms of the Income Tax Act [*Chapter 23:08*] (herein referred to as the Act).

The taxation system involves submission of self-assessment returns by certain categories of tax payers of which the appellant is one of them.

The respondent carries out periodic audits and investigations on tax payers to ensure full compliance with the Act since it does not have the capacity to scrutinize every self-assessment return submitted by tax payers.

The respondent embarked on an investigation of the appellant, which is in the business of making and selling bread in the country, to check and confirm if the appellant was compliant with the provisions of the Act.

From these investigations the respondent was concerned by a number of issues. I will revert to these issues later in this judgment.

The appellant, X, is a wholly owned subsidiary of XX, where XX holds all the ordinary shares. XX is a diversified conglomerate operating a management and investment holding company for its subsidiaries and associate companies. XX is incorporated in Zimbabwe and listed in the Zimbabwe Stock Exchange. The XX Group is involved in the manufacturing, procurement, distribution and marketing of commodities for its food

manufacturing, supermarket and restaurant divisions and the provision of managerial and entrepreneurial skills. The activities are undertaken through various group operating divisions and companies. As alluded to above, the appellant is a private limited company specializing in the production and distribution of bread. It began operations as a small division of *XX* until 2010, when it was incorporated as a subsidiary in terms of a ZIMRA approved scheme of reconstruction. The effective date of the transaction was 1 January 2010. *XX* comprises of a team of functional experts with experience and technical expertise, working to support the operations of the group companies and divisions, including the appellant, through the provision of management support services in terms of the Service Level Assessment ("SLA"). Through its shared service centre, *XX* acts as centre of excellence constituting of a team of people that provide collaboration and use of best practice around specific focus areas to drive business results, as reflected in the appellant's overall increased production and financial indicators.

The shared service centre operates in the following areas;

(a) Strategy and corporate finance;
(b) Group corporate affairs executive;
(c) Financial reporting
(d) Procurement
(e) Legal
(f) Tax
(g) Internal audit; and
(h) Treasury

Coming back to the investigations carried out on the appellant's tax affairs, the respondent concluded the following:

(i) The appellant was giving at least three (3) loaves of bread per week to both its factory and administrative employees. This was a benefit that the employees were getting as a result of the employment relationship. The appellant was not subjecting the bread benefit to taxation in the hands of the employee.

(j) The appellant operates a canteen where meals are prepared and served to all its employees for free. This was another benefit that the employees were getting. Again the appellant was not subjecting this benefit to tax in the hands of the employees.

(k) Value Added Tax: In part Tax was being wrongfully claimed by the appellant in respect of duplicate invoices.

(l) Pre-determined management fees expenses were being claimed as a deduction against income which the appellant failed to substantiate and submit documentary proof confirming that there were management services actually rendered by its parent company IAL. Neither could they provide the cost build-up of the pre-claimed fee.

(m) Capital Allowances were being claimed for an electricity deducted feeder which the respondent believed belonged to ZETDC.

(n) Non-resident tax on fees was not being withheld on technical fees that were being paid to foreigners who were attending to their bread plant.

The respondent proceeded to tax the bread benefit and canteen meals benefit in the hands of the employees. It also proceeded to disallow the input tax on duplicated invoices from its VAT computations. NRTF was computed and charged. The respondent also disallowed management fees and canteen meals expenditure from the income tax computations. Assessments were duly issued to correct these anomalies on 17 July 2017 in respect of 2010, 2011, 2012, 2013, 2014 and 2015 tax years. The appellant agreed to have the input tax claims disallowed from the VAT returns. The appellant also agreed to have the bread benefit taxed in the hands of the employees. The on-resident tax on fees was not disputed. As for the canteen meals benefit the appellant only agreed to have the administrative staff taxed on such meals.

Four issues have remained in contention between the parties, namely, (1) the taxation of meals benefit for factory workers, (2) the deductibility of canteen meals expense against income in the hands of the appellant (3) the deductibility of the management fees against income and (4) the claiming of capital allowances for the dedicated feeder. On 18 July 2017, the appellant lodged an objection to the amended assessments in terms of s62 of the Act. In that objection, the appellant raised seven (7) grounds of objections as follows:

(i) Prescription of additional assessment for 2010;
(ii) Disallowance of management fees;
(iii) Disallowance of canteen meals
(iv) Taxing of canteen meals provided for factory workers;
(v) Disallowance of capital allowances claimed in respect of the dedicated feeder;
(vi) Directive to effect some adjustments highlighted under (i) to (v) for 2016 and 2017;
(vii) Penalty and interest charged.

The Commissioner considered these grounds of objection and disallowed six grounds of objection in full and allowed in full one ground relating to the dedicated feeder after it was

proved that the feeder belonged to the appellant. This led the appellant to lodge the present appeal before this court in terms of s65 of the Act. Despite the voluminous and intimidating documents which have been filed in this appeal, the issues for determination are fairly straight forward and simple.

The issues were set out in a joint pre-hearing minute executed between the parties on 14 January 2020. These are the following:

(a) Whether the Commissioner of the respondent was entitled to adjust the 2010 tax year assessments in terms of s47 of the Act, after the prescription period of six (6) years had expired?

(b) Whether the appellant received management services from *XX* during the period extending from the tax year 2010 to the tax year 2015?

