CUT (PVT) LTD
versus
ZIMRA

SPECIAL COURT FOR INCOME TAX APPEALS
KUDYA J
HARARE 26 September 2017 and 22 October 2019

Income Tax Appeal

D Tivadar, for the appellant
T Magwaliba, for the respondent

KUDYA J: The preliminary issue in this appeal, which constitutes the first question for determination, was raised for the first time by the respondent at the eleventh hour in its heads of argument filed on 15 September 2017. It is whether the Special Court for Income Tax Appeals has jurisdiction to determine this appeal. The real issue that had been referred on appeal by the parties in the joint pre-hearing minute of 20 June 2017 was whether the appellant was obliged to account for non-residents' tax on fees, NRTFs due by it to CNT, a German based corporation, during the financial years 2012 to 2014 in terms of the various Credit Facility Agreements, facilities, concluded between the appellant and that foreign entity.

On a full consideration of the pleadings and both written and oral submissions I have come to the conclusion that sitting as the Special Court for Income Tax Appeals I lack the requisite jurisdiction to entertain the present appeal. I would also have dismissed the appeal on the merits had it been properly before me.

The background

The appellant, a private company incorporated in Zimbabwe on 3 December 2010 is a registered tobacco merchant, which is engaged in the business of purchasing farmer tobacco and processing and blending it for export. It concluded 9 credit facility agreements in 2012 and 5 such agreements in 2013 with CNT, a company incorporated in the Federal Republic of Germany[1]. The number of such agreements concluded in 2014 were not indicated nor filed in the r 11 documents. The German Company was engaged in the business of financing and

[1] Pp 37-91 of r 11 documents

selling processed tobacco in international markets[2]. The appellant sold the processed and blended tobacco to the German Company.[3]

It was a requirement of the Reserve Bank of Zimbabwe regulations during the 2012 to 2014 tobacco seasons for tobacco merchants to purchase local tobacco from offshore finances. In line with this requirement, the appellant secured the preceding credit facilities from the German Company. The terms and conditions governing all the agreements, save for the dates of execution, loan amounts and the banking details to which the repayments were to be made, were generally the same. Clause 2 (a) prescribed the interest rate of LIBOR US$ 1 month plus 2.5% per annum in the 2012 agreements and 2.75% in the 2013 agreements, which could be adjusted on a monthly basis, the commitment fee of 0.5% and arrangement or underwriting fee of 3.5% of the total credit facility amount stipulated in each agreement payable on each draw-down. Four of the 2012 agreements and one of the 2013 agreements did not prescribe payment of commitment and arrangement fees.

Between 24 May 2013 and 5 December 2014, the appellant filed 11 self-assessments in respect of the withholding tax purportedly due from the commitment and arrangement/underwriting fees it remitted to the German Company during the period from June 2012 to November 2014[4]. The tax on fees voluntarily paid to the respondent was in the aggregate sum of US$597 777.71. The material correspondence exchanged between the appellant and its tax consultants on the one hand and the respondent on the other and filed in the r 11 documents encompass the period 7 January 2014 to 13 October 2016[5]. The first letter, written by the appellant's finance manager and all subsequent correspondence to 16 April 2015 demonstrated the appellant's knowledge of the existence of the Double Taxation Agreement, DTA, between the Republic of Zimbabwe and the Federal Republic of Germany. Apparently before that date the respondent had charged the NRTFs against the appellant at the rate of 15% of the grossed-up amounts remitted by the appellant to the German Company. In the correspondence commencing on 7 January 2014 the appellant successfully entreated the respondent to reduce it to 10%, which it believed to be the rate prescribed by the DTA.

On 16 April 2015, the Managing Director of the appellant wrote a very detailed 2 paged letter to the respondent's Regional Manager-Domestic Taxes, Region 1 seeking a refund of the

[2] Letter from appellant's managing director to Zimra of 16 April 2015 at p 18 of r 11 documents.
[3] Letter by appellant's tax consultants to the respondent of 3 July 2015 first line p 10 of r 11 documents.
[4] P 25-36 of r 11 documents.
[5] Pp20-24 of r 11 documents

US$597 777.71 NRTFs paid in the years 2012 to 2014. He set out the nature of the relationship between the appellant and the German Company and the pertinent provisions of the DTA between Zimbabwe and Germany and concluded his letter by stating that:

> "The fees were paid under the misconception that all fees paid to Non-Residents' require withholding tax to be deducted with no exceptions."

