

# IN THE SEYCHELLES COURT OF APPEAL

**[Coram:** F. MacGregor (PCA) , S. Domah (J.A) , A.Fernando (J.A) **]**

## **Civil Appeal SCA 19/2013**

**(Appeal from Supreme Court Decision CA 08/2006)**

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Telecom (Seychelles) Limited

Appellant

Versus

The Commissioner of Taxes (SRC)

Respondent

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Heard: 20 August 2015

Counsel: Mr. Kieran Shah for the Appellant

Mr. Vipin Benjamin for the Respondent

Delivered: 28 August 2015

## **JUDGMENT**

S. Domah (J.A)

[1] This is a 2<sup>nd</sup> tier appeal from the appellate decision of the Supreme Court on the decision of the Commissioner of Taxes (“The Commissioner”) who had assessed the appellant company, Telecom (Seychelles) Limited (“the TSL”) for its liability to pay certain specific taxes on certain payments made by TSL for the period 1999 to 2004 and 8 months in 2005. The TSL had appealed against that decision of the Commissioner to the Supreme Court and the learned Judge had confirmed the decision of the Commissioner.

[2] The TSL has appealed against the decision of the learned Judge and advanced 3 grounds of appeal, as follows:

1. The Learned Judge was in error to find that the Seychelles Government did not and was not willing to exempt the Appellant from payment of withholding tax when such finding goes contrary to the express statement of the Ministry of Finance’s letter dated 25<sup>th</sup> October 1999 that “withholding tax will not be

levied on the business in respect of payment made to foreign suppliers of services and equipment, and this in line with the spirit of our letter FIN/1/27 of 28<sup>th</sup> November 1997.”

2. The Learned Judge was in error to find that the said letter of 25<sup>th</sup> October 1999 did not confer any exemptions or incentives with regard to withholding tax to the Appellant.
3. That on the totality of the evidence and when viewed in their context the learned Judge should have come to the conclusion that the Seychelles Government had granted the Appellant an exemption to withholding tax but instead the learned Judge misled himself in stating that “if the Respondent (sic Government of Seychelles) had intended to have the concessions and incentives apply ... it would have expressly stated so by including it in the agreement or conditions in the licence, just like the other concessions,” when in fact the other concessions were not stated in the agreement nor in the Telecommunication Licence. The other concessions were granted in a separate letter dated 28<sup>th</sup> November 1997.

[3] The respondent is resisting the appeal and has filed its submissions in response to the arguments advanced by the appellant. Grounds 1 and 2 may be taken together.

[4] The facts of the case are as follows. By letter dated 28 November the Government after “carefully considering all the issues and implications” decided to give a number of concessions and incentives to the TSL with the objective of creating a level playing field in the telecommunication sector, all of which were to be administered by the Ministry of Finance (Doc B12 refers). They were 7 in number (“the original 1997 grant”). The content of this letter was made into a formal agreement (B16 refers). On 14 April 1998, a licence was issued to the appellant in accordance with a previous letter dated 6 October 1997 (C12). One particular issue which cropped up regarding its liability to withholding tax related to the item of its use of services of non residents in Seychelles. A letter dated 8 January 1999 was sent to TSL which gave details of the percentage of dividends, interest and royalty that would apply in 6 cases, with a rider that “any payment made for work done as per description provided above, would be subjected to Withholding Tax as provided for in Part IV of the Withholding Tax provisions under the Business Tax Act of 1987.

