REPORTABLE (59)

(1) ARUNDEL SCHOOL (AS SCHOOL) (2) CHISIPITE SENIOR SCHOOL (CSS SCHOOL) (3) ST JOHNS EDUCATIONAL (SET COLLEGE) (4) GATEWAY SCHOOL (GST SCHOOL) (5) ST GEORGES COLLEGE (SC COLLEGE) (6) CHRISTIAN BROTHERS COLLEGE (CB SCHOOL)
v
ZIMBABWE REVENUE AUTHORITY

SUPREME COURT OF ZIMBABWE
GARWE JA, GUVAVA JA & UCHENA JA
HARARE, FEBRUARY 3, AND OCTOBER 12, 2017

F. Girach, for appellant

T. Magwaliba, for the respondents

UCHENA JA: This is an appeal against the decision of the Special Court for Income Tax Appeals which dismissed the appellants' appeals against the determination of the Commissioner-General turning down the appellants' objection against an income tax assessment for additional profit tax.

The appeal is based on a statement of agreed facts which was summarised in the judgment of the court *a quo*. For the purposes of this appeal I summarise them as follows: -

The six appellants are private senior schools operating in Zimbabwe in terms of their respective trust deeds. The second to fourth appellants also operate primary schools, which are jointly administered with the high schools.

Some employees of these schools had their children enrolled at the schools where they worked or at other schools which had mutual agreements with the school at which they are staff members. In terms of those arrangements, the employees of the appellant schools whose children were enrolled at these schools did not pay the same amount of school fees as non-staff parents whose children were enrolled at the schools. The employees' children were spread across the schools and were enrolled, in various classes.

The appellants charged their employees between 20 per cent and 25 per cent of the full fees payable per child. No taxes were paid on the difference between the 20 per cent and 25 per cent of the fees and the full fees payable at the respective schools for the 2009 and 2010 tax years. The first, second, third and sixth appellants charged 20 per cent while the remaining two charged 25 per cent. The fourth appellant used to charge 3 per cent before it was directed by the respondent on 30 November 2009 to charge 25 per cent. It started charging 25 per cent from the third term of 2009.

The respondent contended that the difference between the fees paid by the employee parents to the schools and the full fees payable at the schools was an advantage or a benefit in terms of s 8 (1) (f) of the Income Tax Act [*Chapter 23:06*] to the employee parents arising from their contracts of employment with the appellants which should have been taxed.

The respondent further asserted that the cost of the benefit to the appellants in respect of each benefiting child was the same as the cost of every other pupil enrolled at the school and therefore decided to tax the appellants on the basis that the advantage or benefit claimed by the respondent was equivalent to the waived amount. The appellants disputed the respondents' contentions.

Tax assessments were raised and issued against the appellants in terms of para 10 of the Thirteenth Schedule to the Income Tax Act for taxes which were alleged to be due from the employee parents and which the respondent asserted the appellants were obliged but failed to withhold from the incomes of the concerned employee parents. The appellants disputed both the obligation asserted by the respondent and the application of the legislation in the manner invoked by the respondent. The appellants objected to the respondent's tax assessments. The respondent dismissed the objections. The appellants appealed to the Special Court for Income Tax Appeals against the decisions of the Commissioner-General disallowing their objections.

The appellants' contention before the court *a quo* was that the difference between the subsidised school fees paid by children of the appellants' employees and the fees paid by full school fee paying students was not taxable in terms of s 8(1) (f) of the Income Tax Act because it was not an advantage or benefit. The court *a quo* dismissed the appellants' appeals holding that the concessionary scheme for the payment of part of the school fees by employees whose children were enrolled at these schools should be included in the gross income of the employees in terms of s 8(1) and s 8(1) (b) of the Act and should be included in the assessment of pay as you earn. The court *a quo* held that the subsidised school fees was

an advantage or benefit in terms of s 8(1) (f) I (a) of the Act. It found that the correct assessment had been made in terms of s 8(1) (f) I (a) of the Act.

