



Legal Brief

*Issue No.4 of 2021
From our Tax Desk*

15th October 2021

The Board rules that Withholding Tax is due on Actual Payment!

The Tax Revenue Appeals Board (TRAB) has on 15th October 2021 ruled in ***Tax Appeal No. 50 of 2018 between Vodacom Tanzania Public Limited Company and Commissioner General, Tanzania Revenue Authority***, that: -

- ✚ *Withholding tax is due and payable on actual payment and not on accrual;*
- ✚ *TRA wrongly applied section 3 and 23 of the ITA, 2004 in disregard of section 82 of the ITA 2004;*
- ✚ *It is a cardinal principle of law that a specific provision prevails over a general provision;*
- ✚ *Section 82 of the ITA 2004 being a specific provision, places the withholding obligation when a taxpayer pays the payments in question;*
- ✚ *Definition of the word "payment" in section 3 of the ITA 2004 must be read subject to the context provided in section 82 of the ITA 2004; and*
- ✚ *TRA's imposition of interest for late payment was incorrect.*

Background of the case

If there is an issue that has been tormenting the minds of taxpayers, Chief Finance Officers, Tax Managers and Tax Consultants as well as practitioners over the past decade, is the question as to: ***"at what point in time, the withholding obligation arises, whether when interest is paid or when it is accrued?"*** This question was yet to achieve judicial scrutiny in the United Republic of Tanzania until Vodacom took the issue to judicial bodies. Briefly, the appeal before the TRAB emanated from TRA's determination of the Appellant's Notice of Objection against Withholding Tax on Interest on Shareholders' Loans. TRA served upon the Appellant, the Notice of Confirmation of Assessment confirming its position that withholding tax on interest on shareholders' loans is due and payable to the Authority on accrual. The Appellant had been accounting for withholding tax when actual interest payments were made to the lenders. TRA viewed the Appellant's practice as incorrect and consequently assessed the Appellant with interest for late payment of withholding tax on interest on shareholders' loans. Aggrieved by TRA's decision, the Appellant preferred an appeal to the TRAB.

Issues for Determination

When the appeal was called for hearing, the Board adopted and recorded the below issues:

- (i) Whether withholding tax is due on interest when the interest is paid or when it accrues;
- (ii) Whether the imposition of interest on late payment is correct at law; and
- (iii) What remedies are available to the parties?

The Appellant's Key Arguments

In prosecuting the appeal, the Appellant put forward the following key legal arguments: -

- a) The word “pays” in section 82 (1) of the ITA 2004, must be interpreted strictly and should be accorded its natural meaning.
- b) In order to fully appreciate the context of the applicability of section 82 (1) of the ITA 2004, it is pertinent that one looks at section 3 of the ITA, 2004 providing for the definition of the word payment.
- c) From the statutory definition: payment is the transfer of asset or money; or the transfer or decrease of a liability. The Appellant had not transferred interest on loan to the shareholders at the time the Respondent issued the impugned assessment. The Appellant's interest on loan liability had not been transferred nor had it been reduced at the time the Respondent issued the impugned assessment. The Appellant had not paid the interest on shareholders loan the subject of the appeal. It was only when actual payment was made, then, the Appellant in compliance with section 82 (1) of the ITA 2004, withheld tax on interest on loan and remitted the same to the Respondent. On this basis, the Appellant had not been late in remitting the withholding tax on loan, and hence, the interest for late payment is unjustified.
- d) The term “payment” as statutorily defined under section 3 of the ITA 2004, must be construed in the context of the discharge of a debt obligation and not otherwise. TRA's reliance on the words: “.... the creation of an asset in another person”, to presume that when an interest is accrued, it should be presumed that it is paid, is a flawed thinking in three key respects:
 - i) First, presuming that the words “creation of an asset in another person”, means accruing interest, is against the cardinal principal of income taxation. The principle which is well founded in tax jurisprudence, does not allow the Respondent to impose a withholding obligation based on the presumptions. The clear words of the statute must be given their natural meaning.
 - ii) Second, the meaning of the words “creation of an asset into another person” must be interpreted subject to the *ejusdem generis* rule, that is, they must be interpreted in the context of discharge of a debt obligation and nothing else. This applies for instance, where an asset is created as part of an arrangement for the discharge of a debt, such as where the loan is sold or reassigned to another person such that the debtor is released from the obligation, then, there is payment. That is not the case with the Appellant where the interest had never been sold nor reassigned to another person; and;
 - iii) Third, once a loan is contracted an asset is created and must be reported in accordance with the Generally Accepted Accounting Principles (GAAP). The reporting of a liability in accordance with the GAAP, does not create a new asset. An accounting entry does not

create an income. This means that a mere book-keeping entry cannot be an income unless income has actually resulted. The withholding obligation under section 82 (1) of the ITA, 2004 therefore, arises where the withholder makes actual payment, and not when the interest is accrued.