(c) In the event that the appellant received management services from *XX*, whether the full amount of the fees or any portion thereof are deductible in computing the income tax liability of the appellant in each of the tax years in issue?

(d) Whether the value of canteen meals provided by the appellant to its factory workers constituted gross income in the hands of those factory workers in terms of s8 (1) (f) of the Act and therefore liable to PAYE.

(e) Whether or not the appellant was entitled to deduct the expenditure incurred by it in the provision of canteen meals to its factory workers, in terms of s15 (2) (a) of the Act?

(f) Whether in the circumstances, the 30% penalty levied by the respondent was appropriate?

1. The decision by the respondent not to lead evidence

It is trite that the onus lies on the tax payer to show that the Commissioner's opinion or satisfaction was wrong – see s63 of the Act and *CF (Pvt) Ltd* v *ZIMRA* HH-99-18 at p24. S63 affirms the common law position as set out in *Pillay* v *Krishna* 1946 AD 946 at 951-2 as follows:

> "If one person claims something from another in a court of law, he has to satisfy the court that he is entitled to it .... But there is a third rule, which *Voet* states as follows: "He who asserts, proves and not he who denies, since a denial of a fact cannot naturally be proved provided that it is fact that is denied and that denial is absolute' ... The onus is on the person who alleges something and not on his opponent who merely denies it."

In this case the respondent decided not to lead oral evidence. The respondent's position is that the appellant has not discharged the onus upon it notwithstanding the fact that the respondent did not lead evidence. The respondent argues that appellant's witnesses did not testify as to anything that would have been in the knowledge of the officers of the respondent which could be contradicted by them. There is no adverse inference which can be drawn on the failure by the respondent to lead evidence. In *Siffman* v *Knel* 1909 TS 536 at 543 it was stated:

> "It does not follow, because evidence is uncontradicted, that therefore it is true … The story told by the person on who the onus rests may be so improbable as not to discharge it." It is the respondent's case that the question is not one of the appellant's story being so improbable. It is one where in a large measure, the evidence simply does not measure up to the mark. In other words, the evidence is not sufficient to discharge the onus on a balance of probabilities. Further reliance was placed on the case of *Nelson* v *Marich* 1952 (3) SA 140 (A) at 149A-D where the rule was stated as follows:
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> "The fact that there was no evidence to contradict the evidence given by the defendant does not mean that the court is bound to accept the defendant's evidence"

Further, reference was made to *Sigournay* v *Gillbanks* 1960 (2) SA 552 (A) at 558 H where it was stated:

> "The onus was on the plaintiff and although the defendant could have investigating the matter further by cross-examination it was necessary for the court to consider whether, to quote De VILLIERS JP, in Union Market Agency Ltd v Glick & Co 1927 OPD 285 at 288, the evidence of M. Fonder on the point was "sufficiently substantial, detailed, reliable and satisfactory" to prove what he deposed to. Uncontradicted evidence, is not necessarily acceptable evidence."

The appellant contended that the burden of proof stated in s63 must be discharged on a balance of probabilities and all that is required in this regard from the tax payer is to tilt the scales of justice slightly in its favour. The appellant relied on *H Ltd* v *Commissioner of Taxes* 34 SATC 57 1925 TPD where it was held that when it comes to determining those balance of probabilities that are two main lines of approach, which are not mutually exclusive, namely, credibility and probability. In determining whether a witness is to be believed or not, the court must have regard to the probability of his story. But there may be cases where probability will have to yield to credibility; for a court may believe a witness, despite improbabilities in his evidence and where it does so it may find that any burden of proof resting on him has been discharged. Where the probabilities are evenly balanced, a finding of credibility might well be the determining factor.

Furthermore, when it comes to weighing up probabilities, it must be remembered that a trial judge is not concerned with what is or is not probable when dealing with abstract

businessman or not businessmen, but he is concerned with what is probable and what is not probable as regards the particular individual situation in the particular circumstances in which they were.

With this in mind I now propose to deal with the issues articulated above in turn.

2. Prescription in terms of s47 of the Act

The appellant contends that the respondent was not entitled to adjust the 2010 tax year assessment on account of the provisions of s47 of the Act. The appellant's position is that the 2010 tax year is prescribed in terms of s47 (1) (3) of the Act, which provides as follows:

> "47 Additional assessments
> (1) If the Commissioner, having made an assessment on any tax payer, later considers that –
> (a) an amount of taxable income which should have been charged to tax has not been charged to tax; or
> (b) In the determination of an assessed loss –
> i. An amount of income which should have been taken into account has not been taken into account; or
> ii. An amount has been allowed as a deduction from income which should not have been allowed;
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> Or
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> (c) any sum grated by way of a credit should not have been granted; he shall adjust such assessment so as to charge to tax such amount of taxable income or to reduce such assessed loss or to withdraw or vary such credit, and if any tax is due either additionally, or alternatively, call upon the tax payer to pay the correct amount of tax;
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> Provided that –
> (i) No such adjustments or call upon the tax payer shall be made if the assessment was made in accordance with practice generally prevailing at the time the assessment was made ;
> (ii) Subject to proviso (i), no such adjustment or call upon the tax payer shall be made after six years from the end of the relevant year of assessment the, unless the Commissioner is satisfied that the adjustment or call is necessary as a result of fraud, misrepresentation or wilful non-disclosure of facts, in which case the adjustment or call may be made at any time thereafter;
> (iii) The powers conferred by this subsection shall not be continued so as to permit the Commissioner to vary any decision made by him in terms of subsection (4) of section sixty-two.
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> (2) Sections forty-five and forty-six shall apply to any assessments or additional assessments or to a call for the payment of any additional sum in respect of a credit made by the Commissioner under the … appellants conferred by subsection (1)"

From these provisions, in order for the Commissioner to raise additional assessments in terms of s47 (1) (ii) of the Act, there are two elements in respect of which the Commissioner must be satisfied. Firstly, he must be satisfied that there was a fraud, misrepresentation or wilful non-disclosure of material facts.