Thereafter, the parties exchanged correspondence and held meetings but failed to agree on whether the appellant was entitled to pay NRTFs on the commitment fees and arrangement/underwriting fees paid to the German Company. The tax consultants took over the case on behalf of the appellant but the respondent did not alter its firmly held position that the NRTFs were properly chargeable. As a result of letters written by the tax consultants on 24 June 2015 and 3 July 2015, the respondent conceded in its response of 20 August 2015 that the NRTFs was chargeable at the rate prescribed in para 4 of Article 12 of the DTA of 7.5%.

On 9 September 2015 the tax consultants wrote a letter to the Commissioner for Domestic Taxes entitled: "Refund of NRTFs to Germany: Appellant". I reproduce below the first two and the two penultimate paragraphs of this letter:

> "We refer to your letter dated 20 August 2015 in which you refused to refund Appellant NRTFs amounting to USD597 777.71 that was paid in error for the years 2012 to 2014. This letter therefore serves as a formal objection by Appellant to your decision to deny the refund of the aforesaid tax…….
> Therefore we contest your refusal to refund the tax on the basis that the fees in question were subject to taxation in Zimbabwe. In the light of the above we pray that the Commissioner rescinds his decision and refunds the tax that was incorrectly paid."

On 11 September 2015 the Regional Manager for Domestic Taxes-Region 1 acknowledged receipt of the letter "objecting to my decision to deny the refunding of the aforesaid tax." On 13 October 2016 the Acting Commissioner-General responded "to the letter of objection ...to the denial by Zimbabwe Revenue Authority to refund NRTFs." He partially allowed the objection by reducing the chargeable NRTFs to 7.5% of the commitment and arrangement/underwriting fees paid. He then alerted the appellant of its s 65 of the Income Tax Act right of appeal either to the High Court or to the Special Court.

On 1 November 2016 the appellant filed its notice of appeal. On 15 December 2016 it filed the Appellant's case. The Commissioner's case was filed on 14 December 2017. The proviso to s 62 (4) of the Act allows the Commissioner *inter alia* with the consent of the appellant to extend the period within which to determine the objection. It was common cause that the extension to make decision to the objection 13 months later rather than within 3 months was by consent of the parties. The notice of appeal was filed within the 21 days prescribed by

s 65 (2) of the Act from the date on which the determination was made. Again, the Appellant's case was also filed within the 60 days from the date the notice of appeal was filed as enshrined in r 5 of the Twelfth Schedule to the Act. In addition it also appears to me that the Commissioner's case was also filed within the 60 days set out in r 9 of the Twelfth Schedule. In view of the above considerations, it was not necessary for the appellant to seek the extension of time within which to file the appeal, which in any event was not opposed by the respondent.

At the pre-trial hearing of 20 June 2017, the parties agreed to file a statement of agreed facts by 28 August 2017 if either party did not intend to call evidence at the appeal hearing set down for 25 September 2017. They duly did so and in accordance with the direction given at that pre-trial hearing. The appellant duly filed its heads of argument by 4 September 2017. The respondent also complied with those directions by filing its heads of argument on 15 September 2017. And as I indicated at the commencement of this judgment, the respondent raised the preliminary point for the first time in those heads. The raising of the preliminary point prompted the appellant to file supplementary heads on 22 September 2017, which dealt with the preliminary point.

At the hearing I agreed to hear the appeal both on the preliminary point and on the merits and thereafter reserve judgment.

The preliminary arguments

Mr *Magwaliba*, for the respondent, took the point that the decision objected to by the appellant in its letter of 9 September 2015 was one that could not be objected to in terms of s 62 (1) of the Act and consequently the determination made against such objection could not be appealed to the Special Court or the High Court sitting *in lieu* of the Special Court. He, therefore, submitted that not only did this Court lack jurisdiction to hear the appeal but that such an appeal was in any event a nullity. Mr *Tivadar*, for the appellant made contrary submissions and vehemently argued that this court had jurisdiction to determine the matter.

Mr *Tivadar* raised six grounds against the submission made by Mr *Magwaliba*. The first, which he took on the turn, was that a taxpayer was entitled to seek a refund of any overpaid fees from the Commissioner, in terms of s 30 as read with para 7 of the Seventeenth Schedule. These provide that:

"**30 Non-residents' tax on fees**

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

> "**SEVENTEENTH SCHEDULE (Sections 30 and 95)**
> NON-RESIDENTS' TAX ON FEES
> ***Refund of tax on fees***
> 7. If it is proved to the satisfaction of the Commissioner that any person or partnership has been charged with non-residents' tax on fees in excess of the amount properly chargeable in terms of this Schedule, the Commissioner shall authorize a refund in so far as it has been overpaid:
> Provided that the Commissioner shall not authorize any refund in terms of this paragraph unless the claim therefor is made within six years of the date of payment of such tax."