In respect of the second and third appellants, the court *a quo* set aside the assessments raised by the respondent. It found that the liability of the second and third appellants was not in terms of s 8(1) (f) of the Act, but was in terms of the main charging provision of s 8(1). It held that the respondent should include in the gross income the amount waived by the school at which the child of each such employee parent was enrolled before re-assessing the appropriate pay as you earn liability of the second and third appellants.

The appellants were aggrieved by the decision of the court *a quo.* They appealed against it to this court. The appeal is based on the following grounds of appeal: -

1. "The court *a quo* erred at law by holding that the difference between what was paid by full school fee paying children at each appellant and the school fees charged on each of the affected children of employees enrolled at each appellant constitutes "gross income" in terms of both ss 8 (1) and 8(1 (b) of the Income Tax Act [*Chapter 23:06*] of the employee parent and should be assessed for pay as you earn tax whereas it should have found that, that difference does not constitute an "amount" in terms of s 2 of the same Act.
2. Alternatively, the court *a quo* erred at law by holding that the difference between what was paid by full school fee paying children enrolled at each appellant and the school fees charged on each of the affected children of employees enrolled at each appellant constitutes gross income in terms of both ss 8(1) and 8(1) (b) of the Income Tax Act [*Chapter 23:06*], whereas it should have found that, that difference constitutes an advantage or benefit in terms of s 8(1) (f) of the same act.
3. Alternatively , the court *a quo* erred at law by finding that the correct value of the amount that accrued to the employee parents in each of these matters, is computed as the difference between what was paid by full school fee paying children enrolled at each appellant and school fees charged on each of the affected children of employees enrolled at each appellant, whereas the court should have found that the correct value of the amount accruing to the employees should be their proportionate share of the variable cost of running the school excluding boarding fees.
4. Alternatively, the court *a quo* erred at law by finding that the cost to the employer in terms of s 8(1) (f) (ii) (b) is the total cost incurred in running each school divided by the total enrolment of each school inclusive of the favoured pupils less the concessionary fees paid and all costs related to boarding facilities whereas the court should have found that the cost to the employer is each employee's child's proportionate share of the variable cost of running the school excluding boarding fees.
5. The court *a quo* erred at law by finding as gross income in terms of s 8(1) of the Income Tax Act [*Chapter 23:06*] the difference between what was paid by full school

fee paying children enrolled at either of these two schools by mutual agreement and should be assessed for pay as you earn tax whereas the court should have found that, that difference does not constitute an amount in terms of s 2 of the same Act.

6. Alternatively, the court *a quo* erred at law by finding as gross income in terms of s 8(1) of the Income Tax Act the difference between what was paid by full school fee paying children enrolled at the second and third appellant, whichever is applicable, and school fees charged on each of the 77 children of employees enrolled at either of these two schools by mutual agreement, whereas the court should have found that, that difference constitutes an advantage or benefit in terms of s 8(1) (f) of the same Act.
7. Alternatively , the court *a quo* erred at law in finding that the correct value of the benefit accruing to the employee parents of the 77 children enrolled at either second or third appellant on the basis of mutual agreement between these two schools is the difference between what was paid by full school fees paying children enrolled at each appellant and school fees charged on each of the affected children of employees enrolled at each appellant, whereas the court should have found that the correct value of the amount accruing to the employees should be their proportionate share of the variable costs of running the school excluding boarding fees."

The appeal raised three issues for determination. These are:

1. Whether or not the court *a quo* correctly found that the subsidised school fees fit in the definition of gross income in terms of ss 8 (1) and 8 (1) (b) of the Income Tax Act and is therefore liable to taxation.
2. Whether or not the court *a quo* correctly found that the subsidised school fees were "an advantage or benefit" in terms of s 8 (1) (f) I (a) of the Income Tax Act.
3. Whether or not the court *a quo* correctly assessed the calculations of such waived amounts.

I deal with each of these in turn.