If he is so satisfied, then secondly, he must also be satisfied that the full amount of tax chargeable which was not assessed, was as a result of such fraud, misrepresentation or non-

disclosure of material facts – *SIR* v *Trow* 43 SATC 189. On the one hand, the appellant posits that a period of more than six years having gone by, in the year 2017, which the adjustment was made by the respondent, the respondent no longer had the power to adjust the assessment rendered by the appellant on account of extinctive prescription.

On the other hand, the respondent while admitting that the period of six years had gone by, relies on s47 (1) (ii) supra, which permits the Commissioner to re-open and assess after the prescriptive period if there existed fraud, misrepresentation or wilful non-disclosure of material facts. This is made clear by the letter that the Commissioner wrote to the appellants on 23 November 2017. In the said letter the Commissioner stated the following –

> "After a tax investigation was conducted, it was discovered that the client entertainment costs attributed to the provision of canteen meals and management fees expenses which were not commensurate with the actual work done. Addition, it was observed that employees take (PAYE) payments made to this office excluded canteen meal benefits enjoyed by the client's employees …
>
> Based on the above observation and comments, your client made misrepresentations in the returns submitted to this office by not making the correct declarations and information that was supposed to be disclosed. This resulted in the underpayment of income tax and payee for the 2010 and other tax years affected.
>
> I am therefore of the view that the prescriptive provisions are not applicable under the circumstances and section 47 (1) (ii) of the Act was correctly applied."

It is trite that the appellant was obliged to subtract self-assessments and did so in terms of s37A of the Act. These returns, however, did not disclose the true position in relation to the canteen meals and management fees. They contained a misrepresentation. It is beyond dispute that the appellant provided meals to both factory workers and administrative employees based at its bread manufacturing factory in Harare. In the evidence led on appeal, the appellant chose to persist with the objecting in relation to the meals afforded to factory workers. It abandoned the objection in relation to the administrative staff. Once it is admitted that the appellant claimed as a deduction in terms of s15 (2) (9) of the Act, meals provided to administrative staff which cost the appellant subsequently conceded not to have been properly deducted then the Commissioner was entitled to re-open the assessments in respect of the relevant years. The tax returns and the financial statements contained the concealment of the treatment of management fees and canteen meals. These claimants did not disclose that the appellant was deducting canteen meals where it had no right to do so i.e in relation to administrative staff. On this admitted misrepresentation alone, the respondent was entitled to re-open the 2010 assessment. It is not necessary to deal with the alleged misrepresentation in relation to provision of canteen

meals to factory workers and management fees at this juncture. Once there is a misrepresentation, the entire assessment can be opened. The assessment should not be broken into bits and pieces for the purposes of re-opening under s47. Accordingly, on this issue I find in favour of the respondent that the Commissioner correctly re-opened the assessment for the year 2010.

3. The decision to disallow in full the claim of management fees s15 (2) (a)

In the determination, the Commissioner contends that the appellant failed to substantiate and submit proof that the services involved were rendered to the appellant by its holding company hence the management fees were disallowed under the provisions of s15 (2) (a). It is, however, necessary to define the ambit of the inquiry *in casu*, in view of the agreed issue set out in paragraph 1.3 of the joint minute between the parties. In the event that management services were rendered by XX to the appellant, in terms of issue 1.3, supra I must proceed to determine whether

> "... the full amount or any portion thereof of the management fees ... are deductible in computing the income tax liability of the appellant in each of the tax years."

The framing of the issue in this fashion takes into account the wording of s5 (2) (a). s15 (2) (a) reads:

> "15 (2) The deductions allowed shall be –
>
> (a) Expenditure and losses to the extent to which they are incurred for the purpose of trade or in the production of income ..." (emphasis added)

This provision requires that the tax payer establishes "the extent" to which any losses or expenditure have been incurred for the purposes of its trade or for the production of income. It is not sufficient for the tax payer to prove that services were rendered. The tax payer must go further to prove that the services were rendered to the full extent for the purposes of its trade or the production of income.