To the same effect is s 91 (5) which reads:

> **"91 Relief from double taxation**
> (5) Notwithstanding ……*proviso* (iii) to subsection (1) of section *forty-eight* which deals with ……..reductions and refunds, the Commissioner shall authorize reductions and refunds after the expiry of the period of three years referred to in those provisos if such…..reductions and refunds result from the carrying out of the provisions of any agreement entered into with the government of any other country or territory in terms of this section."

It is correct that the appellant has a statutory right to request a refund in terms of s 30 as read with para 7 of the Seventeenth Schedule of the Act within 6 years of the assessment. This statutory right is further enshrined in s 91 (5) of the Act. The correct and contrary contention made by Mr *Magwaliba* was that the Income Tax Act does not link these provisions to s 65 (1). In my view, these rights may clearly be enforced in other *fora* other than the Special Court. The Special Court is a creature of statute and cannot exceed the statutory mandate provided by s 65 (1) of the Act. These provisions do not confer jurisdiction on this Court to determine whether the refunds are due or not.

The second point he took was that the appellant was barred from raising the jurisdictional point without first amending its case. He based this ground on the provisions of rule 1 of the rules of this Court as read with r 133 of the High Court Rules. It was common cause that rule 1 of the Twelfth Schedule grants to the Special Court all the powers wielded by the High Court in civil actions and its general procedure and practice, save as specifically provided in the Twelfth Schedule itself. It was further common ground that r 133 of the High Court Rules permits a party to amend its pleadings by inserting written alterations on the pleadings or by interleaving additional documents bearing such an amendment to the original pleadings.

The second ground raised by Mr *Tivadar* flounders on the rock-solid sentiments expressed by GARWE JA in *Zimasco (Pvt) Ltd v Marikano* 2014 (1) ZLR 1 (S) at 9E-F that:

> "It is settled law that a question of law can be raised at any time, even for the first time on appeal, as long as the point is covered in the pleadings and its consideration involves no unfairness to the party against whom it is directed. See *Ahmid* v *Manufacturing Industries (Pvt) Ltd* SC 254/96 at p 17 and *Muchakata v Netherburn Mine* 1996 (1) ZLR 163 (S) at 157A."

While in the present appeal, the issue of jurisdiction was not specifically pleaded, by lodging the appeal in terms of s 65 (1) of the Act, the appellant implicitly pleaded the jurisdiction of this Court to determine the appeal. Again, the jurisdictional facts which found the objection and appeal all appear *ex-facie* the pleadings and thus preclude the production of further documentary or even oral evidence as incorrectly suggested by Mr *Tivadar* in both his oral and written submissions. The question of jurisdiction is clearly a question of law and in my view was properly raised for the first time in the respondent's heads of argument on appeal. In any event, not only do I agree with but I am specifically bound by the earlier sentiments of GARWE JA in the *Zimasco* case at 9D-E that:

> " As Mr *de Bourbon* correctly pointed out, where an issue of law, particularly one of jurisdiction, is raised, a court should be slow to refuse to allow such further argument unless the court is satisfied that such further argument would not take the matter any further or that it amounts to an abuse of court process."

The submission by Mr *Tivadar* that the respondent should have preceded the jurisdictional argument by amending its case is not borne out by these Supreme Court sentiments. I am satisfied that the jurisdictional argument is one that goes to the very root of this appeal and that it does not amount to an abuse of process. Accordingly, the second ground raised by Mr *Tivadar* must fail.

The third ground raised against the refusal of jurisdiction was that the appellant would have been effectively non-suited while the respondent would be unjustly enriched. I agree with Mr *Magwaliba* that this Court is a creature of statute, which cannot exceed the jurisdiction conferred on it by s 65 (1) of the Income Tax Act. In any event there exists in our jurisdiction a court of inherent jurisdiction conferred with all necessary powers to deal with any issue and grant any competent relief under the sun to which the appellant, if so advised, could have recourse to. The suggestion therefore that denial of jurisdiction in this court would be tantamount to a denial of access to justice to the appellant in this country was therefore not only incorrect but devoid of merit.

