

REPORTABLE (16)

ZIMBABWE PLATINUM MINES (PRIVATE) LIMITED
v
ZIMBABWE REVENUE AUTHORITY

SUPREME COURT OF ZIMBABWE
BHUNU JA, UCHENA JA & CHATUKUTA JA
HARARE: 20 MAY 2022 & 9 MARCH 2023.

J. Muchada, for the appellant

T. Magwaliba, for the respondent

UCHENA JA: This is an appeal against part of the judgment of the Special Court for Income Tax Appeals handed down on 14 August 2020, dismissing the appellants' appeal against the respondent's Commissioner's dismissal of its objection in respect of its failure to deduct Pay As You Earn (PAYE) in respect of meals and accommodation the appellant provided to its employees and penalties the respondent's Commissioner had imposed against the appellant. At the hearing of the appeal the appellant abandoned its grounds of appeal in respect of penalties. The appeal was therefore argued on whether or not the accommodation and meals the appellant provides to its employees are taxable

FACTUAL BACKGROUND

The appellant is a company duly registered in terms of the laws of Zimbabwe. It is involved in the mining industry at its still to be fully developed mines at Ngezi and Selous areas in Zimbabwe. The respondent is an administrative authority established in terms of the Revenue Authority Act [*Chapter 23:11*] and is tasked with, inter alia, the collection of income tax from income earners in terms of the Income Tax Act [*Chapter 23:06*] (ITA).

On establishing its mines, the appellant built Ngezi, Mupani and Eagle's Nest Villages where it accommodates and provides meals to employees on shifts and those waiting to go on shifts. It gives packed meals to employees who will be on shift in the mines. The employees on shift in the mines are given breaks of only 15 minutes to eat their packed meals before continuing with their duties.

The appellant's villages can only be accessed by employees who it will have authorised to be accommodated there for the periods they will be on shifts and waiting to go on shifts. The appellant completes forms authorising the admission of employees going on shifts into its villages. The villages do not have individual cooking facilities for the employees. The appellant provides them with meals. The villages can only accommodate employees. They do not accommodate the employees' dependents. An employee can only stay in the villages while on shift or waiting to go on shift. When an employee is off duty he has to go back to his own accommodation.

The respondent carried out a tax review audit of the appellant's payroll tax compliance. Upon concluding the investigations, the respondent's officers found the appellant liable for failure to withhold pay as you earn tax on advantages and benefits accruing to the appellant's employees in respect of the accommodation and meals it provides to them in the villages and mines. As a result, the respondent issued the appellant with revised assessments for the period 2010 to 2016 and required it to pay the outstanding taxes.

The appellant objected in terms of s 62 of the ITA to the assessments raised by the respondent in respect of the accommodation and meals it gives to its on shift and waiting to go on shift employees. It submitted that the employees were not deriving any benefit from the accommodation arrangements as they were purely designed for the employer's business transactions.

The respondent's Commissioner disallowed the appellant's objections.

The appellant appealed to the court *a quo* challenging his determination of its objections.

In the court *a quo* the appellant argued that the meals and accommodation it provided to its employees did not constitute a taxable advantage or benefit in terms of s 8 (1) of the ITA.

In response, it was submitted for the respondent that the assessments had been done in terms of the law. It was argued that the appellant's employees were getting a benefit from the free accommodation and meals they got from Eagle's Nest, Ngezi and Mupani villages as they were relieved of the financial burden of paying for their own accommodation and buying their own meals. The respondent therefore argued that this made the provision of accommodation and meals taxable benefits in the hands of the appellant's employees.

In determining the issue of the meals and accommodation provided by the appellant to its employees at Eagle's Nest, Ngezi and Mupani Villages, the court *a quo* held that they were taxable as they relieved the employees from having to pay for their own accommodation and meals.

The appellant was aggrieved by the decision of the court *a quo*. It appealed against it to this Court, on the following ground of appeal: -

“The court *a quo* erred in law by holding that the meals and accommodation provided by the appellant to its employees temporarily residing at Eagle's Nest, Ngezi and Mupani Villages and working at the appellant's mines constitutes a taxable advantage or benefit in terms of section 8 (1) (f) (ii) (b) of the Income Tax Act (Chapter 23:06) accruing to the employees”.

