IN THE HIGH COURT OF MALAWI

REVENUE DIVISION

CIVIL APPEAL NUMBER 26 OF 2015

BETWEEN:

CHIBUKU PRODUCTS LTD APPELLANT

AND

MALAWI REVENUE AUTHORITY RESPONDENT

CORAM: THE HONOURABLE JUSTICE JOSEPH CHIGONA

MR SAUTI PHIRI, OF COUNSEL FOR THE APPELLANT

MR ANTHONY CHUNGU, COUNSEL FOR THE RESPONDENT

MR KAMCHIPUTU, OFFICIAL COURT INTERPRETER

CHIGONA, J.

ORDER

BACKGROUND:

The background to this appeal is as follows: Chibuku Products limited, herein referred to as the Appellant, is a subsidiary of SABMiller Plc, a parent company incorporated in the United Kingdom. There was a double taxation agreement (DTA) between Malawi and the Netherlands and on the hand, between Malawi and the United Kingdom, though it is said the application of the two agreements differ.

SABMiller Plc owns wholly 100% of SABMiller Management BV, a company incorporated in the Netherlands, a tax heaven. On 15th March 2005, the Appellant entered into a management agreement with SABMiller management BV. SABMiller management without employees, in turn entered into an agreement with its mother company, SABMiller Plc (UK) in order that SABMiller management BV renders management services to Chibuku Products Limited, on behalf of SABMiller Plc (UK). It is said that SABMiller Plc also entered into a contract for provision of accounting and directory services to Chibuku products limited with SABMiller management BV alongside execution of the management services contract. Pursuant to the two agreements, the Appellant paid a total of MK351, 014, 880 in management fees to a UK based account where SABMiller Plc (UK) is. The accounts into which the management fees were deposited by the Appellant are in the name of SABMiller management BV but managed in the UK by SABMiller Plc (UK). The Respondent accordingly calculated non-resident tax totaling to MK52, 652, 232 for the management fees paid between the period of April 2005 and August 2009. The Appellant appealed against the payment of the said non-resident tax on the grounds of jurisdiction through an appeals committee and the Commissioner General rejected the appeal on 7th September 2010 on the ground that Malawi has taxing jurisdiction over the said paid management fees. Being dissatisfied with the determination by the Commissioner General, the Appellant lodged an appeal with the Special Arbitrator. Further, being dissatisfied with the Special Arbitrator's determination, the Appellant commenced the present appeal proceedings.

The Appellant's filed their grounds of appeal. Suffice to mention that the respondent also cross appealed against the decision of the Special Arbitrator. I will first deal with the grounds of appeal as advanced by the Appellant. I am mindful of the rules of procedure that an appeal of this nature is a rehearing.

There are five grounds of appeal as advanced by the Appellant. The first ground of appeal, which in my opinion, is the major ground of appeal, is that the Special Arbitrator erred in law in holding that the Malawi/Netherlands Double Taxation Agreement does not exempt management fees, and that his finding that management fees paid to a Netherlands taxpayer are subject to Malawi non-resident tax. Counsel for the Appellant submitted that the Malawi/Netherlands Double Taxation Treaty is the proper instrument to apply in a transaction between the appellant and a tax resident of the Netherlands. In his oral submission, counsel submitted that the Malawi/Netherlands DTA does not exclude management fees.

Counsel stated that management fees are commercial and industrial profits under the Malawi/Netherlands DTA because they are not specifically excluded, unlike in the case of Malawi/UK DTA, where management fees are expressly excluded.

In response to this ground of appeal, counsel for the Respondent submitted that the Malawi/Netherlands Treaty does exclude management fees. Counsel stressed the point that management fees are not mentioned anywhere in Malawi/Netherlands DTA. He argues that it is not for the court or Appellant to import something into the DTA which is not included. Counsel submitted that the Special Arbitrator was correct when he found that both the Malawi/UK and Malawi/Netherlands DTAs, management fees are not exempted. Let me deal first with this ground of appeal.