The fourth ground, as I understood it, was that by objecting to the refund refusal decision, the appellant was in substance objecting to the assessments of the NRTFs. In my

view, this was an explicit concession by the appellant that its objection in fact was directed at the decision refusing to refund the paid NRTFs and not on the specific assessments relating to the NRTFs. The question whether a self-assessment is an assessment made in terms of the Act and whether the respondent formally assessed the appellant with respect to each NTRFs payment are really irrelevant in the determination of whether the appellant objected to an assessment or to the refund refusal decision. I am satisfied from the manner in which the appellant's correspondence were couched from the 16 April 2015 to the objection letter of 9 September 2016 and from the consequent responses of the respondent from 23 April 2015 to the determination of 13 October 2016 that the subject matter between the parties related to the refund of the NRTFs and not to the assessments of the NRTFs. The challenge to the assessments was raised for the first time in the Appellant's case in contradiction to the objection raised in the letter of objection and contrary to the provisions of s 65 (4) of the Income Tax Act. It did not have the consent of the respondent nor did it seek leave of the Court to rely on a new cause of action.

However, for what it is worth, I am satisfied that that a self-assessment is deemed to be an assessment served by the Commissioner on the taxpayer on the date it was submitted or on the date it was due to for submission. This is because s 37A (1) obliges every taxpayer to furnish the respondent with a self-assessment in which the tax is computed and subs (11) thereof treats the furnished self-assessment as an assessment served by the Commissioner on the later of the due date or the actual date of furnishing the return. It seems to me that the wording of s 37 (11) constitutes a statutory exception to the definition of assessment portrayed in *Barclay Bank Ltd* v *ZIMRA* 2004 (2) ZLR 151 at 154D-E. In any event, the definition of assessment in s 2 of the Act includes the self-assessment. The contention by Mr *Magwaliba* that the self-assessment was only an assessment for the limited purpose of computing the dates on which the six-year prescription envisaged in proviso (ii) to s 47 (1) began to run overlooked the point that prescription only begins to run on a valid assessment. His contention was therefore self-defeating and incorrect.

The fifth ground was that the objection was treated by the respondent as valid. It is correct that in the letter of 11 September 2015, determination of 13 October 2016 and item 3 of the index to the r 11 documents the respondent referred to the letter of 9 September 2015 as a letter of objection. But like the appellant itself the respondent regarded the subject matter of objection to be the refusal to refund and not the individual assessments of the NRTFs. This Court is not bound by an erroneous view of the law held by a litigant. Thus, the fact that the

Commissioner treated the objection as validly made does not confer jurisdiction on this Court to determine the appeal against the clear provisions of s 65 (1). The jurisdiction of this Court as a creature of statute, in the absence of an empowering provision to that effect, cannot be conferred by litigants. The fifth ground must also fail.

The last point of disagreement was that the objection was valid as it related to an assessment. I agree with Mr *Magwaliba* that the objection did not relate to an assessment. It was an objection to the refund refusal decision. Counsel were agreed that jurisdiction to hear appeals by the Special Court or the High Court sitting in the seat of the Special Court is conferred by s 65 (1) of the Act. It reads:

> "**65 Appeals from decision of Commissioner to High Court or Special Court**
> (1) Any taxpayer entitled to object and who is dissatisfied with the decision or deemed decision of the Commissioner in terms of subsection (4) of section *sixty-two*, may, in accordance with the rules set out in the Twelfth Schedule, appeal therefrom either—
> (*a*) to the High Court; or
> (*b*) to the Special Court.

And the referenced s 62 (4) provides that:

> "(4) On receipt of a notice of objection to an assessment, a decision or the determination of a reduction of tax the Commissioner—
> (*a*) may reduce or alter the assessment, alter the decision or, as the case may be, increase or alter the reduction or may disallow the objection; and
> (*b*) shall send the person upon whom the assessment has been made or to whom the decision has been conveyed or, as the case may be, to whom the reduction has been allowed, notice of the reduction, increase, alteration or disallowance.
>
> Provided that, if the Commissioner has not notified the person who lodged the objection of his decision on it within three months after receiving the notice of objection, or within such longer period as the Commissioner and that person may agree, the objection shall be deemed to have been disallowed."