SUBMISSIONS BY THE PARTIES

Mr *Muchada* for the appellant submitted that he will be advancing argument in respect of ground 3 which dealt with s 8 (1) (f) of the ITA focusing on taxation of accommodation and meals provided by the appellant to its employees. He submitted that s 8 (1) (f) of the Income Tax Act contained an exception to the effect that advantages or benefits used, enjoyed or consumed by employees for purposes of the employer's business transactions are not taxable. He averred that the meals and accommodation provided by the appellant to its employees in the mines and villages were not taxable as they were provided for the employer's business transactions. He further submitted that the circumstances surrounding the operations of the appellant demanded that the employees be provided with temporary accommodation and meals on site for the employer's benefit.

Per contra, Mr *Magwaliba* for the respondent submitted that the appellant's employees enjoyed a benefit that was unrelated to the services they rendered and so they ought to have been taxed on the meals and accommodation they received from the appellant. He further averred that the appellant's employees ought to have found their own accommodation in neighbouring towns because the accommodation and meals which were provided by the appellant were not in line with the business transactions of the appellant, but was mainly for the convenience of the employees. He however conceded that employees who are off duty cannot stay in the villages and have to go back to their own accommodation and would not be entitled to meals.

The appellant having abandoned the issue of the penalty imposed upon it, the only issue remaining to be determined relates to:

Whether or not the court *a quo* correctly held that there was no misdirection on the part of the respondent in holding that the meals and accommodation provided by the appellant constituted a taxable advantage or benefit in terms of the Income Tax Act.

THE LAW

It is settled law that the taxpayer bears the onus of proving its case on appeal.

Section 63 of the Act provides as follows:

“63 In any objection or appeal under this Act, the burden of proof that any amount is exempt from or not liable to the tax or is subject to any deduction in terms of this Act or credit, shall be upon the person claiming such exemption, non-liability, deduction or credit and upon the hearing of any appeal the court shall not reverse or alter any decision of the Commissioner unless it is shown by the appellant that the decision is wrong.”

The tax payer can prove this by giving evidence which proves that the law exempts him/her/it, from paying the tax the Commissioner is requiring it to pay.

In the case of *Parkington v Attorney General*, 1869 LR 4 H.L. 100, 122 LORD CAIRNS commenting on the interpretation of fiscal statutes said:

“As I understand the principle of all fiscal legislation it is this. If a person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be.”

The facts of each case and the relevant provisions of the ITA must therefore be carefully examined to determine whether or not a tax payer falls within or outside the ambit of the taxing provision.

Section 8 (1) (f) provides 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) to (g)...
- (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”

The Act proceeds to define the terms advantage or benefit as including:

“the use or enjoyment of any other property whatsoever...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...” (emphasis added)

The words “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” provides an exception which determines whether or not an employee who receives an advantage or benefit should be taxed.

The words “in so far as it is not” which precedes the words “consumed, occupied used or enjoyed” means the taxability of the advantage or benefit depends on the purpose for which the consumption, occupation use or enjoyment is given by the employer.

The words “for the business transactions of the employer” exempts the employee from taxation if he/she/it consumes, occupies, uses or enjoys the advantage or benefit for the business transaction of the employer. It must be noted that the consumption, occupation use or enjoyment would be taxable but is exempt because of the need to further the employer’s business transactions. The Legislature deliberately provided for the exemption in appreciation that circumstances may arise when employees may get an advantage or benefit which should be exempt because it will have been necessitated by the business transaction of the employer.

The purpose of the employer’s business transaction can be identified by considering, who is the dominant beneficiary between the employer and the employee or who determines the need for the giving of the benefit and is enriched by it. If the transaction is predominantly for the employer’s benefit or interest the employee should be exempt from

taxation. If the transaction gives the employee an advantage or benefit as would be the case when employees are given incentives the employee must be taxed.

This, therefore, means advantages and benefits which are given to an employee are taxable unless they are consumed or used by the employee for the purpose of the business transactions of the employer.

APPLICATION OF THE LAW TO THE FACTS

In determining the appeal on whether or not the accommodation and meals provided by the appellant to its employees were taxable the court *a quo* said:

“The issue herein is whether the meals and the accommodation provided by the appellant to its employees at these camps constitute a taxable advantage or benefit accruing to the employees in terms of s 8 (1) (f) of the Act. The appellant’s contention is basically that it provides meals and accommodation to its employees at these villages because it is a necessary part of its business. In other words, there is no taxable benefit which is given to the employees. During the hearing the appellant chose not to pursue the issue as to whether or not there was a practice generally prevailing within the respondent in terms of which meals provided to low level employees were not subjected to tax. I will therefore focus on the remaining issue.

