Legal Brief

Lawhill & Co. Advocates – Premier Tax & Corporate Attorneys

Issue No. 5, June 11th 2020.
From our Tax Desk

Court of Appeal puts the value of Fiscal Stabilization Clauses in Question

The Court of Appeal of Tanzania sitting in Dodoma has on 10th June, 2020, in ***Civil Appeal No. 9 of 2019 between Geita Gold Mining Limited and Commissioner General, TRA*** hold that:

- *The MDA envisaged changes in rate of withholding tax from third parties as may be required from time to time;*
- *The change in rate of Withholding Tax through amendment or repeal of the law, did not affect the Appellant;*
- *The effect of a repealing legislation is that, the repeal does not revive anything not in force or existing at the time which the repeal takes effect;*
- *The task of conclusively resolving factual questions ends at the Tribunal and cannot be entertained at the Court of Appeal;*
- *A life insurance contract must meet the definition provided under Section 3 of the ITA, 2004.*

Brief facts of the Dispute

On 24th June 1999, Geita Gold Mining Limited (GGML) and its shareholders entered into a Gold Mine Development Agreement (MDA) with the Government of Tanzania. Under the MDA Agreement, GGML was entitled to enjoy tax incentives stipulated therein. Between 2009 and 2011, GGML engaged various non-resident persons to perform technical services in connection with its mining activities. GGML paid fees as a consideration for such services through its affiliate's companies (Anglo Gold Ltd, Anglo Ashanti Ltd, Anglo Gold Australia and Anglo Gold). During the period in question, the appellant paid insurance premiums to cover personal injury or incapacitation. The appellant also made payments for various goods and services supplied to it by persons who did not have Tax Payer Identification Number (TIN).

In 2013, the respondent, TRA conducted a tax audit on appellant business affairs for the years of income 2009-2011, with the object of ascertaining appellant's compliance in payments of various taxes. As a result, on 29th July 2013, TRA communicated her audit findings to the effect that, GGML was required to remit withholding tax at a rate of 15% from payments made to third parties. TRA basis was that, GGML was not implementing the WHT scheme as required under the ITA 2004 of withholding tax at a rate of 15% instead GGML was withholding tax at a rate of 3%. In protest, the Appellant contended that, in terms of clause 4.5.2 of the MDA Agreement, it was obliged to withhold only 3% of the gross amount of payments made in respect of technical services and management fees, irrespective of the changes on the rate pursuant to amendment or repeal of the law. Following exchange of communications, on 31st December 2013, TRA *vide* a letter of Finalization of the Tax audit, issued to the appellant, GGML a Withholding Tax Certificate demanding TZS. 1,819,002,183 as principal sum and TZS. 1,123,875,027 as interest, making a total of TZS. 2,942,877,210. The appellant being aggrieved appealed to the Tax Revenue Appeals Board, in which the Board partly allowed the appeal to the extent of computation made for the year 2009 in respect of payments made by GGML to non-TIN holders. Dissatisfied by the decision, the appellant appealed to the Tribunal unsuccessful, hence lodged the present appeal.

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Appellant's Arguments before the Court of Appeal

1. The appellant's obligation to withhold tax is regulated by section 34(2)(e) of the ITA 1973 and clause 4 and 10 of the MDA. The clauses were geared at stabilizing the tax regime for the entire life span of the mining until closure and could not be affected by the coming in force of the ITA 2004.
2. The supply of materials and equipment were directly related to the exploitation of minerals including services therein. The Court should adopt the purposive approach to interpretation of services under the ITA 2004 as including appellant's technical and managerial services.
3. GGML is not obliged to withhold a sum greater than 3% for its payment to third parties in respect of technical or managerial services.
4. The BUPA insurance contract qualified as a life insurance contract under section 3 of the ITA, 1973 because its commencement was in 22/01/2004 and was renewed after 12 months after risk assessment, this did not mean entering into a new contract. Hence the Court should adopt a purposive approach in interpretation of life insurance under section 3(h) of the ITA 2004.

The Respondent's Arguments before the Court of Appeal

1. GGML was obliged to withhold tax from payments made to third parties at the rate prevailing at any point in time under the existing law. The MDA did not protect third parties since they are not privy to the MDA Agreement. As such, the appellant was obliged to withhold tax at the rate of 15% from the payments in question.
2. Whether services rendered by the appellant are technical or managerial services, is a factual issue which ought to have been raised and resolved conclusively before the Tribunal. However, that burden was not discharged according to section 18(2)(b) of the TRAA and hence factual issues cannot be considered by the Court of Appeal but questions of law as provided under section 25(2) of the TRAA.
3. Services rendered to the appellant were neither technical nor managerial and were not directly related to extraction of minerals as envisaged under section 2(1) of the ITA 1973 as amended in 1997.
4. Premiums paid under the BUPA insurance agreement did not meet the criteria set for life insurance under section 3(b) of the ITA, 2004. They arose out of a general insurance agreement whose premiums has a source in United Republic of Tanzania and accordingly attracted WHT at a rate of 15% in line with section 83 (b) and 69(f) of the ITA, 2004.