In *Z (Pvt) Ltd* v *ZIMRA* 2014 (2) ZLR 568 (H) at 575A KUDYA J (as he then was) correctly amplified this test as follows:

> "In *Commissioner of Taxes* v *Rendle* 463 (A) in fine 466; 1965 (1) SA 59 (SRA) at 62H – 63D (which was followed by SMITH J in *S (Pvt) Ltd* v *Commissioner of Taxes* 1985 (4) SA 34 (ZH) at 385-39D), BEADLE CJ stated that:
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> "The broad test which is now universally applied was laid down by WATERMEYER AJP in *Port Elizabeth Electrict Tramway Co* v *Commissioner for Inland Revenue* 1936 CPD 241 at 246. This test, with slight alteration in the wording was approved by the Appellate Division in Commissioner of *Inland Revenue* v *Gem & Co (Pty) Ltd* 1955 (3) SA 293 (A) at 299, and the test as modified by the Appellate Division has subsequently been approved by that Division in the *Commissioner for Inland Revenue* v *African Oxygen Ltd* 1963 (1) SA 681 (A) at 688 and in *Commissioner for Inland Revenue* v *Allied Building Society* 1963 (4) SA 1 (A) at 13. The broad task, which may now be regarded as the accepted test, is as follows:

"All expenses attached to the performing of a business operation *bona fide* performed for the purposes of any income are deductible whether such expenses are necessary for its performance or attached to it by chance or are bona fide incurred for the proper performance of such operation provided they are so closely connected with it that it would be proper, natural or reasonable to regard the expenses as part of the cost of performing the operation."

It is beyond material dispute that during the period under review, the holding company, IAL housed group functions such as Internal Audit, Tax, Legal and Secretarial, Strategy, Operations and Corporate Communication. The appellant provided the respondent with management services contracts in place between the appellant and its holding company, IAL, which detail the services provided. It also availed to the respondent invoices relating the management fees including detailed explanations of the nature of the services that are rendered from a group level.

In a nutshell the issue here is whether or not the appellant received management services from IAL for the tax years 2010 to 2015. The appellant adduced a considerable amount of evidence during the hearing. It relied on the oral evidence (supported by documents) from the Group Director of *XX*, the Company Secretary; the *XX* Group Tax Officer RG and Finance Director of appellant. Most of the testimony of these high profile witnesses evinces the entrepreneurial skills of the highly qualified people of the helm of *XX* and the impact thereof on the appellant. From a business point of view the holding company, *XX* and the appellant and other subsidiaries are admirably run. The *XX* is a diversified conglomerate, operating as a management holding company for its subsidiaries and associate companies. *XX* is incorporated in Zimbabwe and is listed on the Zimbabwe Stock Exchange ("ZSE"). The Group is involved in the manufacture, procurement, distribution and marketing of commodities for its food manufacturing and in the provision of managerial and entrepreneurial skills. These activities are undertaken through various Group operating divisions and companies. The appellant one of such of the subsidiary companies. The appellant's modus operandi has already been highlighted in the preceding paragraph. Suffice to state that *XX* comprises of a team of functional exerts which vest experience and technical expertise, working to support the operations of the Group companies including the appellant, through the provision of management support services. Through its corporate office, *XX* acts as a centre of excellence consisting of a team of people that promote collaboration and use of best practices around specific focus areas to drive business results as reflected in the appellant's overall increase production and financial indicators. The shared service centre arrangement, as adopted by the Group *in casu*, is common among multinational companies in today's

business environment where a Group can rely on professional in-house expertise while reducing overall cost for the administration and management of the business. It would be expensive from a Group perspective, to duplicate the common functions at each operational subsidiary level. This approach allows the Group entities to access professional support at reasonable expense.

Against this background, I propose to highlight the relevant services for which management fees were invoiced in this matter for the tax period under review.

(a) Strategic support service

These services provide the basis for selecting lines of business, choosing an organization structure and operating procedures, analyzing and undertaking acquisitions and divestitures and responding to competitors and to market forces. *XY*, according to the testimony adduced, provides strategic advice aimed at growing the business. This resulted in the expansion of the appellant's production capacity to the current 600 000 loaves per day from 300 000 loaves per day. This also resulted in the appellant having the most technologically advanced plant in the country. This evidence was given in detail during the hearing with aid of video recording of the bread manufacturing exercise.

The appellant also benefited from efficient and economic delivery of its bread because of its fleet identified and serviced at *XY* level and access to better delivery platforms.

(b) Supplier negotiations

Given *XY*'s long standing suppliers and wider business relationships as it has been active, established and successful in the industry, it leverages from these relationships to provide assistance to the appellant through negotiation of favourable supply terms.

(c) Treasury function

IAL ensures that the appellant secures cheaper financial facilities, secures long term facilities and IAL provides guaranteed facilities. A cash pool is a banking structure which allows the balances on a number of separate accounts to be treated collectively. The concentration of surplus cash into one account generally managed by the Group treasury improves the company's control over cash. Use of a cash pool can also help a company to improve its liquidity management, as total cash balances are managed centrally rather than locally. Were *XY* is experiencing cash shortfalls, it is funded from the master account at a cheaper rate than could be obtained locally or from external providers.

(d) Project Management Support

On an individual entity basis, if certain strategic projects are being undertake *XY* heavily involved from a strategic and technical perspective, in designing, advising and

provision of strategic input. The appellant would be involved in the direct implementation of the projects themselves, however with oversight from [illegible] ns at hand s and when required. In the circumstances, the appellant nbeefi t s from the extensive senior project management skills and expertise of *XY*, which enhances its capabilities to implement appropriate strategies and ultimately drive revenue.

(e) Finance and Revenue

XY supports the appellant with various functions that enable the efficient running of the financial function. The support produced by *XY* leads to economies of scale as well as savings for the appellant as the company does not require a large contingency of finance staff or staff with financial qualifications to perform the functions required.

(g) Legal and regulatory affairs

XY provides advice on company secretarial and legal issues. It also provides legal opinion and legal advice concerning the activities of the appellant. The support from *XY* leads to economies of scale as well as the savings for the appellant.

