B&E AKO LAW

Arusha
NSSF Mafao House
9th Floor| Left Wing
P.O.Box 1526
+255 786 532 222

Dar Es Salaam
Plot No. 30, House No. 7
Ursino Street, Regent Estate
P.O. Box 71748
+255 22 2771145

Mwanza
Plot No 7, Block D
Isamilo Area
Postcode No. 33104
+255 28 2542445

Withholding Tax on fees for services rendered offshore. Is it end of the Road?

For a decade now, businesses operating in Tanzania and particularly in the oil and gas sector have been fighting with the Tanzanian Tax Revenue Authority ("TRA") on the legality of imposing withholding tax on payments to non-residents for services rendered outside Tanzania. Except once, the Court of Appeal of Tanzania (the "Court" and the highest in the land), has consistently ruled against the taxpayers.

In the most recent case (**Ophir Tanzania (Block 1) Limited versus Commissioner General (TRA) Civil Appeal No 58 of 2020)**, the Court was invited to depart from its previous decisions which ruled against the tax payers. However, the Court declined this invitation on the ground (amongst others) that the powers to do so is vested on a full bench of the Court with five judges. Let us park this for a while as we discuss the history of the disputes.

Most of these disputes arose between 2010 to 2014 during the surge of oil and gas business in the country. In terms of the law then, payments made to non-resident persons suffer withholding tax in Tanzania if they have a source in Tanzania. The law further provides that for a payment for a service to have a source in Tanzania, then the service must be rendered in Tanzania as per section 69(i) (i) of the Income Tax Act, 2004 ("ITA").

Several appeals were referred to the tax courts for an interpretation of the law. As a result, the Court in 2015 came up with the widely celebrated decision in the case of **The Commissioner Genera (TRA) versus Pan African Energy Tanzania Limited, Civil Appeal No 146 of 2015(Unreported)**. In that case, the Court ruled that withholding tax does not apply on payment in respect of services rendered/performed outside Tanzania. The taxpayers' jubilation and elation was however short-lived.

Three years down the lane, in another case of **Tullow versus the Commissioner General, Civil Appeal No. 24 of 2018 (Unreported)** the Court in rather strange circumstances, distinguished the Pan African Energy case and ruled that if the results of the services are utilized in Tanzania, then withholding tax applies irrespective of the fact the services are rendered offshore.

Author

WILSON MUKEBEZI

Partner

CREDENTIALS

QUALIFICATIONS:
LLB | M.A in Revenue Law and Administration | Advocate

EXPERTISE:
Tax | Dispute Resolution | Procurement | Competition | Employment and Labour Relations | Banking

CONTACT:
wilson.mukebezi@beakolaw.co.tz | +255 768 983 015 | +255 784 645 690 | +255 766 645 690

The said position was followed by four other decisions namely, **Shell Deep water versus the Commissioner General, Civil Appeal No. 123 of 2018 (Unreported), National Microfinance Bank versus the Commissioner General Civil Appeal No. 168 of 2018 (Unreported)** and **The Commissioner General versus Aggreko International Projects Limited, Civil Appeal No. 148 of 2018 (Unreported).**

When the Pan African Energy decision was rendered in 2015, the Court advised that the law should be changed since the way the law is crafted could be a leeway for tax avoidance to unfaithful taxpayers. In so doing, the Court got inspiration from India where a similar action was taken to protect government revenue for services which are rendered outside India.

In 2016 therefore, the Parliament in an attempt to change the law, defined the word 'service rendered' to mean 'service delivered or transmitted in Tanzania'. However, section 69(i)(i) of the ITA remained intact. Therefore, when the Tullow and other decisions were delivered in 2018, the ITA had already been amended. The amendment was not useful because section 69(i)(i) of the ITA remained unchanged and the Tullow case related to transactions which happened before the amendment.

The position that if the result of the services rendered offshore are utilized/consumed in Tanzania then withholding tax applies, created conflicting positions from the same court because the Pan African Energy position was never disowned by the Court of Appeal.

In 2020, the law on source of income in so far as service fees are concerned was changed again. Section 69(i)(i) of the ITA was changed by section 33 of the Finance Act, 2020.

Section 69(i)(i) now provides that 'payment will have a source in Tanzania irrespective of a place where the service is rendered provided that the service is consumed in Tanzania'. So technically, the law was changed to codify what the Court ruled in the Tullow case.

Tax laws are usually construed strictly unless there is an element of tax avoidance. Likewise, tax laws are strictly applied prospectively, meaning tax must be charged as per the law as is at the time of the transaction. Taxes are forbidden to be imposed for a previous transaction upon which no law existed. The Tullow case versus the 2020 Finance Act amendments therefore, is a case for a cart before the horse. Practical, not practical? - not sure.

Ophir Tanzania (Block 1) Limited versus Commissioner General (TRA) Civil Appeal No 58 of 2020 was decided by the Court after the amendment in 2020, although it covered transactions which happened years before both amendments. Three key things emerged from the Ophir decision.

In terms of the law, the Court has powers to depart from its previous decision and that does not necessarily require a full bench. There are various scenarios where three justices of appeal decided to depart from the Court's previous decision. Although it is true that a full bench of five judges may also depart from previous decision of three justices of appeal, it did not in our view preclude the Court (of three judges) in the Ophir case to depart from the decisions of the Court. They could, in terms of the law, but chose not to.

However, and importantly too, there is still a room for the Court to still depart from its previous decisions on this point to make the 2020 Finance Act amendments meaningful– way forward.!

Way Forward

Given the Court's position in the Ophir case, taxpayers with pending disputes may request the Court to resolve the upcoming similar disputes through a full bench of five judges. Hence, perhaps it's not the end of the road.