The Court's Reasoning and Decision

The Court in its judgment reasoned as follows:

- That the obligation to pay tax is a creation of statute under section 6(1)(a)(b) of the ITA. To a resident is from a chargeable income for the year of income from employment, business or investment. Similar criterion is applicable to non-residents to the extent that the income has a source in Tanzania.
- In our jurisdiction, the effect of a repealing legislation is that, unless a contrary intention appears, the repeal does not revive anything not in force or existing at the time which the repeal takes effect. The change in rate of WHT through amendment or repeal of the law does not in any way affect the appellant who collects such tax on behalf of the respondent. The MDA had envisaged changes in rate of WHT as may be required from time to time. The appellant as a resident person was obliged to withhold 15% of income tax which was the rate applicable in terms of the current law in force from payments made by third parties which were neither technical nor managerial in terms of section 69, 83(1)(b) and para 4(c) of the first schedule to the ITA, 2004.

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- Establishment of whether a service is technical or managerial is a question of fact and the Court cannot deal with questions of facts but law as provided under section 25(2) of TRAA. It is an elementary canon of statutory interpretation that the meaning of a statute, must in first instance be sought in the language in which the Act is framed. If it is plain, courts must presume that, the legislature says in a statute what it means and means in a statute what it says.
- A life insurance contract should be in effect for at least five years without a limit and not terminable by the insurer before expiration of five years so as to qualify as a life insurance contract under Section 3 of the ITA, 2004. A twelve months BUPA insurance agreement was not at all envisaged to be a life insurance contract and hence WHT at a rate of 15% from premium paid in respect of 12 months insurance should be paid as per dictates of section 83(1)(b) of the ITA 2004.

Our assessment of the Court's Decision

Lawhill & Co. Advocates observes that the decision brings in the key question as to the value of fiscal stabilization clauses in natural resources agreements. This is true for both, the mining sector and the oil and gas sector. It has been an established understanding that, when, pursuant to an investment agreement, a State guarantees certain fiscal benefits, subsequent amendments in laws, do not apply to such project. The MDA in question, provided in specific terms under Article 4, Clause 4.5.2 as follows:

"The companies shall be liable to withhold taxes from payments to third parties ***as may be required by law from time to time****,* ***save that the companies shall not be obliged to deduct****:*

4.5.1. Not applicable

4.5.2. ***any amount greater than 3% from the gross amount of payments in respect of technical services and management fees****, provided, however, that where in the case of management fees the gross payment exceeds 2% of the operating costs, the amount withheld shall not exceed 20%.*

In ruling that the ITA 2004 applied to subject the payments to 15%, the Court emphasized on the words: *"**as may be required by law from time to time***" in Article 4, Clause 4.5. Our observation however, is that, the words "as may be required by law from time to time", are subject to such rates not exceeding 3%. This means, any amendments to the rates more than 3%, was not meant to apply under the MDA. Of interest, is that, the clause relied upon, specifically puts a clear exception as to such obligation. The words: ***"save that the companies shall not be obliged to deduct" ……..any amount greater than 3% ….***" Seems to have not been given full effect. Though the Court was of the view that, the change in rate of WHT through amendment or repeal of the law did not in any way affect the appellant who collects such tax on behalf of the respondent, it overlooked the fact that such obligation to withhold is limited to not more than 3%. This would essentially mean that requiring the appellant to withhold 15%, is beyond the scope of the obligations agreed upon under the MDA.

Besides Clause 4.5 referred above, Clause 4.2 of the MDA speaks volume as to the applicable law, that is, for income taxation being the Income Tax Act, 1973. It would be a good idea to note that section 143 (1) of the ITA 2004, grandfathers the applicability of the provisions of the ITA 1973, where there is a binding agreement between the Government of the United Republic with a person. Generally, the decision has greatly tested the value of fiscal stabilization clauses in natural resources agreements, of which, investors must take note of, and devise a mechanism that will provide more stability, certainty and predictability with regards to fiscal terms, including safeguarding against change in interpretation of the applicable law.

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