The Malawi/UK DTA, Article 11 (1) (j) states the following:

> " The term 'industrial or commercial profits includes profits from such activities or business and also includes rents or royalties in respect of cinematograph films but does not include income in the form of dividends, interest, rents, royalties (other than rents or royalties in respect of cinematograph films), management charges or remuneration for personal services…"

It is very clear that the above definition excludes management charges/fees, a finding the Special Arbitrator made, which the appellant does not agree with.

Article 11 (1) (j) of the Malawi/Netherlands DTA states the following:

> "Industrial or commercial profits includes rents or royalties in respect of cinematograph films"

It is the argument of counsel for the Appellant that the Special Arbitrator erred in law when he decided that management fees, under the Malawi/Netherlands DTA are excluded. Let me mention that I do not subscribe to the reasoning of counsel for the Appellant. It is so clear under the Malawi/Netherlands DTA that management fees are excluded. I do not think, with due respect to counsel, that simply because management fees are not explicitly excluded as the Malawi/UK DTA has done, then the intention of the parties was to include them. The parties were at liberty to specifically include management fees under that definition, which they did not. Now, for counsel for the Appellant to conclude that simply because management fees are not specifically excluded, then they are included, will be tantamount to this court re-writing the Malawi/Netherlands DTA, which is so clear. I therefore hold that this ground of appeal fails.

The second ground of appeal advanced by the Appellant is that the Special Arbitrator violated the maxim *pacta sunt servanda* which states that every treaty in force is binding upon the parties to it and must be performed by them in good faith. Counsel submitted that this *maxim* is contained in Article 26 of the Vienna Convention on the Law of Treaties and that Malawi is a party to this Vienna Convention. Counsel submitted that if Malawi now wants to adopt an interpretation of the Malawi/Netherlands DTA and that interpretation now differs from that of the Netherlands, it must firstly negotiate with Netherlands to find a common interpretation before implementing a different interpretation. In his oral submission, counsel submitted that the intention of the two countries was that management fees be exempted from double taxation. In other words, counsel is arguing that Malawi is not observing the principle of good faith in taxing management fees. In response, counsel for the respondent submitted that this ground of appeal cannot hold as the Special Arbitrator interpreted the Malawi/Netherlands DTA correctly and in good faith.

I am at pains to grasp the argument of counsel for the Appellant. I am of the humble view that the Special Arbitrator was merely interpreting the Malawi/Netherland DTA as intended by the parties. Counsel for the Appellant has not brought any satisfactory evidence to show that the Special Arbitrator interpreted the DTA in bad faith. As alluded to under the first ground, it will be illegal for this court to imply that the Malawi/Netherlands DTA excludes the management fees as does the Malawi/UK DTA. I do not think that the Special Arbitrator by holding that the Malawi/Netherlands DTA excludes management fees is a sign of lack of good faith. The Special Arbitrator was interpreting exactly what is contained in that treaty. I therefore also hold that this second ground of appeal fails.

The third ground of appeal was that the Special Arbitrator used literal interpretation of the treaty instead of liberal interpretation. Counsel for the Appellant submitted that a tax statute requires strict interpretation whereas treaties require liberal interpretation. Counsel for the Appellant cited the case of **UNION OF INDIA V AZADI BACHAO &ANOTHER**[1], where it was stated that the interpretation of a treaty imported into law by indirect enactment was described as being unconstrained by technical rules of English law, or by English Legal precedent, but conducted on broad principles of general acceptation. The judges

[1] (2003) 263 ITR 706 SC

said that this echoes the optimistic dictum of Lord Widgery CJ that the words are to be given their general meaning, general to lawyer and layman alike.... The meaning of a diplomat rather than a lawyer. Counsel for the Appellant submitted that the true intention of the Malawi/Netherlands DTA is expressed in the second schedule where it describes desire of the two governments to conclude a Convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income. Counsel stated that the treaty was entered in order to avoid double taxation. In response, counsel for the Respondent submitted that it is not correct to say that the Special Arbitrator applied strict interpretation simply because he found that management fees are excluded.