The decisions that may be appealed are prescribed in s 62 (1) which states:

> **"62 Time and manner of lodging objections**
> (1) Any taxpayer who is aggrieved by—
> (*a*) any assessment made upon him under this Act; or
> (*b*) any decision of the Commissioner mentioned in the Eleventh Schedule; or
> (*c*) the determination of a reduction of tax in terms of section *ninety-two*, *ninety-three*, *ninety-four*, *ninety-five* or *ninety-six*;
>
> may, unless it is otherwise provided in this Act, object to such assessment, decision or determination within thirty days after the date of the notice of assessment or of the written notification of the decision or determination in the manner and under the terms prescribed by this Act:"

I have already held that the objection did not relate to the assessments but to a decision against a refusal to refund the fees. The decisions made by the Commissioner that are

appealable are set out in para 1 of the Eleventh Schedule to the Income Tax Act. I agree with both counsel that the refusal to make a refund of paid tax is not one of the many decisions that are enumerated in that Schedule. Again, I agree with counsel that subs (1) (c) of s 62 above, has no application in the present matter. It must follow from the above finding that the notice of objection was invalid *ab initio* and was of no force or effect. See *the Zimasco* case, *supra,* at 10A and *MacFoy* v *United Africa Co. Ltd* [1961] 3 All ER 1169 (PC) at 1172 and *Jensen* v *Acavalos* 1993 (1) ZLR 216 (S) at 220C-D.

An appeal is founded on the notice of objection. In the absence of a valid notice of objection, there cannot be a valid appeal. Accordingly, the point raised by Mr *Magwaliba* that this Court lacks the jurisdiction to preside over this appeal was well taken. In the result, the appeal must be struck off the roll. But for the reason that this point was taken at the eleventh hour, I would have granted the respondent its costs. In the premises I will order that each party shall bear its own costs.

The merits

I proceed to deal with the merits of the appeal on the off chance that I may be wrong in upholding the preliminary point and in view of the protracted arguments made by both counsel. I am satisfied that the appeal on the merits was unstainable. These are my reasons.

The Statement of Agreed Facts

The parties proceeded by way of a statement of agreed facts. The agreed facts were that:

1. The appellant is a registered tobacco merchant engaged in the business of purchasing farmer tobacco, processing and blending the same for export.
2. CNT is a company registered in the Federal Republic of Germany.
3. The appellant entered into various Credit Facility Agreements, the facilities, relating to the years 2012 to 2014
4. The sourcing of these facilities was undertaken by CNT, which arranged, negotiated and underwrote the facility in Germany. In return, the appellant agreed to pay CNT a commitment fee and an arrangement/underwriting fee for 0.5% and 3.5%, respectively of the amounts specified in the facilities.
5. The appellant paid a total of US$597 777.71 to ZIMRA as non-residents' tax on fees, NRTFs, on the commitment and arrangement/underwriting fees paid to CNT pursuant to the facilities in relation to years 2012, 2013 and 2014.

I will deal with the further agreed facts taken in argument by the parties and drawn from the pleadings and the r11 documents as I resolve the issue referred on appeal on the merits.

The issue

The issue referred on appeal was whether the appellant was obliged to account for NRTFs due to CNT during the tax years 2012 to 2014 in terms of the various credit facility agreements entered into between the appellant and that company.

The resolution of the issue

Whether the appellant was entitled to pay the NRTFs depends on the construction of the Double Taxation Agreement, DTA, concluded between the Republic of Zimbabwe and the Federal Republic of Germany on 22 April 1988 and domesticated in Zimbabwe by Statutory Instrument, SI, 141 of 1988 as further corrected by SI 170 of 1989.

The Double Taxation Agreement

The purpose of the DTA enshrined in the heading and preamble was, *inter alia*, for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, capital and capital gains. In terms of Article 2 (3) (b) (v), amongst the Zimbabwean taxes to which the DTA applied were the NRTFs, with which we are concerned in this appeal.

The term permanent establishment, PE, is defined in Article 5 (1) and (2) as entailing "a fixed place of business through which the business of the enterprise is wholly or partly carried on" and includes among others, a place of management, a branch or an office. In terms of para 4 of the same article, it excludes the six activities listed thereon that are to do with collating information, purchasing goods or merchandise, conducting any preparatory or auxiliary activities, maintenance of stock of goods or merchandise solely for purposes of processing by another enterprise and maintenance of goods and merchandise and business belonging to the foreign entity solely for storage, display or delivery. The term excludes the operations of an independent contractor acting for the foreign resident in the ordinary course of that independent contractors' business. However, where any other person habitually contracts in the name of the foreign resident in the Contracting State in which the foreign resident is not resident, then the foreign resident is deemed to have a permanent establishment in the foreign State.