(h) Tax services

The appellant is generally responsible for its own tax functions. *XY* asserts with the review of the tax computations every quarter, VAT returns, input tax claims and documentation. *XY* also asserts Group companies such as the appellant obtain clearance certificates and attend to any tax queries from the revenue authority. This is a summation of the material aspects of the appellant's evidence alluded to above.

(4) Deducting of management fees

The respondent's Commissioner disallowed the management fees primarily on three grounds:

(i) Firstly, there was insufficient evidence of actual services rendered.

(j) Secondly, the appellant did not provide a cost build-up of the pre-determined fees

(k) Thirdly there was no proof of unique expertise that was available at *XY* which not available at the appellant, which warranted the supply of such services by to the appellant.

These three grounds relied upon by the Commissioner have been considered in proper context. It is trite that a parent company can arrange for a wide scope of services to be available to its subsidiaries, in particular, technical, financial and commercial services. In an integrated group, the board of directors and senior management of the parent company make all important decisions concerning the affairs of its subsidiaries and the parent company, or another

subsidiary may carry out all marketing, training and treasury functions – OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrators at 7.2 and 7.4.

Further, the revenue authority cannot place itself in the armchair of a businessman or in the position of the Board of Directors and assume the role of deciding what is reasonable expenditure having regard to the circumstances of the case. No businessman can be compelled to maximize its profit. The tax authorities must put themselves in the shoes of the tax payer and see how a prudent businessman would act. The authorities must not look at the matter from their own view point but that of a prudent business an – SA Builders Ltd v CIT (2006) 289 ITR 26 (SC). Further, I agree with what was stated by Australia's Full Federal Court on the function of the tax authorities and fiscal legislation. In FC of T v BHP Billion Finance Ltd 2010 ATC 20169 at paragraph [18] the said court quoted with approval from *Tweddle* v *FCT* (1942) 180 CLR at 7 where WILLIAMS J staid that:

> "it is not suggested that it is the function of the Income Tax Acts or those who administer them to dictate to tax payers in what business they should engage or how to run their business profitably or economically. The Act must operate upon the result of a tax payer's activities as it finds them. If a tax payer is in fact engaged in two businesses, one profitable and the other showing a loss, the Commissioner is not entitled to say he must close down the unprofitable business and cut his losses even if it might be better in his own interests and although it certainly would be better in the interests of the Commissioner if he did as: *Toohey's Ltd* v *Commissioner of Taxation* (NSW) (1922) 22 SR (NSW) 432 at pp 44044,]"

Further, in Income Tax case number (1847) 73 SATC 126 the court reminded the Commissioner of SARS after the latter had disallowed management and marketing fees paid by a subsidiary to its holding company that:

> "it is not for the court or the Commissioner to say, with the benefit of hindsight be disallowed on the basis that it was not strictly 'necessary', or that it was not as effective as it could have been. If the purpose of the expenditure was to produce income, in the course of trade, and the expenditure was not of a capital nature, then that is sufficient. Accordingly, the respondent was wrong in his assessment of these fees."

In this said case the court accepted that, many a time a subsidiary is utterly dependent on its holding company for its effective functioning. The holding company had used its muscle, as a long established public company, to raise capital for the tax payer and from the evidence it was clear the tax payer needed the management input of the holding company and received it. It need the global vision and strategic advice of the cosmopolitan, internationally experienced team from the holding company. The management service fees charged by the holding company to the subsidiary were held to be in line with the norm in the industry.

I will now consider the evidence before me in light of the above principles. In this case it is beyond material dispute that the management fees charged by IAL to the appellant were pre-determined at the beginning of each year and subsequently invoices were then issued in respect of each month in the year whether or not service was actually supplied. The position of the respondent is corroborated by the evidence of the appellant. The Group Finance Director likened the charges for management fees levied by the XX to subscriptions for DSTV which were pre-determined and prepaid notwithstanding the fact that the customer does not on a particular day choose to watch the programs provided. When the respondent requested the cost build up or the evidence of the services that were rendered by XX to the appellant, no such evidence or cost build up was produced. The only documents produced were the contracts between XX and the appellant. Such contracts did not prove that in fact services had been rendered to the appellant by XX. The best they showed was that XX was available to render the services as and when they were required by the appellant. Even in the documents produced by the appellant the cost build up could not be established. These documents are secondary evidence which do not show who authored them, when they were authored and why. They bear no evidence as to when they were presented, if at all, to the respondent. It is trite law in this jurisdiction that in respect of management services, the obligation to pay for such services does not arise upon the signing of a service level agreement between the holding company and its subsidiary. The obligation is incurred when services are actually rendered.