I agree with counsel for the Respondent that the Special Arbitrator interpreted the Malawi/Netherlands DTA as it ought to be interpreted. I am of the humble view that where words in a treaty are clear, there is no need to give a general/purposive interpretation as counsel for the Appellant would want this court to believe. Where the treaty is clear, I do not see the reason of getting interpretation somewhere. The Malawi/Netherlands DTA excluded management fees. There is no any ambiguity at all as to refer to other aids of interpretation. I am of the humble view that applying liberal interpretation where literal and strict interpretation is not creating any ambiguity is tantamount to disregarding the intention of the parties when they excluded management fees. I therefore hold that this third ground also fails in its entirety.

The fourth ground of appeal is that the Special Arbitrator misconceived the definition of industrial or commercial profits quoted in the book **Simon's Taxes, Income Corporation Tax, Capital Gains, Revised 3rd Edition**. Counsel for the Appellant submitted that the Special Arbitrator misconstrued the passage quoted because it does not support the opinion that management fees are not covered by the Malawi/Netherlands DTA. Rather counsel submits that it supports the opinion that the Malawi/Netherlands DTA exempts management fees paid to a Netherlands resident taxpayer from Malawi non-resident tax because they are included in the definition of industrial or commercial profits. In response, counsel for the Respondent submitted that whatever root is taken, management fees will not qualify as an exemption fees under the Malawi/Netherlands DTA.

In the book, **Simon's Taxes, Income Tax, Corporation Tax, Capital Gains Tax,** the authors write as follows with respect to industrial and commercial profits:

> " The industrial and commercial profits of an enterprise of one country are exempt from tax in the other, except to the extent that they arise from a permanent establishment in the latter. When industrial and commercial profits are defined for this purpose, they normally mean income from a trade or business, including the business of providing the services of personnel, but excluding-
>
> (a) dividends, interests, royalties and rents, unless these are connected with the business of the permanent establishment; and
>
> (b) remuneration for personal (including professional) services."

The Special Arbitrator arrived at a conclusion that management charges or remuneration for personal services are specifically excluded from industrial or commercial profits. He went further to state that ordinarily management charges are not industrial or commercial profits and in a DTA which provides for an exemption of industrial or commercial profits of an enterprise of one country from tax in the other, this does not include management fees. He stated that unless the Malawi/Netherlands DTA specifically includes management fees as industrial or commercial profits, the same will not be exempted.

I am of the humble view that the Special Arbitrator did not misconstrue the definition of industrial or commercial profits as defined in the book quoted above. The authors of the book are so clear as to what industrial or commercial profits are, which the Special Arbitrator grasped very well. It is very clear from the definition above that management charges/fees are not part of the industrial or commercial profits. I am of the firm view that if Malawi/Netherlands Treaty wanted to have management fees as part of the industrial or commercial profits, they could have provided exactly so in the DTA. The Special Arbitrator in quoting the interpretation advanced by the authors was just trying to enrich the argument that management fees are not industrial or commercial profits. I totally agree with the Special Arbitrator and subsequently, I also hold that this ground of appeal has failed.

The fifth ground of appeal is that the Special Arbitrator misconducted himself by failing to make a decision on a vital matter in dispute. Counsel for the Appellant submitted that the Special Arbitrator failed to make a determination as to residence of SABMiller Management BV. In his submission, he stated that SABMiller

management BV is a resident of Netherlands. Counsel submitted that if the Special Arbitrator conducted himself properly, he could have found that the Malawi/Netherlands DTA, which excludes management fees, was the one to apply herein. He submitted that by failure to make such a determination, the Special Arbitrator committed a misconduct, which resulted in an injustice to the Appellant. In response , counsel for the Respondent submitted that they are in total agreement with the determination of the Special Arbitrator on this point and in fact prayed to this court to develop jurisprudence in this area. I have noted that this ground of appeal is the same as the respondent's second ground of cross appeal. It was submitted by the Respondent that the applicable DTA was the Malawi/UK looking at the facts of the case. I am of the considered view that these two grounds of appeal can as well be dealt with together.