Whether or not the court a *quo* correctly found that the subsidised school fees fits in the definition of gross income in terms of sections 8(1) and 8(1) (b) of the Income Tax Act and is therefore liable to taxation.

Mr *Girach* for the appellants submitted that the difference between the amount paid by full school fee paying children and the amount paid by the children of parents employed at these schools is not part of the appellants' employees' gross income in terms s 8(1) of the Income Tax Act. He submitted that the court *a quo* erred in dismissing their objection to that difference being included in the assessment of payable tax. On the other hand, Mr *Magwaliba* for the respondent submitted that the appellants were liable to pay tax in terms of s 8(1) of the Act. According to the respondent, the definition of the term 'gross income' covers the position of the appellants' employees' school fee concession for their children. Mr *Girach* for the appellants', submitted that the subsidised fees is not part of the appellants' employees' gross income in terms of s 8(1) of the Act. He argued that the subsidised fees were not an amount in terms of s 2 of the Act.

The Act defines the term "gross income" as follows:

> "8 (1) For the purposes of this part: -
> "gross income" means the total amount received by or accrued to or in favour of a person or **deemed to have been received by or to have accrued to or in favour of a person in any year of assessment from a source within or deemed to be within Zimbabwe** excluding any amount (not being an amount included in "gross income" by virtue of any of the following paragraphs of this definition) so received or accrued which is proved by the taxpayer to be of a capital nature and, without derogation from the generality of the foregoing, includes—
> (a) …
> (b) any amount so received or accrued in respect of services rendered or to be rendered, **whether due and payable under any contract of employment or service or not,** and any amount so received or accrued by reason of the cessation of the employment or service of a person other than a benefit (not being a pension or gratuity) received or accrued by reason of contributions made to the Consolidated Revenue Fund, and any amount so received or accrued in commutation of amounts due under a contract of employment or service:-" (emphasis added)

In terms of s 2 of the Act, an "amount" is defined as;

> "amount", for the purposes of the provisions of this Act relating to the determination of the gross income, income or taxable income, as defined in subs (1) of section eight, of a person, means—
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> (a) money; or
>
> (b) **any other property, corporeal or incorporeal,**
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> **having an ascertainable money value;** and "accrued", "paid, "received" or any cognate expression shall, in so far as it applies to an amount as defined in paragraph (*b*), be construed in a sense correlative with that in which it is construed when it applies to money;" (emphasis added)

In my view these provisions are wide enough to cover all money and any other property, corporeal or incorporeal which has an ascertainable monetary value. Non-monetary items which have an ascertainable monetary value are included in the terms of this provision. A non-monetary item can only escape if it has no ascertainable value. The question which arises, is whether the difference between the amount paid by full school fee paying children and the amount paid by the children whose parents are employed at these schools an incorporeal thing with an ascertainable value? It is obvious that the benefit received by the employees of the appellants is an incorporeal thing with an ascertainable value. As such the advantage received by the employees of the appellants falls within the broad definition of the term gross income.

It should also be noted that income is not only construed in monetary terms but may be in any other form other than money. In *Commissioner for Inland Revenue v People's Stores (Walvis Bay) (Pty) Ltd* 1990 (2) SA 353 (A) Hefer JA at page 364 G - J said:

> "It must be emphasised that income in a form other than money must, in order to qualify for inclusion in 'gross income', be of such a nature that a value can be attached to it in money. As Wessels CJ said in the Delfos case (*supra*) at 251:
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> 'The tax is to be assessed in money on all receipts or accruals having a money value. If it is something which is not money's worth or cannot be turned into money, it is not regarded as income.' (See also *Mooi v Secretary for Inland Revenue (supra* at 683A-F). On the other hand, the fact that the valuation may sometimes be a matter of considerable complexity (of the Lace Property Mines case (*supra*) at 279 - 81) does not detract from the principle that all

> income having a money value must be included. How the valuation is to be done depends, of course, entirely on the nature of the income and the circumstances of the case"

In light of this dictum, I find that the concessionary rate of school fees which was offered to the appellants' employees is income and should have been taxed. The concessionary rate of school fees has a value which is taxable in terms of s 8(1) of the Act. The court *a quo* therefore correctly found that the subsidised school fees fits in the definition of gross income in terms of s 8(1) and is therefore liable to taxation.