In *CF (Pvt) Ltd, supra* at p39, KUDYA J (as he then was) had this to say:

> "The principle of law that LEWIS JP appears to have approved in *Commissioner of Tax* v *A, supra*, at 415G-H by reference to two Australian cases of *Federal Commissioner of Taxes* v *James Flood (Pty) Ltd* (1953) 88 CLR 493 and *Nevill & Co. Ltd* v *Federal Commissioner of Taxation* and the English case of *Edward Collins and Son Ltd* v *IRC* 12 TC 773 at 783 was that an expenditure or loss arising from the terms and conditions set out in a contract is incurred when the contracted work is performed. This view is supported by the underlying words by WATERMEYER AJP in *Port Elizabeth Electric Tranway Co. Ltd* v *CIR* 85 SATC 13 (1936 CPD 241) wh at p15 stated that:
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> 'But expenses 'actually incurred' cannot mean actually paid. So long as the liability to pay them actually has been incurred they may be deductible. … The clear principle arising from these cases is that the unconditional obligation to pay is incurred when the work is done or the services are rendered. In my view, the provision made in respect of the audit fees constituted a contingent liability, the performance of which was "impending, threatened or expected" in the future. The appellant wrongly sought to deduct in the years in which the provisions were made." *In casu*, the dispute does not relate to whether the expenditure is "actually incurred" or "actually paid". The legal dispute concerns the determination as to when expenditure is "actually incurred" in circumstances where a payment has already been made on the basis of a contractual document but without evidence that the contacted service was "actually rendered". The determination as to whether the appellant is correct or not is two- fold.

Firstly, the determination is whether the conclusion of a contract for service necessarily means that the services had been rendered. Put differently, the question is whether a payment made pursuant to the conclusion of service level contract amounts to incurring expenditure for purposes of deductions permissible in terms of s15 (2)(a) of the Act. In my view, the signing of the service level contract is not sufficient for the appellant to incur obligation to pay management fees. In the circumstances I have to determine the second issue i.e. whether in fact any services were rendered by XX, and if so, what the services were and how much was charged in respect of services. This two-stage inquiry is evinced by the splitting of the issues in the joint minute of the parties. The first issue being the question management services were rendered by XX and the second being a determination of the extent of such services.

I am in agreement with the contention of the respondent that the execution of a service level agreement between the appellant and its holding company, XX, does not amount to incurring any legal obligation in respect of management fees. Like any other contract, the incurrence of a legal obligation depends on the performance by the parties of their obligations in terms of the contract. There being no evidence that the appellant received specified services from XX during the tax period under consideration (and if so the extent thereof) no legal obligation was incurred by the appellant in respect of management fees.

In other words, the appellant succeeded in establishing the existence of contractual relationship between it and its holding company. It, however, did lead evidence to establish that services were rendered to it by IAL pursuant to the service level contract and the extent of such service. It failed to prove a cost build-up of the pre-determined fees when required to do so by the respondent. The evidence of the Group Finance Director, supra, was not helpful in this regard. He was not employed by XX in this between 2010 and 2011 i.e the relevant tax period *in casu*. His testimony primarily comprises a rationalization of facts as gathered from company documents. He conceded that there were people who could competently speak to the activities undertaken by XX in as far as they related to appellant between the years 2010 and 2011. It is trite that not every employee can give evidence on behalf of a corporate body such as the appellant. Any such employee must have been at the relevant time, been placed within the corporate governance structure of the corporate entity so as to enable him or her to have knowledge of the facts which he or she testifies to. Such knowledge must be derived from the employee's personal contact with the transactions in issue or from their position in the company which allows him or her access to the relevant information – *Antonio* v *Ashanti Goldfields Zimbabwe & Anor* 2009 (2) ZLR 272 (H) at 384D-E. The position of this witness at the

relevant time did not allow him to deal personally with the interaction between the appellant and *XX*. In any event his evidence is harmless to the case for the respondent. In most respects it constitutes nothing more than a restatement of common cause facts or a [illegible] ation of the respondent's position. From his evidence it can be gleaned that the strategic decision to unbundle the bread making business commenced in 2010 and was completed in 2015. It is not clear what fees were changeable under the service level agreement for the tax period 2010 – 2011. He gave detailed evidence of expertise and experience of management of *XX* at the disposal of the appellant. With due respect, the appellant, *in casu*, is required to prove that in fact, it received management services from *XX*. The service level agreements signed by appellant and *XX* merely establish the contractual relationship as alluded to above. The invoices issued by *XX* to the appellant did not provide sufficient evidence to confirm that the services under contention were rendered. Even in court such evidence was not forthcoming from the witness. The witness made detailed reference to a presentation document made to the respondent on 20 November 2018. This is a secondary document. It, however, does not show that in fact any services were rendered by *XX* to the appellant. The service documents upon which the summary is based were not produced either to the respondent or this court. The person who prepared it was not identified with any clarity in the appellant's evidence. No one can therefore vouch for the correctness of the entries in the document. The document does not refer to the service level agreements which it purports to give birth to the number s set out therein. No minutes, emails or any other documents confirm that in fact the charges related to any services that were in fact actually rendered. The testimony of this witness and indeed that of the Company Secretary was to the effect that the figures were arrived at taking into account what was reasonable on the market. Reference was made to bench-marking the charges against reputable companies which supplied similar services. There is nothing wrong with bench-marking. Hereunder there must be reliable evidence of such bench-marking. Such reputable companies and their charges should be evinced, otherwise it seems no more than a retrospective rationalization of figures, extrapolated in order to justify the invoices that had been issued between 2010 and 2015. The document does not even state the particular date on which it was made. The witness admitted that it was prepared in order to "access certain information gaps that ZIMRA had identified." It is trite that the performance of the contracted services is a matter of evidence. The appellant failed to produce such evidence. In any event, some of the services would only be rendered once a year. For instance, tax services would be rendered at the time when the submission of tax returns was at hand. The monthly charge therefore did

not take into account whether the services were actually rendered in that particular month or not. It was simply a standard charge that was raised. This shows the falsity of the service level agreement contracted between the appellant and *XX*.