In their cross appeal, in a nutshell, the Respondents submitted that decisions affecting SABMiller management BV were all made by the parent company, SABMiller plc based in the United Kingdom. They submitted that the tax payable on management fees was deposited into an account of SABMiller management BV in the United Kingdom, which the Respondent alleges that its management vests in the parent company. The Respondent submitted that there was no evidence that the same was remitted to SABMiller management BV in Netherlands. They continued to submit that management and control of SABMiller management BV was in the United Kingdom and not the Netherlands. They also submitted that by virtue of the fact that SABMiller management BV has no employees in the Netherlands only shows that the beneficiary of the management fees was the parent company and not the subsidiary company, SABMiller management BV. To the Respondents, all these facts show that the applicable treaty was the Malawi/UK DTA. The Appellants submitted that the applicable treaty is the Malawi/Netherlands DTA. Counsel for the Appellant submitted that the company is a resident of the Netherlands as evidenced by **AM4** and **AM4A,** being a tax certificate issued by a competent authority, Inspector of Taxes, in the Netherlands. Counsel argued that SABMiller management BV is not a sham and that its management and control are in the Netherlands. Therefore, the question that I have to resolve is which treaty is applicable between the Malawi/Netherlands DTA and the Malawi/UK DTA.

The Special Arbitrator, on reasons well explained in his determination, indeed did not make a determination on this point. He reasoned that under both the Malawi/Netherlands DTA and Malawi/UK DTA, management fees are not exempted from taxation. At that point, he expressly stated in his determination that

it was not necessary to delve into issues of whether SABMiller Management BV is resident in the United Kingdom or Netherlands.

I totally agree with the Appellant that the Special Arbitrator was supposed to make a determination as to which Treaty was to apply. I am of the considered view that the Special Arbitrator had all the information he needed to make such a decision. Having said that, let me now resolve that issue. I am of the humble view that the UK/Malawi DTA is applicable and not the Malawi/Netherlands DTA. I agree with counsel for the Respondent that looking at the evidence adduced herein, one would reasonably conclude that SABMiller management BV, a subsidiary company of SABMiller Plc of the United Kingdom is a sham, only aimed at assisting the parent company enjoy more economic and financial gains.

First and foremost, as a subsidiary company, one would have anticipated that SABMiller management BV will have its own employees, which is not the case. Counsel for the Appellant submitted that the company uses mostly agents and consultants to discharge its duties in all subsidiary companies of SABMiller Plc. However, there was no evidence to that effect that the company uses agents or consultants to discharge its duties. As a subsidiary company, definitely, it was supposed to have at least a handful number of employees in the Netherlands where it is incorporated. One wonders whether this company has registered offices in the Netherlands. If it does, I find it untenable that that registered office can operate without any employees. It is surprising that the company can only operate without a single employee in the Netherlands.

Further, SABMiller management BV has to receive the payment of the management fees through accounts in its name but located in the United Kingdom where the parent company is. Though one may argue that this is done in multinational companies to administratively manage the companies scattered all over the world, I do not think that all those companies across the world are to have accounts in the country of residence of the parent company. These subsidiaries are to some extent autonomous. In fact, if that is the case, I am of the opinion that this arrangement can even be a cause of hardship in the administration of these subsidiaries. As if that is not enough, there is no evidence that SABMiller management BV received the money from the United Kingdom. There is no evidence of remittance as correctly pointed out by the Respondent . Further, there is no evidence that the company in the Netherlands has its own accounts. All these constitute special circumstances that show that the beneficiary of the management

fees was the parent company. A reasonable man or a competent tribunal looking at all these facts will definitely conclude that SABMiller management BV only exists on paper. In the case of **Vodafone International Holdings B.V. V Union of India & Anr**[2], the court stated the following:

> " ...in case of multinationals it is important to realize that their subsidiaries have a great deal of autonomy in the country concerned except where subsidiaries are created or used as a sham. Of course, in many cases the courts do lift up a corner of the veil but that does not mean that they alter the legal position between the companies...."