It is trite that s 8 (1) (f) of the Act excludes from taxation any advantage or benefit in so far as it is used, consumed or enjoyed for the purpose of the business transactions of the employer. The appellant contends that this provision is not different from the so-called convenience of the employer doctrine, applied in the United States of America. The later doctrine as codified by the Internal Revenue Code of 1954, established two requirements for excluding meals: (a) the employer must provide the meal for the convenience of the employee” and (g) the meal must be provided “on the business premises of the employer”. See also *Commissioner v Kawalisk* 434 US 77 (1977). I disagree with the appellant. Section 8 (1) (f) creates a dispensation that is materially different from the US doctrine of the convenience of the employer” The respondent correctly relies upon a case from this court in ITC number 1336 (1981) 43 SATC 114 (Z). In that case SQUIRES J stated:

‘The advantage of (sic) benefit of using a car belonging to the employer is to relieve the employee tax payer of the financial burden of owning a car himself. It can be a very substantial benefit compared to the person who receives no such advantage-----

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 income particularly as they are equally clear a cost to the employer’.

Although the court was dealing with a, motoring benefit the principle is equally applicable to accommodation and meals benefits in *casu*. These benefits are subject to taxation. **The accommodation and meals provided by the appellant to its employees relieves the employees of the financial burden of paying for their own accommodation and buying their own meals.** They are therefore benefits taxable in the hands of the employees. The accommodation and meals were not consumed for the business transactions of the appellant. The job would have been done whether or not the appellant had provided the accommodation and food. The employees could have looked for their own accommodation and their own food to sustain themselves. If all that the appellant wants was to prevent its employees from wondering away from the workplace and at the same time not give them a taxable benefit was for the appellant to provide the accommodation and the meals for a market price consideration. The appellant even provided meals to employees who were no longer on shift.” (emphasis added)

In his evidence Mr Jokonya the appellant’s Human Resources and Community Services Manager during his examination in-chief told the court how they run three shifts.

During that part of his evidence the following exchange took place between him and the appellant’s Counsel:

“Q. In relation to that can I ask you Mr Jokonya to tell the court how long does an employee stay at this (sic) accommodation villages?

A. We run three shifts what we call 7;3 when employees are on dayshift they are at work for 7 days and then they go off for 3 days. That is when they are on day shift. When they go on night shift they go on what we call 7;4 which means that they are at work for 7 days and they go off for 4 days. And at any one point in time there is a shift that is off so two shifts are at work, one shift is off. And then we have got the third one that we call 5;2. This basically refers to people who work Monday to Friday and they are off over the weekend.

Q. Mr Jokonya you have explained to the court the various shifts that employees work for 7 days then after 4 days off, then 5 days off, when these employees are not on shift where did they stay?.

A. **My Lord when these employees are not on shift they are expected to go on (sic) wherever they call home.”** (Emphasis added)

The fact that employees who are not on shift or awaiting to go on shift have to go to their own accommodation resolves the issue. It means the court *a quo* erred when it, in its judgment held that “The accommodation and meals provided by the appellant to its

employees relieves the employees of the financial burden of paying for their own accommodation and buying their own meals.”

If employees have to go to their own accommodation when not on shift or waiting to go on shift it means they have to own or rent their own accommodation for use when they are not on shift. Their stay in the appellant’s camps or villages is temporary and does not relieve them of the financial burden of owning or renting their own accommodation. Mr *Magwaliba* for the respondent conceded during the hearing of the appeal that employees go to their own accommodation when they are not on shift or waiting to go on shift.

Entry and exit from the villages are controlled by the employer. An employee can only be accepted into the villages at the instance of the employer who completes a form instructing the village to book in the employee who will be about to go on shift. The employees can only stay in the villages for the period specified by the employer. At the end of his shift an employee has to leave the village and go back to his own accommodation. He will be replaced in the village by another employee who will be coming to stay for the duration of the next shift. The accommodation is therefore only availed to employees during the duration of their shifts. This clearly demonstrates that the accommodation is for the benefit of the employer’s business. The employer controls the employees’ stay in the villages at times it requires their presence in the villages to work in its mines which are located in the bush.

The employer also controls the provision of food in its villages and mines. The villages have no provision for employees to cook their own food. They have to eat what the employer provides. Employees working in the mines are given fifteen minutes per shift to eat the packed meals. This is obviously to avoid loss of production time. This is clearly for

the benefit of the employer's business transaction. The employees can therefore only stay in the villages and consume the meals for purposes of rendering efficient services to their employer during the times they are confined to the villages and mines for the business transactions of the employer.