In terms of Art 7 (1) and (5), business profits emanating from a permanent establishment other than those arising from the mere purchase of goods or merchandise are taxed in the country in which the permanent establishment is located. In terms of para (7) thereof, Article 7 is inoperable where the profits include income which is dealt with under the provisions of other articles.

Art 12 deals *inter alia* with fees for technical services. I reproduce the salient paragraphs of this Article.

(1) Royalties and fees for technical services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.
(2) However, such royalties and fees for technical services may also be taxed in the Contracting State in which they arise, and according to the laws of that State, but if the recipient is the beneficial owner of the royalties or of the fees for technical services the tax so charged shall not exceed 7 ½ per centum of the gross amount of such royalties and fees for technical services. The competent authorities of the Contracting States shall, by mutual agreement, settle the mode of application of this limitation.
(3) ….
(4) The term "fees for technical services" as used in this Article means payments of any kind to any person, other than payments to an employee of the person making the payments, in consideration for any services of a managerial, technical, administrative or consultancy nature rendered in the Contracting State of which the payer is a resident."

In terms of para (5), para (1) and (2) do not apply where the beneficial owner carries on business in the paying State through a PE or performs independent personal services from a fixed base in the paying State and the right, property or contract from which the fees arise, only then will Art 7 and 14 apply. And in terms of para (6) fees for technical services shall be deemed to arise in the Contracting State when the payer is amongst other things, a resident of that State. Where the payer has a PE or fixed base from which fees are incurred and payable then the fees are deemed to arise from the State in which the PE is situated.

In terms of Article 21, "items of income of a resident of a Contracting State, wherever arising which are not dealt with in the foregoing Articles of this Agreement shall be taxable only in that State." In terms of article 23, (1) (a) and (b) any income due to a German resident that is taxed in Zimbabwe, including fees on technical services, will not be taxed in Germany.

The respondent subjected the appellant to NRTFs on the basis of the above-mentioned provisions of Article 12 (4), which defines fees for technical services as used in the DTA.

The essential factors upon which the appellant is entitled to pay NRTFs are these:

(a) Payments of any kind to any person, other than employee of the payer,
(b) In consideration for any services of a managerial, technical, administrative or consultancy nature,
(c) Rendered in the Contracting State where the payer is a resident.

The appeal impugns the assessments made by the Commissioner that the appellant was liable to pay the NRTFs in the 2012, 2013 and 2014 tax years. In terms of s 63 of the Act, the onus on objection and appeal to establish on a balance of probabilities that it was not liable to pay the NRTFs and that the decision of the Commissioner was wrong rests on the appellant.

The onus does not lie on the Commissioner to show that the appellant was liable to pay the NRTFs or that his decision was correct as Mr *Tivadar* suggested in both his written and oral submissions.

I proceed to apply each factor to the facts of this appeal.

(a) Payments of any kind to any person, other than employee of the payer

It was common cause that the appellant made payments of money to the foreign resident. The appellant therefore failed to impugn the first factor. When the fees for technical services arise from Zimbabwe, as in this case, they become eligible for taxation in both Germany and Zimbabwe in terms of paras (1) and (2) of Article 12, respectively. In terms of Article 23 (1) Germany would not tax such fees, if they were taxed in Zimbabwe.

(b) In consideration for any services of a managerial, technical, administrative or consultancy nature

In para 19 of its case, the appellant averred that ZIMRA misconstrued the provisions of Art 12 (4) in arriving at the decision that NTRFs were payable by appellant. In response, the respondent in para 5 of the Commissioner's Case, disputed the averment and placed the onus on the appellant to prove that averment. In the letter of 20 August 2015, the respondent regarded the commitment fees and arrangement/underwriting fees paid to the lender as charged and paid for technical and administrative services and in the determination as made for administrative and consultancy services.

The basis for the respondent's finding was that the fees were paid not just for negotiating, arranging and underwriting the facilities as indicated in the statement of agreed facts but also, as specified in the facilities, for the full participation and co-operation of the lender in the strict application of the funds in the growing schemes of the farmers contracted to produce Flue Cured Virginia, FCV, tobacco and the purchase and sale of the tobacco in the respective seasons to which the facilities related. The lender protected the facilities and interest in three ways. The first was by way of collateral on pledged goods consisting of all green tobacco and packed tobacco, all the appellant's accounts receivables from tobacco sales and other goods and services against the growing schemes and contracted farmers. The second was by purchasing the blended and processed tobacco from the appellant and the third was by setting off the appellant's indebtedness to the lender against the appellant's sales to the lender and "trade and other accounts payable" against the pre-finance facilities.