I agree with the reasoning in this case that subsidiaries are to be autonomous. These companies are supposed to have their own employees, assets and accounts just to mention a few. Indeed the company may retain services of agents and consultants, but that does not mean that it is to have no single employee. To have a subsidiary company without accounts in the country of incorporation and employees only buttresses the point that this company is only on paper. Even looking at the contract itself for the provision of management services, the Appellant entered into a contract with SABMiller management BV. Subsequently, SABMiller management BV entered into a contract with its parent company, SABMiller Plc, UK in order for them to provide management services to the Appellant on behalf of SABMiller Plc, the parent company. I am of the humble view that this arrangement only shows that SABMiller management BV is controlled fully by the parent company.

Counsel for the Appellant prayed to this court to declare the Malawi/Netherlands DTA applicable in this case. Article XVI of the Malawi/Netherlands Double Taxation Agreement stipulates that taxation authorities mean Commissioner General of Malawi Revenue Authority and in case of the Netherlands, the Director General Der Belastigen or their representatives. It is surprising that the Appellant who is praying that the Malawi/Netherlands DTA should apply did not follow the dictates of the Agreement itself. Instead of channeling their grievance through the responsible authority, the Director General Der Belastigen, the Appellants contacted Inspector of Taxes in the Netherlands who issued **Exhibit AM4** and **AM4A** declaring that SABMiller management BV is a resident of the Netherlands. I am of the humble view that this information was to come from the Director General Der Belastigen and not Inspector of Taxes. The Appellant did not even

[2] Civil Appeal No 773 of 2012

submit whether these two entities are the same. In the absence of such evidence, I hold that these two authorities are different. It therefore raises suspicion that the Appellant produced in court this document contrary to the Malawi/Netherlands DTA which the Appellant is advocating. It has to be put on record that the Malawi/Netherlands DTA was abrogated from 1st January 2014, a fact that was brought to the attention of the court by counsel for the Appellant and admitted by counsel for the Respondent. Counsel for the Respondent submitted that the DTA was abrogated as there were many pseudo companies in the Netherlands, which is a tax heaven.

I am of the view, basing on reasons advanced above, that the appropriate treaty to apply in these circumstances should be the Malawi/UK Double Taxation Agreement and I so hold. However, let me put on record that both the Malawi/UK DTA and Malawi/Netherlands DTA do not exempt management fees, a determination that the Special Arbitrator correctly made. This means that this ground of appeal also fails.

In conclusion, all grounds of appeal advanced by the Appellant have failed. I therefore dismiss the appeal in its entirety.

Having dismissed the appeal, as indicated above, the Respondent also cross appealed against the determination of the Special Arbitrator. The Respondent advanced three grounds of appeal. The grounds of cross appeal are as follows:

- The special arbitrator erred in law and in fact by holding that the appellant had sufficient interest to be the appellant in this matter, (irrespective that he is not the actual taxpayer);
- The special arbitrator erred in law and in fact by not adequately addressing the issues on merit about scope and application of Double Taxation Treaties that were before him;
- The special arbitrator erred in law and in fact by holding that the interest (under Section 105 of the Taxation Act) applicable was that of arithmetic progression(AP) as opposed to Geometric Progression (GP).

As alluded to above, the second ground of cross appeal has been dealt with. It remains of me now to deal with the first and third ground of the cross appeal. The first ground of the cross appeal is that the Appellant has no sufficient interest to be a party to the present proceedings. The Respondent submits that the Appellant has no any legal mandate to act on behalf of SABMiller management B.V. The Respondent argues that its only a tax withholding agent. On the other hand, the Appellant argues that the Appellant is legally allowed to bring the present proceedings in their representative capacity as per Sections 77 and 78 of the Taxation Act.