- e) Assuming that the definition of the words “creation of an asset in another person” in the meaning assigned to the word “payment” under section 3 of the ITA, 2004, meant that withholding obligations arises on accrual as alleged by the Respondent, (which the Appellant strongly disagrees), section 3 of the ITA 2004 cannot override section 82 (1) of the ITA 2004 on the following two key reasons:
 - i) First, the definition of the term “payment” under section 3, must be read in the context of section 82 (1) of the ITA, 2004. This is because the applicability of the definition is subject to the context not requiring otherwise. The context in section 82 (1) of the ITA, 2004 require a taxpayer to withhold when he/she pays the interest in question. This understanding is implicit in section 3 of the ITA, 2004, which starts with operative words: **“In this Act, unless the context requires otherwise.”** This means the definition of the word “payment” under section 3 is subject to the context provided under section 82 (1) of the ITA 2004; and
 - ii) Second, section 82 (1) of the ITA 2004, being a specific provision with regards to withholding obligation, overrides any general provision including section 3 and 23 of the ITA 2004. It is a settled principle of law that a specific provision overrides a general provision.
- f) That the bundle of authorities have been overwhelmingly consistent in holding that a specific provision overrides a general provision. Section 82 (1) of the ITA 2004, being a specific provision overrides any general provision, let alone, being a general provision that is sought to be applied based on presumptions.

Respondent's Submissions

The Respondent, TRA on its part, argued that: -

- a) Withholding tax on interest on loans is due when the interest is due and payable, that is, on accrual basis. That actual payment of interest is not legally necessary for the withholding obligation to arise. That this position is based on the holistic, purposive and harmonious interpretation of relevant provisions of the law;
- b) That since the payer is the withholding agent, and the payee is the withholder, the word “pay” in the context of the definition of withholder can validly be construed as creating an entitlement to receive as opposed to actual receiving;

- c) That the meaning of “payment” under section 3 of the ITA 2004 and requirements to account on accrual basis under section 23 of the ITA 2004, should be construed to require withholding obligation to arise on accrual and not necessarily on actual payment; and
- d) That the Respondent was correct to impose interest for late payment.

The TRAB’s Reasoning & Decision

The TRAB has held that, withholding tax on interest is due when such interest is paid and not when it accrues. The question revolved around interpretation. The TRAB concurred with the Appellant that the definition of “payment” under section 3 of the ITA 2004 is applicable unless the context requires otherwise. In the present case, the context in section 82 (1) requires that, withholding tax be charged when interest is paid. The TRAB further observed that it is a cardinal principle of law that, a specific provision overrides a general provision. Hence, TRA misconceived the interpretation of section 3 (the word payment) and section 23 of the ITA 2004, which are general provisions and section 82 of the ITA 2004 which is a specific provision. After answering the question when withholding tax on interest is paid, the TRAB held further that TRA was wrong to impose interest for late payment, and consequently proceeded to allow the Appellant’s appeal on its entirety.

Our Assessment of the TRAB’s Decision

Lawhill hails the TRAB’s decision as a decision of the century that accords the correct interpretation of the law in two respects; first, the applicability of a specific provision vis-à-vis a general provision. This principle is well established and cannot be easily departed from; second, the TRAB’s application of strict interpretation of taxing statutes, which again, is a well celebrated principle of taxation. That taxing statutes must be construed strictly is the foundation of taxation since its inception. It would be hazardous to accord a liberal interpretation of taxing statutes as by so doing, the canons of taxation, such as certainty, predictability and fairness cannot be achieved.

To taxpayers, the decision is a huge relief it states the legal position that address a very burning issue on the incidence of withholding tax in Tanzania. Lawhill had a settled view that, the law as it is, withholding tax on interest on loans is due when actual payment is made and not on accrual basis. It’s our humble view that, should the Government desire to impose withholding tax on accrual basis, then, necessary amendments should be made in the ITA 2004, rather than attempting to upset the very foundational legal principles at the detriment of taxpayers.

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