- [5] On the issue of the supply of services, TSL started a correspondence with the Office of the President as from 29 March 1999. The Ministry of Finance had raised some queries on the matter. TSL argued in the letter that in the negotiations that culminated in the original 1997 grant letter (28 November 1997), this condition that “the withholding tax will not be applicable” had been mooted but had been missed out in the list of concessions and exemptions. Following a further correspondence dated 25 May 1999, the Ministry of Finance tenders, on 25 October 1999, an answer to TSL and stated so unequivocally that “*withholding tax will not be levied on the business in respect of payments made to foreign suppliers of services or equipments, and in line with the spirit of our letter FIN/1/27 of 28<sup>th</sup> November 1997.*” The letter is duly copied to the Commissioner of Taxes (“the subsequent 1999 grant”).
- [6] The Commissioner wrote back to the appellant hoping that the issue is resolved by noting that “*this exemption applies only to ... liability to withholding tax in respect of setting up the telecommunications network in Seychelles and not in respect of potential withholding tax liability on payments to non residents in regards to all/other matters.*” The appellant TSL was, therefore, requested to submit a complete list of such payments from January 1999. The purpose was to identify “*those payments that are claimed by (the) TSL to still be in regard of the setting up of the network and to ensure payment of any liability to withholding tax on the remaining payments.*” (B17 refers).
- [7] The Commissioner offered assistance to TSL in case any clarification was required for the application of the new exemption given. The TSL replied that: (a) “*most of (the) payments for services to non residents are in connection with the setting up of the telecommunication network;*” and (b) from September 1999, the TSL has been paying the fee for the service rendered by non residents in connection with their roaming business in the range of US\$500 to US\$1500 a month.
- [8] By letter dated 29<sup>th</sup> May 2000, the TSL writes to the Secretary of State again to request for an “extension of the concession on the payment of withholding tax, in respect of payments made to overseas suppliers, on the following heads also: (1) payment of interest to the overseas financiers for financing the cost of the project; (2) payment of recurring services rendered to the TSL by the overseas suppliers.

- [9] Before making a reply, the Office of the President sought the views clarification of the Commissioner. The obvious question was whether foreign providers of services included overseas providers of services. The Commissioner advised that “the exemption was in respect of costs involved with the set up of the network and not in respect of the regular ongoing expenses involved in the day to day operation of the business.” The new concessions sought: i.e. interest payments to overseas financiers and payments to non residents for the expenses of recurring services are not to be recommended as they do not fall within the setting up of the network. The Commissioner gave a number of policy and other reasons for same.

### **GROUND 1 and 2**

- [10] Grounds 1 and 2 are interlinked. The central issue under these grounds is what did the learned Judge make of the letter of the Ministry of Finance dated 25<sup>th</sup> October 1999? He interpreted it as though it was a denial of the 8<sup>th</sup> concession for the reason that it referred TSL back to the letter FIN/1/27 of 28<sup>th</sup> November 1997.
- [11] There cannot be any doubt on anybody's mind that in so treating the content of the 1999 letter, the learned Judge clearly misapprehended its purport. It was intended to add to the number of concessions by extending exemption to foreign supplier of services and equipment. Nothing could be more plain: “... withholding tax will not be levied on the business in respect of payment made to foreign suppliers of services and equipment.” If the grant was qualified as being “in line with the spirit of our letter FIN/1/27 of 28<sup>th</sup> November 1997,” that spirit was expressed in the 1997 agreement as the spirit of liberalizing the telecommunications sector and creating a level playing field with other competitors.
- [12] There is substance in grounds 1 and 2. And on this alone, the appeal should be allowed.

### **GROUND 3**

- [13] Under Ground 3, it is a mystery to us how the learned Judge came to assume that the concessions and exemptions should have been stated in the agreement or the Telecommunication Licence; and that, because, they were not, the appeal before him failed. The fact of the matter is that the first 7 concessions had been expressly stated in the letter dated 28<sup>th</sup> November 1997 and the 8<sup>th</sup> concession in the letter dated 25

October 1999. Had his attention been drawn to the content of the original 1997 grant and that of the subsequent 1999 grant in an oral submission, we are certain his conclusion would have been different.

- [14] The conclusion is, therefore, inescapable that the learned Judge misapprehended the totality of the facts in relation to the case and, for that reason, came to a conclusion which was erroneous.

Ground 3 also succeeds.

- [15] All the three grounds having succeeded, this appeal should be allowed. However, it is befitting for us to make a certain number of observations to show how this dispute arose: rather innocuously.

- [16] The Commissioner used the term “setting up” as the criteria for determination of the tax liability of the appellant. This term had been picked up from the heading in a letter written by the appellant itself.

- [17] The original 1997 grant letter does not make use of the term “setting up.” We were in fact intrigued by the term “setting up” which was used to govern the relationship between TSL and the Commissioner. Where did this come from? We requested Counsel on either side whether the limitation that concessions and exemptions should apply to the gestation period of setting up. That term has been used in the letter of the TSL as a title and not as a term or condition in the agreement with government. That term cannot therefore be read into the document unless it is found to exist somewhere else in any formal agreement between the parties. Titles to content of letters do not turn into conditions of contract to govern legal relationships. Actual conditions of contract do.

