

TOTAL UGANDA LIMITED v UGANDA REVENUE AUTHORITY

COURT OF APPEAL OF UGANDA

COURT OF APPEAL CIVIL APPEAL No.1 OF 2002

(ON APPEAL FROM HIGH COURT OF UGANDA CIVIL APPEAL NO. 6 OF 2001)

BEFORE

A.E.N. MPAGI-BAHIGEINE, A. TWINOMUJUNI, C.N.B. KITUMBA, .JJA

April 22, 2002

JUDGMENT

TWINOMUJUNI, J.A: This is a second appeal by the appellant against the judgment of the Tax Appeals Tribunal and the High Court of Uganda in which, but for different reasons, both tribunals ruled that a holder of a Certificate of Incentives who has elected to continue under section 168 (21) of the *Income Tax Act, 1997* is not entitled to exemption on withholding tax on dividends paid to non resident shareholders.

For the background to this dispute, I cannot do better than reproduce it as it is found by the Tax Appeals Tribunal in their judgment dated August 21, 2001 as follows:

“The Uganda Investment Authority in accordance with section 25 of the *Investment Code, 1991*, issued a Certificate of Incentive is [sic] No. MSD/00393/20097 to:

- (i) Total Outre Mer Cedex 97,9207 Paris la Defence and
- (ii) Marketing Services International (MAST) of Box 1931, Ave Geonges Pomidou Djibouti.

Both non-resident shareholders for their investment of US\$5,574,000 in M/S Total (U) Ltd.

As holders of a Certificate of Incentives, they were exempted from corporation tax, tax on dividends and withholding tax for a period of five years to the extent of fifty percent (50%).

These incentives were to be valid for the period of January 1, 1996 to December 31, 2000.

Parliament enacted the *Income Tax Act, 1997* and section 167 (1) repealed section 25 of the *Investment Code, 1991*. Subsection 2 of this section states:-

“Any right or privilege acquired by any person under the repealed legislation ceases to exist on the date this Act is published in the Gazette unless it is expressly provided in this Act or in regulation made under this Act that the right or privilege is to remain in existence.”

But as a transitional measure, section 168 (21) gave investors with valid certificates of incentives the option to elect to continue with the incentives in the repealed section 25 of the *Investment Code*.

Section 168 (21) stipulates:-

“(21) Notwithstanding the repeal of section 25 of the *Investment Code* by section 167, the holder of a Certificate of Incentives which is valid at the commencement of this Act may make an election in writing to the Commissioner by December 31, 1997 for the exemption from tax on

corporate profits and the exemption from withholding tax paid on dividends and interest paid to resident persons as provided under section 25 of the *Investment Code* to continue until the exemption expires in accordance with that section as if that section had not been repealed.”

The applicant elected to continue with the incentives and communicated to this effect to the Commissioner General in letter UCI4/878 of July 28, 1997. The District Revenue Officer, Nakawa, Jinja Road in a letter Ref. 37363 of August 6, 1997 accepted the election, on behalf of the respondent. It is on this understanding that the applicant, when paying dividends of Shs. 6,040,000,000/= to its non resident shareholders for the year of income 1999, withheld and remitted to the respondent Shs. 453,000,000/= being the 50% as set out in the exemption on the Certificate of Incentives or 7.5% of the withholding tax rate. On the other hand, the Commissioner, Large Taxpayers Department, demanded for a further Shs.453,000,000/= from the applicant by his letter dated January 5, 2001. The additional amount demanded was to complete the 15% withholding tax rate as provided for in section 84 (1) and section 121 (1) of the Act because according to the Commissioner, section 168 (21) of the Act did not cover non-resident shareholders.

The applicant objected to this view and hence this application before the Tribunal.”

Five issues were agreed before the Tribunal for determination, but save for the first issue, the rest were not subject of the appeal to the High Court and need not be reproduced here. The first issue was whether a holder of a Certificate of Incentives who has elected to continue under section 168 (21) of the *Income Tax Act, 1997* is entitled to exemption from withholding tax on dividends paid to non resident shareholders. As already stated above both the Tribunal and the High Court decided the issue in the negative, hence this appeal.

There are six grounds of appeal in the memorandum of appeal as follows:

“(1) The learned trial Judge erred in law in dealing with the question as to whether a valid election had been made by the Appellant pursuant to Section 168(21) of the *Income Tax Act*, for the continuance of the exemption stipulated therein, when this was not a ground of appeal before him nor had he been addressed on this issue by the parties.

(2) The learned trial judge erred in law in dealing with the question as to whether a valid election had been made by the appellant pursuant to Section 168(21) of the *Income Tax Act* when it was an agreed fact that a valid election had in fact been made and the dispute was only as to the scope of the exemption.