Section 8(1) (b) clearly states that any amount received or accrued in respect of services rendered or to be rendered, whether due and payable under any contract of employment or service is liable to taxation. Having accepted that the subsidised fees are an amount in terms of the Act, it is therefore clear that that amount accrued to the appellants' employees because of their contract of employment.

I therefore find that ss 8(1) and 8(1) (b) of the Income Tax Act are wide enough to cover the difference between the concessionary fees and full school fees which accrued to the appellants' employees.

I do not accept Mr *Girach*'s contention that the court *a quo* erred in finding that the difference between the amount paid by full school fee paying children and the amount paid by the children of parents employed at these schools is income in terms of ss 8(1) and 8(1) (b) of the Income Tax Act. It is clear that the benefit received by the employees of the appellants' falls within the broad definition of the term gross income and therefore was subject to taxation.

Whether or not the court a *quo* correctly found that the subsidised school fees, is "an advantage or benefit" in terms of section 8(1) (f) I (a) of the Income Tax Act.

Even though I have already found that the appellants were liable to pay tax in terms of ss 8(1) and 8(1) (b) of the Act, the determination of the second issue is important in the disposition of the third issue concerning the value of the benefit. It is important to highlight that the assessment of the tax in question was for the 2009 and 2010 tax years. Section 8(1) (f) of the Income Tax Act as applicable during the relevant period included within the meaning of "gross income" the following: -

> "(f) an amount equal to the value of an advantage or benefit in respect of employment, service, office or other gainful occupation or in connection with the taking up or termination of employment, service, office or other gainful occupation:
> Provided that—
> (i) …….
> (ii) …….
> For the purposes of this paragraph—
> 1. "advantage or benefit"—
> (a) means—
> ` (i) board; or
> (ii) the occupation of quarters or of a residence; or
> (iii)the use of furniture or of a motor vehicle; or
> (iv) **the use or enjoyment of any other property whatsoever, corporeal or incorporeal, including a loan, whether of the same kind as that referred to in subparagraph (i), (ii) or (iii) or not,** which is not an amount referred to in paragraph (a), (b) or (c) of the definition of "gross income" in this subsection; or
> (v)an allowance;"
>
> **granted to an employee, his spouse or child by or on behalf of his employer in so far as it is not consumed, occupied, used or enjoyed, as the case may be, for the purpose of the business transactions of the employer and in so far as a amount is not paid by the employee, his spouse or child in respect of its grant;** and (emphasis added)

The use in (iv) above of the words "any other property whatsoever … whether of the same kind as that referred to in subpara (i) (ii) or (iii) or not" is significant. It means the words "advantage or benefit" are not confined to what is stated in (i) to (iii). It, in my view, means any "advantage or benefit" and what is stated in (i) to (iii) are mere examples whose possible limiting effect is removed by paragraph (iv) which provides that the advantage or benefit can be the use of "any property whatsoever" and can or cannot be of the same kind as those mentioned in paragraphs (i) to (iii). The words "any other property whatsoever" and "or not" broadens the ambit of the meaning of the words "advantage or benefit".

There is no doubt that the concessionary school fee benefit was granted to the appellants' employees by the appellants. The benefit is not being used for the benefit of the appellants' business but that of their employees. It is not paid for by the employees but is an advantage or benefit accruing to them by virtue of their being the appellants' employees in terms of their contracts of employment. It is therefore part of the employees' taxable income …

Section 8(1) (f) I (a) (iv) was subsequently amended by the Finance Act (No. 2) of 2012 (Act 6 of 2012) which includes in the definition of the words "advantage or benefit" the following: -

> "(vi) in the case of an employee who is a member of the teaching or non-teaching staff of a "school" as defined in the Education Act [*Chapter 25:04*], the waiver of the whole or any portion of the amount of tuition fees, levies and boarding fees (hereinafter called a "school benefit") that would otherwise be payable by the employee for any child of his or hers who is a student at that or another school;".