- [18] The actual conditions were couched not in terms of the vague notion of setting up but in terms of a specific temporal provision: i.e. the concessions and incentives are effective from 1<sup>st</sup> December 1997 and are valid for a period of 10 years, guaranteed, irrevocable and unalterable unless breached in the circumstances mentioned in the Agreement.

- [19] The Agreement of 28 November 1997 did not give the concessions and the incentives by reference to a vague gestation notion but by reference to a specific temporal period: i.e. 10 year period as specified in the letter to TSL. Nor were exemptions and incentives

given to TSL blanket measures. The items granted or not granted were specific: such as “to import at zero rates of trades tax, both new capital equipment and replacements for capital equipment with a clear mention that capital expenditures does not include passenger vehicles and that in the case of service vehicles the issue of trades tax payable will be examined on a case to case basis.

- [20] Learned counsel for the appellant, Mr Shah S.C., referred us to paragraphs 3 and 4 of the Agreement in that TSL will be guaranteed GOPs for 25 staff at the concessional rates of SR500 per month per employee for the first 3 years of its operations and after 3 years the proportion of guaranteed GOPs will be 25% of the workforce at the normal rate of SR1,500 per month per employee.
- [21] Again, the concessions and incentives are temporal in nature, without any mention of the infancy or otherwise of the industry to be developed for the purposes of giving effect to the “nature of the project, the size of the investment and in keeping with the spirit of the decision to liberalize the sector.” When the Commissioner, therefore, began applying the criterion of setting up, his office fell into error. If the term was to be used at all, it could only be for the 10 year period for the 15-year licence the appellant had been granted.
- [22] Admittedly, the term “foreign suppliers of services or equipments” in the subsequent 1999 grant has not been defined. Does it mean non-resident suppliers of services or equipment or does it include overseas suppliers of services or equipments. These are pre-eminently policy matters pertaining to the executive beyond the remit of the Courts. It is not even within the remit of the Commissioner who is the machinery institution for application and collection of taxes. The Agreement is administered by the Ministry of Finance. It is the latter Ministry fully apprised of the facts and in the spirit of the 1997 agreement which should so decide and recommend to government. The parties are and should be governed by the letters FIN/1/27 of 1997 and the letter of 25<sup>th</sup> October 1999 with regard to concessions and exemptions. Any issue arising therefrom for application should be resolved at the level of the Ministry of Finance and Communications under special arrangements.
- [23] Increasingly now, it is the purposive interpretation of tax law which prevails in tax law jurisprudence, a fact not foreign to Seychelles law on taxation: **Largo Concrete**

**Products (Pty) Ltd v Collector of Customs, Seychelles (no. 2) 1974 SLR 204;** deduction allowed for machinery and plant: **Ex parte Hadee Brothers 1940 SLR 68;** too strict an interpretation is to be discouraged otherwise, the courts would remain burdened with cases of tax: **Benson v Commissioners of Income Tax 1942 SLR 80;** a distinction is to be drawn between charging provisions and machinery provisions: **Sauzier v Controller of Taxes : 1975 SLR 253.**

- [24] A purposive interpretation should be given to the intention of the legislator in the Business Tax Act in the light of the objective set out in the 1997 original Agreement as well as the 1999 subsequent Agreement: see **Pepper v. Hart [1992] UKHL; IRC v. McGuckian [1997] 1 W.L.R. 991; Frankland v. IRC (1997) STC 1450.** As has been stated in Tax law should be interpreted not in a literal way but a purposive way. The following statement by Lord Wilberforce in the case of **W. T. Ramsay v Inland Revenue Commissioners 1982 A.C. 300,** would prove helpful:

*"There may, indeed should, be considered the context and scheme of the relevant Act as a whole, and its purpose may, indeed should, be regarded."*

This sentence is critical. It marked the rejection by the House of pure literalism in the interpretation of tax statutes.

- [25] For the reasons and in the terms set out above, the appeal is allowed.

S. Domah (J.A)

**I concur:.** .....

F. MacGregor (PCA)

**I concur:.** .....

A.Fernando (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on 28 August 2015