It is only the appellant's employees on shift who can stay in the villages. The employees have to find their own and their families' accommodation elsewhere. They have to provide meals for their families during the period they will be on shift. They have to go back to their own accommodation when they are not required to be in the villages or mines for the business transactions of the employer. The appellant clearly uses its villages and meals for the furtherance of its business transactions.

The appellant in my view discharged on a balance of probabilities, the onus placed on it by the law to prove that the Commissioner erred when he held that the meals and accommodation provided to the employees constitute a taxable advantage or benefit.

The advantages or benefits received by the employees of the appellant fall within the broad definition of the term gross income but also fall within the exemption under s 8 (1) of the Act. The court *a quo* therefore erred when it held that the accommodation and meals provided by the appellant to its employees serve as a financial relief and they are therefore benefits taxable in the hands of the employees. That finding is contrary to the uncontroverted evidence led from Mr Jokonya, who said the employees temporarily stayed at the camps/villages when they were on shifts or waiting to go on shift but would go back to their own accommodation at the end of the shift. He also said they provided meals to employees working in the mines because they only give them 15 minutes breaks to eat their meals. He explained that 15 minutes is not even enough for an employee to get out of the mine and be cleared out by security to enable an employee to go

out and look for his/her own food at the shops located seventeen kilometres from the mine. It is clear that the provision of food to employees working in the mines is for, the benefit of the employer's business transactions. The food given to employees who will be in the employer's villages, awaiting their turn to go on shift is in my view also in the interest of the employer's business transactions. The employer will have brought the employee from his/her own accommodation and confined him/her in its own accommodation for the efficient running of its mines. The employer gives them food because there are no individual cooking facilities in its villages.

This case is distinguishable from the facts in *Arundel School & Ors v Zimbabwe Revenue Authority* SC 61/17 in which this Court held that the exemption of a school's teacher from paying fees for his/her children is a taxable benefit. The free education given to a teacher's child is a benefit to the child who acquires education at the expenses of his or her parent's employer. The teacher is relieved of the burden of paying for the education of his or her child. The employer derives no benefit from the education of its employee's child. It is not comparable to merely temporarily staying in the employer's accommodation and consuming the employer's meals because the employer realised that it had to make these provisions for the efficient running of its mines.

It is also distinguishable from ITC number 1336 (1981) 43 SATC 114 (Z) where the Special Court held that the benefit of using the employer's vehicle for one's own use relieves the employee from having to own his own vehicle. An employee who uses the employer's vehicle for the employer's business and for his own uses is relieved of the burden of having to buy his own motor vehicle. While the provision of meals for employees in villages while waiting to go on shift may be a benefit to employees because for the duration of their stay in the villages they do not have to buy their own food. One must however be guided by the law which acknowledges these benefits but exempts them because they are given as part of the employer's business transactions. As already explained under

the analysis of the law what the Legislature has exempted should remain exempted and what the legislature says should be taxed must be taxed. Tax legislation must be interpreted in such a way as to give effect to the intention of the legislature even if it may seem to cause hardship to the taxpayer or loss to the *fiscus*.

In light of the above, I find that the meals given by the appellant to its employees may be income but they are exempt from taxation by the operation of law. The meals and accommodation have a value that is taxable in terms of s 8 (1) of the Act but are exempt in terms of s 8 (1) (f) of the same Act. The court *a quo* therefore correctly found that the meals and accommodation fit in the definition of gross income in terms of s 8 (1) but erred in holding that they do not fall within the exemption provided for by s 8 (1) (f).

The appeal has merit.

It is accordingly ordered as follows:

1. The appeal succeeds with no order as to costs.
2. The decision of the court *a quo* in respect of the taxation of the employees for the accommodation and meals given to them at the appellant's villages and mines is set aside and is substituted by the following:

“The objection lodged by the appellant against the amended tax assessments issued by the respondent on 23 May 2017 in respect of employment tax (PAYE) on meals and accommodation provided to employees at Eagle's Nest, Ngezi and Mupani Villages and working on the appellant's mines is allowed”.

BHUNU JA:

I agree

CHATUKUTA JA:

I agree

Maguchu & Muchada, appellant's legal practitioners

Advocate's Chambers, respondent's legal practitioners