The modalities of monitoring strict application of pre-financing the appellant's growing schemes and contracted farmer, if any, which were designed by the lender were not disclosed

by the appellant. What was clear to me was that the agreement presaged a deeper and intricate business relationship between the foreign lender and the appellant, which the appellant did not disclose. The bald averment made in the pleadings and in argument that the lender did not conduct business activities, that fell into either of the four delineated categories of managerial, technical, administrative or consultancy was inadequate to establish that averment on a balance of probabilities. Such an averment was not supported by any facts concerning the activities undertaken by the foreign lender which underscored the co-operation in the purchase and sale of tobacco by the appellant and the requisite strict monitoring of the drawdowns and their application to the agreed activities. The sparse information disclosed by the appellant's managing director in the letter of 16 April 2015 was that the lender financed and sold packed tobacco in international markets. It was common cause that the foreign lender financed and purchased packed and blended tobacco from the appellant as envisaged in the facilities.

I dealt with an analogous case involving another tobacco merchant kindred to the appellant in *M Co (Pvt) Ltd* v *Commissioner-General, ZIMRA* 2016 (2) ZLR 112 (SCITA). The facts in that matter were distinguishable from the present matter. However, that case disclosed the intricacies involved in funding growing schemes and contract farmers and in the purchase of tobacco from contract farmers by the tobacco merchant for on sale to international buyers. It also revealed the intimate managerial, technical, administrative and consultative involvement of offshore lenders in the purchase of such tobacco from the tobacco merchants such as the appellant. Some negotiated prices with tobacco merchants in Zimbabwe while others were content with receipt of tobacco leaf samples offshore. The colour and appearance, the sugar and nicotine levels, and the texture and quality of the export tobacco were all assessed by the international purchasers such as the foreign lender, in person or by proxy in Zimbabwe. I mention these factors to demonstrate that the epithet "purchase and sale of tobacco" in the facilities covered a wide range of practical activities of the foreign lender envisaged in the facilities. As I understand it, clause 2 (a) of each facility envisaged the payment of the commitment fees and arrangement or underwriting fees for all the activities recorded in each such facility.

In both *G Bank Zimbabwe Ltd* v *ZIMRA* 2015 (1) ZLR 348 (H) at 379G-380A and *M Co (Pvt) Ltd, supra*, at 125F-128B, I endeavoured to define the meaning of "any services of a managerial, technical, administrative or consultative nature" in the Seventeenth Schedule of our Income Tax Act. In the latter case, at 128E I held that there were hardly any activities of a

taxpayer that would escape the wide embrace of each of those four categories. In the former I said words to the same effect at 380A.

In the present case, it seems to me that the appellant did not even begin to discharge the onus on it to show on a balance of probabilities that the activities covered in the facilities of co-operation and strict monitoring of the application of drawn funds to the growing schemes and contract farmers and the purchase and sale of packed tobacco did not fall into each of the four categories of "a managerial, technical, administrative or consultancy nature."

(c) *Rendered in the contracting State where the payer is a resident*

The respondent averred in para 11 of its case that:

> "The main service that was supplied by CNT was that of providing a credit facility to the appellant. Such service was provided in Zimbabwe as money was provided in Zimbabwe where it was to be used to buy tobacco in the respective seasons. The duties carried by CNT in Germany was merely preparatory and incidental to the main service of providing the credit facility. It is the latter service that the appellant was paying for and not the former."

The duty to establish that this averment was incorrect lay on the appellant. Mr *Tivadar* contended that in terms of para 4 of the statement of agreed facts the arrangements negotiations and underwriting for the facilities were done in Germany and that the commitment fees and arrangement/underwriting fees were in respect of these activities. Para 4 of the statement of agreed facts does not set out the full picture concerning the payments. Both counsel correctly in my view contended that the statement of agreed facts was further supplemented by the uncontested averments in the pleadings and r 11 documents, to which they both liberally referenced in both their oral and written submissions.