Section 77 of the Taxation Act provides as follows:

> " For the purposes of this Act, representative taxpayer in relation to the assessable or taxable income remitted or paid by a person in Malawi to a person temporarily or permanently absent from Malawi, means the person remitting or paying such income"

Section 78(1) states as follows:

> " Subject to Section 76 every representative taxpayer, in respect of the taxable income to which he is entitled in his representative capacity or of which in such capacity he has the management, receipt, disposal, remittance, payment or control shall be in all respects to the same duties, responsibilities and liabilities as if such income were received by or accruing to or in favour of him beneficially and shall be liable to assessment in his own name in respect of such income, but any such assessment shall be deemed to be made upon him in his representative capacity only."

I am of the humble view that Section 77 and 78(1) are so clear as to who qualifies as a representative taxpayer. In the present case, I am of the view and I so hold, as did the Special Arbitrator, that the Appellant has sufficient interest in this matter as a representative taxpayer, a fact that counsel for the Respondent even admitted in court. This means therefore that this ground of cross appeal fails.

On the last ground of cross appeal, the Respondent argues that the Special Arbitrator erred in law when he calculated the interest at 16.5% of the last month using arithmetic progression. The Respondent argues that this was a wrong application of Section 105(6) of the Taxation Act. Counsel stated that applying the Arithmetic Progression AP Formula of (3/4 +(n-1)(1/4))%, where n is given as 64) in Section 105 of the Taxation Act it would become:

64(3/4+((64-1)1/4)%

= 64(3/4+63/4)%

= 64(66/4)%

= 64 (16.5)%

= 1056% (of the non-resident tax due)

Counsel for the Respondent submitted that the correct interest payable was supposed to be 1056% of the non-resident tax due. However, he stated that in many situations, the Respondent applies leniency to reduce the rate. Applying that leniency, the Respondent arrived at interest rate of 42% of the non-resident tax due.

The Special Arbitrator arrived at the rate of 16.5% of the non-resident tax due. The only difference I have noted is the application of the total number of months, that is, 64, to the final rate of 16.5%. The Special Arbitrator in his calculations as per Section 105 of the Taxation Act did not multiply the number of months to the rate, which the Respondent did.

Section 105(6) of the Taxation Act provides as follows:

> " Where the tax unpaid exceeds K22, the rate of interest referred to in subsection (5) shall be three quarters per cent per month in respect of the first month or part thereof, with the addition of one-quarter per cent per month for each additional month or part thereof and the final rate of interest shall apply for the whole period during which any tax has remained unpaid, so however that in no case shall the total interest payable be less than K5.50."

First, let me put on record that before the Special Arbitrator, the parties differed as to whether arithmetic or geometric progression was to be used. However, before me, the Respondent submitted that they are only pursuing arithmetic progression and not geometric progression. Having said that, the bone of contention is the application of the whole period to the final rate. I am of the view that this is emanating from Section 105(6) of the Taxation Act, in precision, that part that reads:

> "...and the final rate of interest shall apply for the whole period during which any tax has remained unpaid..."

In interpreting this part, the Respondent applied 64 to the final rate of 16.5%, (which the parties agree is the correct final rate) representing total months the tax remained unpaid. Counsel for the Appellant argues that that application of 64 was not correct as the final rate covers the whole period.

I am of the humble view that the position advanced by the Respondent is not correct. Section 105(6) of the Taxation Act stipulates that the final rate of interest shall apply for the whole period during which any tax has remained unpaid. What

this means is that the final rate of interest using the arithmetic progression is to be taken as covering the whole period. There is no need to apply this final rate to the whole period, as doing so, will be unjust to the taxpayer and I do not think that this was the intention of the framers of that law. This was the view that was taken by the Special Arbitrator as he did not apply to the final rate the total number of months the tax remained unpaid. I cannot find fault with the Special Arbitrator's determination. I therefore hold that this ground of cross appeal also fails.

In conclusion, only ground two of the cross appeal has succeeded. Grounds one and three of the cross appeal have failed.

Costs are in the discretion of the court. I therefore order that each party should bear its own costs.

Pronounced in Open Court at Principal Registry, Blantyre this 16th day of January 2018 in the Republic of Malawi.

JOSEPH CHIGONA

JUDGE