The Company Secretary also testified that he personally drafted the service level agreement between the appellant and *XX*. He admitted that some of the agreements were replicated with errors for the years 2010 to 2015. He stated that employees, directors or shareholders at *XX* provided services to appellant. Naturally, because *XX* was the shareholder in the appellant, in their course of business, these persons dealt with some aspects of the business of the appellant. What, however, did not clearly come out from his testimony is the dichotomy between the said persons, including himself serving *XX* and serving the appellant. *XX* existed for its own purposes for which it was not entitled to charge the appellant. He stated that because of the strategic interventions of the *XX* shared services centre, the appellant made substantial savings in fuel procurement, insurance premiums, legal services, audit services etc. That may be so to some extent. But he confirmed that it was difficult to quantify the time spent by the officers of *XX* on business of the appellant since none of them kept time sheets. Further the issue was raised with this witness – whether the invoices issued by *XX* to appellant met the legal requirements of invoice. It is trite that the meaning of the noun "invoice" given in the Shorter Oxford Dictionary is: 'a list of the particular items of goods shipped or sent to a factory, consignee or purchaser, with their value or prices and charges'. And the meaning of the verb 'to invoice' is given as: 'to make an invoice of, to enter in an invoice'. The basic idea at the root of the noun 'invoice' seems to be a list of the things sent away or shipped, not necessarily, to a buyer – *Universal Shipping Co. (Pty) Ltd* v *Weston Distributing Co*. 1946 NPD 260 at 263. Strictly speaking these documents in law were in fact not invoices. They were accepted by the appellant as invoices and paid upon. In the circumstances it is either no services would have been tendered by IAL for certain periods but all the same wanted payments to be made to IAL or that some services would be rendered but all the same *XX* wanted to be paid for all the services. The Group Tax Officer's testimony was essentially an attempt to establish that services were rendered in respect of tax advice to appellant. There is, however, nothing which evinces exactly when the services were rendered and how much was charged for the services.

The Finance Director for appellant testified and his testimony remarkably contradicted that of the Group Finance Director of *XX* on the fundamental premise upon which the notices in issue were raised. He contended that the invoices were issued on the basis of services

rendered and by implication suggested that if services were not rendered for any particular portion of the period concerned, the appellant would not be obliged to pay [redacted] XX. In contradiction the Group Finance Director had testified that the rendering of a service was not a pre-requisite for the charge which *XX* raised on a monthly basis to the appellant. The evidence of these witnesses was therefore, mutually destructive. The appellant's Finance Director stated that the yearly fees were registered and agreed upon the commencement of the year. He, however, had no documents as proof of such negotiations on the fees. He did not provide any rational basis for the charge which was raised by *XX* to the appellant. He also admitted *XX* exists for its own purposes and does not exist to provide service to the subsidiary only. It was therefore, necessary to separate the functions of the employees, directors and shareholders of *XX* in pursuant of the interests of *XX* as against the interests of the appellant as a subsidiary. He conceded that the invoices were not itemizing the services rendered. The acceptance of an irregular invoice by the respondent does not make the appellant compliant with the law. S20 (4) of the Value Added Tax Act requires that a tax invoice must contain particulars including –

> "(e) a description of the goods or services supplied;
> (f) the quantity or volume of the goods, or services supplied." These provisions are mandatory and anything done in contravention thereof is a nullity – *Schirhout* v *Minister of Justice* 1926 AD 99 at 109; *X-tend-A-Home (Pty) Ltd* v *Hoselaw Investments (Pvt) Ltd* 2000 (2) ZLR 348 (S); *Manning* v *Manning* 1986 (2) ZLR 1 (S).

In any event erroneous acceptance of invalid invoices by the respondent's officials would not validated them – *R* v *Board of Inland Revenue XP. MFK Underwriting Agencies Ltd & Ors* [1997] ALL ER 91 at 100d-j; *AG exp – Imperial Chemical Industries PLC* (1986) 60 TCI at 64; *Vestcy* v *ICR* (No. 1) [1977] 3 ALL ER 1075 at 1098 [1979] ch ITI 177 and *Commissioner of Taxes* v *Astra Holdings (Pvt) Ltd* 2003 (1) ZLR 417 (S).

From these authorities it is trite that "one should be taxed by laws, and not untaxed by commissions" or errors of revenue officers.

From the foregoing it is clear that the appellant's case on the issue of management fees must fail.

4. Whether canteen meals provided to factory workers are taxable

The evidence of the appellant on canteen meals was primarily from three witnesses. What the evidence showed is that the factory workers based at appellant's factory were supplied with meals. Such meals were not supplied in the factory and at the post of duty. The workers exited

the factory floor and had a break from work for about fifteen (15) minutes and consumed the meal in a canteen outside the factory. *In casu*, the appellant's employees do not continue with their duties while having the meal. They exit the factory to the canteen and are relieved of their duties and re-enter it to resume their duties after they have had their meal. The respondent relies on the decision of this court in ITC 1394 (1984) SATC 119 (Z). In this case the court ruled that the provision of meals to employees constitutes entertainment where the employees are not required to continue with their duties during the meal. It only constitutes an allowable deduction in the production of the income of the tax payer – if the employees are required to continue with their duties. *In casu*, the factory workers do not continue with their duties while having the meal. The respondent on the one hand contends that there is a taxable benefit on the canteen meals provided by the appellant. The respondent relies on s8 (1) (f) of the Act. The appellant, on the other hand, submits that the employees are not deriving any benefits from the canteen meals as this provision is purely designed to meet the employment conditions. In terms of s8 (1) (f) of the Act, the taxable benefit only arises in cases where the employees derives some benefit therefrom. The legislature, under s8 (1) (f), *supra,* excludes from taxation any advantage or benefit in so far as it is used, consumed or enjoyed for the purposes of the business transactions of the employer. The "employee's business purpose," test should be applied to the meals in order to determine whether they are taxable or not.

