

BARCLAYS BANK OF ZIMBABWE
and
THE COMMISSIONER GENERAL
ZIMBABWE REVENUE AUTHORITY (ZIMRA)

APPLICANT

RESPONDENT

IN THE SPECIAL COURT FOR INCOME TAX APPEALS
HELD AT HARARE
HLATSHWAYO J
HARARE, 6 July 2005.

Opposed Application

Advocate J C Andersen, for the appellant.
Advocate Mazonde, for the respondent.

HLATSHWAYO J: The appellant is Barclays Bank of Zimbabwe Limited, a company duly incorporated with limited liability under the laws of Zimbabwe, which operates as a commercial and merchant banker with offices throughout Zimbabwe (hereinafter called “the bank”) and the respondent is the Commissioner General, Zimbabwe Revenue Authority.

Three preliminary issues were disposed of at the beginning of the hearing of this matter. The application for the condonation of the late noting of the appeal by the appellant was not opposed and was duly granted. Also unopposed and duly condoned was the late filing of the respondent’s case. This was done in terms of the provisions of the Twelfth Schedule to the *Income Tax Act*, (Chapter 23:06), Part I(4) which allows the court to “enlarge any of the times and periods set out in these Rules on good cause being shown or by the agreement of the parties”. On the question of interest raised by the respondent on the late payment in terms of section 72(7) of the *Income Tax Act* the parties informed the court that they had entered into a mutual agreement whereunder in the event of the appellant being unsuccessful in this appeal, no interest would be payable, but if the appellant is successful, the appellant would be entitled to a refund with interest.

On 2nd December 2003, the respondent issued proposed amended assessments in respect of the dates on which it contended income tax was due by the appellant in respect of interests on promissory notes for the income tax years ended 31st December 1997, 1998, 1999, 2000, 2001 and 2002 together with interest on the alleged late payment of the income tax. The appellant lodged an objection against this proposed assessment and interest and the respondent disallowed the objection. On 17 February 2004, the respondent formally issued amended assessments in terms of the proposals and the appellant appealed against the amended amounts on 11 March 2004, the late noting of which has been condoned as indicated above.

The bone of contention in this matter is that in its income tax returns for the tax years in question, the appellant declared the date of interest received on promissory notes as being the date of their maturity, whereas the respondent contends that the interest accrued to the appellant on dates of issue of the promissory notes and, accordingly, issued the amended assessments on that basis. In terms of the promissory notes, which were drawn up as negotiable instruments, capital and interest was only payable to the bearer, who might not be the person to whom the promissory notes were issued, on presentation on the date of maturity. Accordingly, the appellant contends that it was not entitled to interest on the promissory notes prior to the date of maturity as such interest did not accrue nor was it payable to it prior to that date.

The Commissioner bases his position that the interest on the promissory notes accrued to the bank notwithstanding the fact that the actual payment of the interest was to be done on maturity on three grounds which will be discussed below, viz. sections 8(1) and 10(7) of the Income Tax Act, the accrual basis of accounting as contained in the International Accounting Standards (IAS) and the definition and character of a promissory note. The provisions of the

Income Tax Act and the nature of a promissory note are related and will be discussed together.

The import of the accrual basis of accounting in relation to the issue before the court needs to be disposed of first. The Commissioner relied on Accounting Rules IAS 1 and IAS 39 whose contents need not detain us here. While accounting principles and practices may coincide with or help illuminate taxation laws, the court in deciding tax cases is not concerned with what might be considered proper from an accountant's point of view or the point of view of a prudent businessperson, but merely with what is required or permissible according to the language of the Act. See *Sub-Nigel Ltd v CIR* (1948) 15 SATC 381.

Section 8(1) requires to be included in the gross income any amount "received by or accrued to or in favour of a person or deemed to have been received by or accrued to or in favour of a person in any year of assessment..." In terms of section 10(7) and amount is deemed to have accrued in the year of assessment in which the taxpayer becomes entitled to it, despite its being only due and payable to him or her in a future year. Where, however, a taxpayer's entitlement to an amount remains conditional at year-end, it has been suggested on the basis of the principle in *Mooi v SIR* (1971) 34 SATC 1, that there is no accrual in that year. See, L W Hill, *Income Tax in Zimbabwe*, 5th ed. Pp. 5-6 and the cases discussed therein.

Can it be said, therefore, that the facts of this case fall within the circumstances where the taxpayer's entitlement remains so conditional that there is no accrual in that year? The answer to this question depends on whether the instrument in issue is a true bearer promissory note with capital and interest redeemable only at maturity or some other evidence of indebtedness. The taxability before the date of redemption of interest earned on a true bearer instrument would appear to be insupportable by the language of the

Act and case law unless some element of discounting of such interest to its value at year-end was undertaken.

According to R H Christie in Business Law in Zimbabwe at p.194, a promissory note is defined as “an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand or at a fixed or determinable future time a sum certain in money to, or to the order of, a specified person, or to bearer”. The actual wording of the promissory note in issue here, viz., Note 2 to the Promissory Note made by PG Industries (Zimbabwe) Limited to Barclays Bank of Zimbabwe Limited, is as follows:

“This promissory note is issued and held subject to the terms and conditions of the Cession and Pledge Agreement concluded in September 1996 between the Issuer and Barclays Bank of Zimbabwe Limited. Any transfer of the promissory note is made subject to the amount payable hereunder being set-off against any and all amounts payable to the Issuer by the bank in terms of the Cash Management Agreement concluded in September 1996 between the Issuer and the bank.”

Although the promissory note in this case is titled “Bearer Promissory Note”, I have come to the conclusion that it is not a true bearer promissory note. It does not comply with the carefully worded definition of a promissory note which is an unconditional promise and therefore it cannot be “...negotiable free of equities, but it may still supply evidence of and even in itself amount to, a contract.” (R H Christie, *op.cit.*). The negotiability of the promissory note is dependent on the specific performance of the terms and conditions agreed to in separate agreements between PG Industries and Barclays Bank. The bearer of the promissory notes throughout the period was Barclays Bank. The promissory note could only be transferred with the consent of the bank. The appellant in its letter to the respondent dated 19th July 2002 acknowledges that it raised interest accrual entries in compliance with International Accounting Standards, but contended that the interest calculated and

recognized on accrual basis in the bank's Income Statement had not accrued for tax purposes. However, as indicated above, I am persuaded by the submissions made on the respondent's behalf that the appellant had become entitled to the interest accruing from the instruments up to the end of each year of assessment. Maturity was only a condition of payment and not a condition for accrual. Accordingly, this appeal must fail and the costs, naturally and in the absence of any submissions to the contrary, would follow the outcome.

The appeal is dismissed with costs and the amended assessments are confirmed.

Scanlen & Holderness, the appellant's legal practitioners
Kantor & Immerman, the respondent's legal practitioners