It should be noted that the amendment specifically addresses a problem identical to the one before this court. It specifically provides for the taxation of a school benefit, an issue which had been in dispute between the appellants and the respondent since 2009.

Mr *Girach* for the appellants submitted that the clear meaning of s 8(1) (f) prior to its amendment in 2012 is that not all perquisites fall to be treated as advantages or benefits, but only those to which specific meaning is given. He submitted that the use of the verb 'means' in subpara I (a) of the definition of 'advantage or benefit' is undoubtedly used in contradistinction to the more general verb 'includes'. He further submitted that the fact that the provision was amended meant that the legislature cannot be assumed to be repeating itself. He submitted that s 8(1) (f) I (a) (iv) was amended to include something new which had not previously been covered by legislation. He submitted that the difference between what other parents pay for the education of their children and what the employees of the appellants pay is not an "advantage or benefit" contemplated by s 8(1) (f). He submitted that the waived amount was not corporeal or incorporeal property as it has no tangible being. I do not agree.

It seems to me that on a proper interpretation of the provision, if the legislature intended to exclude other advantages and benefits which it subsequently decided to include in the amended s 8(1) (f) I (a) (iv), it would not have used the words "any other property whatsoever … whether of the same kind as referred to in paras (i), (ii) or (iii) or not". The subsequent specific inclusion of the school fees advantage or benefit in 2012 does not mean that the employee parents' "advantage or benefits" were being included for taxation for the first time. In my view it was merely being clarified. That is why the amendment is worded in

a manner which gives the impression that it was intended to resolve the disputes in this case which had started in 2009.

Mr *Magwaliba* for the respondent submitted that the concessionary rate of school fees which was offered to the appellants' employees was an advantage or benefit in terms of s 8(1) (f) I (a) (iv) in that it was an entitlement arising from an employment contract and as such it was a right. According to him, it was not the pupils who have a right to education but rather the parents who have the right to have their children educated at the concessionary rate. That right to have their children educated at a concessionary rate constituted incorporeal property which has a monetary value. Mr *Magwaliba* for the respondent therefore submitted that the amendment did not bring in a new thing, but was legislated to clarify existing legislation. I agree. It is not unusual for the legislature to clarify legislation whose wording would have caused disputes. In this case the wording of s 8(1) (f) I (a) (iv) had caused disputes between the six appellants and the respondent in the 2009 and 2010 income tax years which had not been resolved at the time of the amendment …

L.W. Hill In his book; *Income Tax in Zimbabwe 4*th Edition at page 52 commented on s 8(1) (f) of the Income Tax Act as it was before the 2012 amendment as follows: -

> "Employers may remunerate their employees for services rendered either in cash or in any other way, **but any advantage or benefit which can be connected with an employee's employment forms part of his gross income.** "Advantage or benefit" is defined as: board; the occupation of quarters or of a residence; the use of furniture or of a motor vehicle; **the use or enjoyment of any other property,** including a loan; or an allowance…….
> For the most part, **paragraph (f) imposes liability on the employee's private use of the employer's assets.** This is because many receipts by employees from employers, in cash or in kind, will already have fallen within the provisions of paragraph (b), considered earlier" (emphasis added)

In view of the above it is clear that the liability imposed by para (f) is for the use of the employer's assets. In this case, it is not in dispute that the employees of the appellants have rights which entitle their children to be educated at the appellants' educational institutions at concessional rates because of their contracts of employment. Those rights, although personal, are capable of being enforced against the appellants. The right to have their children educated at a concessionary rate is an incorporeal property envisaged in para (f) of the Act. It is on that basis that I find no fault in the judgment of the court *a quo* that the waived amount is an amount equal to the value of an advantage or benefit in respect of employment.