My understanding is that as general rule the provision of a meal to an employee may well constitute "entertainment" as envisaged in s16 (1) (m) of the Act. The scenario in ITC 1394 (1984) 47 SATC, supra is an exception to the said general i.e lunch for bank tellers that were required to work through lunch to continue with their duties during the meal …" This is, however, not the only exception. The facts of this case present another exception. The meals here are provided more beneficial to the employer as they are designed primarily to meet the business objectives of the employers rather than to create an advantage or benefit in the hands of the employee i.e. they are non-compensatory. There is a clear link to the business objectives than to a supposed benefit in the hands of the employees. This is akin to the "employer business purpose test in the United States jurisprudence – *Commissioner* v *Kawalsk* 434 U.S. 77 (1977); *Caratan* v *Commissioner* 442 F 2d 606 (1971) and *Boyd Gaming Corp.* v *Commissioner* 177F.3d 1096 (9th Cit 1999). In this case should the employer not have provided the employees with meals this would introduce additional business risk in the form of increased monitoring of employee movements in and out of their work location, additional disruptions to business

continuity including the potential of increased tardiness as well as health and safety risks should employees not in fact eat meals.

Accordingly, the meals are provided to employees in the interest of the appellant's business. The canteen meals provided to employees cannot be classified as entertainment. The primary purpose of the meals is not to be hospitable. The hospitality aspect is absent in this scenario as the primary purpose of providing the meals is to ensure minimal business disruption and continuity given the appellant operates continuously 24 hours a day and every day of the year. The expenditure is closely connected with the production of income and would be allowable under s15 (2) (a) of the Act – *Port Elizabeth Electric Trainway Co. Ltd* v *CIR, supra*, and ITC 81820 SATC 507. S16 of the Act which enlists the prohibited deductions is not an absolute prohibition, but is subject to the Act. The preamble to s16 (1) states that "save as is otherwise expressly provided in this Act, no deductions shall be made in respect of the following matters." Thus, if there is any provision in this Act, which provides otherwise, in respect of any of the prohibited deductions that provision will prevail over s16. In the words, s16 of the Act is subservient to the other provisions of the Act which provide otherwise. S15 (2) (a) sets out the general deduction formula, such that any business expense that meets the prescribed formula is deductible. While a canteen meal expense may fit under the ordinary grammatical meaning of entertainment that should not be the end of the enquiry for deductibility of such an expense. The next enquiry is whether, it qualifies for deduction under s15 or any other provision of the Act which provides for deductions. The legislature never intended all entertainment expenses to be prohibited from deduction, because if that was the intention they could have adopted a provision which absolutely prohibits the expenses. However, the legislature was alive that while some expense may fall under the ordinary meaning of entertainment; they will still be deductible if they were incurred under the criteria set for deduction in terms of s15 or any other provision of the Act.

Before I conclude on the issue I wish to highlight the contention by the appellant on why the employees have to have meals at a canteen just on periphery of their work site. The alternative is to allow them to bring their home prepared food, the risk of contaminating the bread being manufactured is very high. In any event the Council Health Regulations would not allow such consumption of food brought from outside in the factory baking site. On the issue of canteen meals for factory workers the appeal should be allowed.

Penalty

The penalty is now only applicable to the issue of the management fees. On this issue the appeal is unsuccessful in its entirety. In the case of Income tax case No. 1725, 64 SATC 223, the court held that the penalizing section enjoins the Commissioner or the court to conduct an inquiry on the intention of the tax payer. The respondent is enjoined to inquire whether in defaulting the tax payer had the intention of evading tax. Where no such intention exists there is no justification for a penalty – Income Tax case No. 1725, 64, *supra.* In this case the appellant believed in its interpretation of the law. But with the expertise at its disposal, the appellant should have used proper invoices which meet the minimum requirements of the law. While a case has been made for the reduction of the penalty, I am not persuaded that I should reduce it in its entirety. I will accordingly reduce it to 20%.

Disposition

In light of the foregoing I accordingly order that:

1. The appeal is allowed in part
2. On the issue of management fees, the appeal is dismissed and assessments issued on 17 July 2017 are hereby confirmed.
3. On the issue of canteen meals for factory workers the appeal is allowed and the resultant assessment issued by the respondent is set aside.
4. The matter is remitted to the respondent for the issuance of a revised assessment in keeping with the terms of this judgment stated in paragraph 3, above.
5. The penalty is reduced to 20% in respect of the contents of paragraph 2 above.
6. Each party shall bear its own costs.

18/11/22

Dube, Manakai & Hwacha, appellant's legal practitioners.
ZIMRA, Legal & Corporate Services, respondent's legal practitioners.