In the preamble the parties undertook not only to cooperate in the purchase and sale of tobacco in each season but CNT further undertook to pre-finance the appellant's expenses for each season's crop in Zimbabwe. The money was required and strictly applied to purchase inputs required to support the contract farmers produce Flue Cured Virginia tobacco and in one instance Burley tobacco in Zimbabwe. In terms of clause 1(b) and (c), the draw-downs could be done in part or in full. In terms of clause 2 (a) the commitment and arrangement/underwriting fees were not just for the arrangement, negotiation and underwriting of the credit facilities but were for the entire credit facilities. In fact, in the letter of 3 July 2015, which the appellant adopted as part of the agreed statement of facts, the tax consultant averred that "these fees were not only to compensate for CNT's risk in providing the facility to the appellant but also to compensate for CNT's time and costs incurred in negotiations with the providers of finance to fund the draw-downs by the appellant." Again, in the letter of objection

the tax consultants averred that the appellant "secured a financing facility with CNT whereby the later avails the former with credit finance in return for fees." The further averment by Mr *Tivadar* in his written heads that the payment of these fees were payable irrespective of whether the money was drawn down or not was not borne out by the above mentioned quotation in the letter of 3 July 2015 which links the payment of the fees to the draw-downs. That the fees payments were triggered by the actual draw-downs is further reinforced by the 11 self-assessments filed by the appellant which link the date of payment of the fees to the draw-downs.

The appellant did not lead any evidence to explain in concrete terms how the co-operation in the purchase and sale of tobacco took place between the appellant and the foreign resident. It was clear from clause 2 (d) of the facilities that the foreign resident purchased packed tobacco from the appellant. In terms of that clause repayments of all amounts due by the appellant were in the first instance offset against the net purchase of the packed tobacco sold by appellant to the foreign resident. Again, the foreign resident was availed an open cheque to set off "trade and other accounts payable", a euphemism for its indebtedness to the appellant, against the pre-finance facilities". This was again confirmed by the tax consultant in the letter of 3 July 2015, who underscored that the repayments of the drawdowns with interest were "deductible from the proceeds due to the appellant for tobacco sold by the appellant to the foreign resident". In addition, in terms of clause 3 (a) of each facility not only did the appellant irrevocably pledge to the foreign resident all green tobacco and its equivalent part as packed tobacco (lamina by-products) and other inventories but it also assigned all accounts receivable due to sales of tobacco or other goods and services as well as demands towards their growing schemes and their contracted farmers to the foreign resident. And lastly, in terms of clause 3 (c), the foreign resident was made the beneficiary or the "loss payee" on all insurance policies procured by the appellant.

I have highlighted these clauses to demonstrate the complex business relationship of lender and the borrower, co-operating partners in the purchase and sale of tobacco from local farmers and seller and buyer of the very same tobacco that existed between the appellant and the foreign resident. The respondent did not lead any evidence to show the modalities that were put in place by both parties to manage this relationship. In my considered view, it would have been reasonable possible for the foreign resident, being an international purveyor of processed tobacco, to have been intimately involved in the management of the purchase and sale of the tobacco in Zimbabwe.

I find myself in agreement with Mr *Magwaliba* that the purchase and sale of the tobacco that the parties pledged co-operation and the collateral arrangements all must have taken place in Zimbabwe. I also agree with him that the drawdowns of the facilities to be effective for the appellant, could only have taken place in Zimbabwe where the money was to be strictly used to grow FCV tobacco. At the very least the appellant did not lead any evidence to establish that the drawdowns took place in Germany or any other place that was outside Zimbabwe. The contention by the appellant that no money was provided in Zimbabwe was misplaced. The provision of the credit facilities was admitted by the appellant's managing director in para 6 of his letter of 16 April 2015. The very fact that the parties signed so many facilities in any given year in the three years confirmed the provision of the money in Zimbabwe. This was further confirmed by the drawdowns that were recorded in the self-assessments. It seems to me that the nature and context of the facilities, most of the services for which the commitment and arrangement or underwriting fees were paid for, were provided by the foreign entity in Zimbabwe.

Accordingly, I would have found that the appellant was entitled to pay the NRTFs arising from the payment of the commitment and arrangement or underwriting fees on the basis of para (4) as read with para (2) of Article 12 of the DTA between Zimbabwe and Germany. In view of the requirements of s 65 (12) of the Income Tax Act, I would have ordered each party to bear its own costs.

Disposition

The appeal was erroneously filed in the Special Court for Income Tax Appeals. I have no jurisdiction to determine it. However, as the issue of jurisdiction was raised at the eleventh hour, I will order each party to bear its own costs.

Accordingly, the appeal is struck off the roll, with each party to bear its own costs.

Gill, Godlonton and Gerrans, the appellant's legal practitioners