Whether or not the court *a quo* correctly assessed the calculations of the waived amounts.

Mr *Girach* for the appellants submitted that the court *a quo* erred at law by finding that the cost to the employer in terms of s 8(1) (f) (ii) (b) is the total cost incurred in running each school divided by the total enrolment of each school inclusive of the favoured pupils less the concessionary fees paid and all costs related to boarding facilities whereas the court should have found that the cost to the employer is each employee's child's proportionate share of the variable cost of running the school excluding boarding fees. I do not agree. Section 8(1) (f) II (b) of the Income Tax Act provides:

> "II. the value of the grant of an advantage or benefit, other than a payment by way of an allowance, shall be determined …
>
> a. In the case of the occupation or the use of quarters, residence or furniture, by reference to its value to the employee; and
> b. In the case of any other advantage or benefit, by reference to the cost to the employer"

The import of this provision is that the value of the school fees benefit which is afforded to the employees of all six appellants should be computed with reference to the cost to the employer. The appellants' argument was that the non-variable costs should not be

included in the assessment of the value of the benefit because these costs would have been incurred by the employer whether or not the employee is conferred with the benefit and these are incurred by the employer in running the school. That argument is flawed. The provision made it clear that the value of the benefit is to be determined with regard to its cost to the employer. To draw a distinction between variable costs and non-variable costs would be tantamount to reading into the provision what was never intended by the legislature. The remarks of GUBBAY JA (as he then was) in *Mxumalo & Ors v Guni 1987 (2) ZLR 1 (S)* are apposite. He said: -

> "The language used is plain and unambiguous and the intention of the Law Society is to be gathered there from. It is not for a court to surmise that the Law Society may have had an intention other than that which clearly emerges from the language used. This principle has been stated frequently and I need only refer to Ex parte Minister of Justice: In re *R v Jacobson & Levy* 1931 AD 466 at 480, where Stratford J said that:
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> > "**The function of a Court of Law is to construe the language of the Legislature and arrive at its intention in that way; it has no power to redraft or alter the language**. (The) intention is not to be ascertained by surmise however probable such surmise may be"".

The provision does not draw a distinction between variable and non-variable costs. The learned judge *a quo* in making his determination made reference to *Income Tax Case No. 1336* at p 117 where SQUIRES J said:

> "The clear intention of the legislature is manifestly to tax in a taxpayer's hands all the benefits or advantages afforded to him as an employee from his employment, as well as the income he earns. The advantage or benefit of using a car belonging to the employer is to relieve the employee taxpayer of the financial burden of owning the car himself. It can be a very substantial benefit compared to the person who receives no such advantage, and not the least relief is the costs of licencing and insuring such asset, quite apart from the diminution in value that is inherent in the aspect of depreciating whether actual or notional. Since the relief thus afforded is unquestionably a benefit to the employee, I can see no basis on which the spirit of the Act would save to exclude these from what falls into the gross income, particularly as they are equally clearly a cost to the employer. Not only, therefore, is there no reason for implying additional words, but, as it seems to me, a strong reason for giving the words used their ordinary meaning."

Mr *Girach* for the appellants submitted that the facts of that case can be distinguished from the facts *in casu* because in that judgment the car was not used for the public. He argued that if the car was used for the public as well as for the employee's benefit, the learned judge would not have come to the same conclusion because all the costs of running the vehicle (variable and non-variable) would not have been found to constitute the value of the benefit to the employee. I do not agree with that argument. The cost to the employee should be computed with regard to the total cost of running the school regardless of the allegation that under the school budget, the non-variable costs are covered by the full school fees paying children. To hold that non-variable costs should be excluded from the meaning of "cost to the employer" would be reading into the language of the statute what was not intended by the legislature.

The appeal is devoid of merit. It is accordingly dismissed with costs.

GARWE JA: I agree

GUVAVA JA: I agree

*Dube Manikai and Hwacha***,** appellant's legal practitioners

Advocates' Chambers, respondent's legal practitioners