(3) The learned trial judge erred in law in holding that the accrued rights and privileges stipulated in the Certificate of Incentives which had been issued in relation to the appellant on the April 26, 1996 pursuant to Section 25 (a) (if) of the *Investment Code 1991* had been altered by the latter amendment to the said Section 25 made on May 8, 1996 by the *Finance Statute 9 of 1996*.

(4) The learned trial judge erred in law in holding that the application by the appellant to the Tax Appeals Tribunal pursuant to Section 15(1) of the *Tax Appeals Tribunal Act 12 of 1997* for review of the respondents taxation decision was improper and invalid and that instead the appellants foreign shareholders should have brought an application before the High Court against the Government and/or the Uganda Investment Authority pursuant to Section 30(4) of the *Investment Code 1991*.

(5) The learned trial judge erred in law in holding that the exemption from withholding tax on dividends granted by section 25 of the *Investment Code 1991* as amended related to the dividends

declared on the shares of the foreign shareholders of the appellant and not to the dividends declared on the shares of the appellant.

(6) The learned trial Judge erred in law in failing to determine the sole ground of appeal before him as to whether Section 168(21) of the *Income Tax Act 1997* related to an exemption from withholding tax on dividends paid to residents shareholders only or whether it extended to an exemption from withholding on dividends paid to both resident and non resident shareholders.”

In my judgment, save for the sixth ground of appeal, the rest are not relevant to the sole ground of appeal which was raised before the High Court. It appears to me that in considering the sole ground of appeal before him, namely that: -

“The Tribunal erred in law in holding that the holder of a Certificate of Incentives who elected to continue under section 168 (21) of the *Income Tax Tribunal Act 1997* is not entitled to continuance of the exemption on withholding tax on dividends paid to its non resident shareholders,”

The learned first appellate judge, with respect, delved too much into matters which were not relevant to determination of the ground. This forced counsel for the appellant to raise matters before us that were not in issue in the High Court. In this appeal, I shall only endeavour to provide an answer to ground six of the memorandum of appeal. The other five grounds of appeal raise matters that were not issues in the High Court and should not be entertained at this level.

Mr. Masembe Kanyerezi, learned counsel for the appellant and Mrs. Anne Mugenyi Bitature and Mr. Nicholas Kanabahita learned counsel for the respondent, represented the parties from the Tax Appeals Tribunal through the High Court up to this Court. Their arguments on the interpretation of section 168 (21) of the *Income Tax Act, 1997* before the Tax Appeals Tribunal, the High Court and before this Court are very well documented.

The arguments are competently summarised in the judgment of the Tax Appeals Tribunal as follows: (Those related to the issue at hand).

Mr. Masembe Kanyerezi (for the appellant)

“7. It is the applicant’s primary submission that the words and therefore the legal effect of section 168 (21) of *Income Tax Act* are clear and without ambiguity.

8. Accordingly, the only interpretation to section 168 (21) is:

- (a) exemption from tax on corporate profits
- (b) the exemption from withholding tax paid on dividends; and
- (c) exemption from withholding tax paid on interest paid to resident persons.

9. The respondent contends that section 168 (21) only saved the exemption to withholding tax paid to resident persons. But it is the applicant’s submission that this stretches the ordinary meaning of the words of that section and also fails to give the *Income Tax Act*’s terms of art their technical meaning. Submits that the words “resident persons” in section 168 (21) clearly were not inserted to limit the exemption from withholding paid on dividends; they are aimed at limiting the exemptions from withholding tax paid on interest to resident persons.

10. Had the intention of parliament been to limit the exemption from withholding tax on dividends to resident shareholders, section 168 (21) would have been phrased differently. The draftsman deliberately inserted the words “to resident persons” not to limit the scope of the exemption on withholding tax paid on dividends but to define the type of interest upon which withholding tax is levied.

11. Since it is the applicant's primary submission that the meaning and legal effect of section 168 (21) of the *Income Tax Act* are clear and unambiguous, the applicant humbly submits that the honorable Tribunal should give effect to the section without regard to the "policy" or the intention of parliament.

12. It is the applicant's submission that this Honorable Tribunal must resolve the ambiguity in the applicant's favour. He concluded that the holder of the Certificate of Incentives who elected to continue under section 168 (21) of the Act is entitled to exemption on withholding tax on dividends paid to non resident shareholders."

Mrs Anne Mugenyi Bitature (for the respondent)

"1. A holder of a Certificate of Incentives who has elected to continue under section 168 (21) of the *Income Tax Act, 1997* is not entitled to exemption on withholding tax on dividends paid to non resident shareholders;

2. The words in section 168 (21) of the Act are very clear and not ambiguous. When section 168 (21) is paraphrased, it appears as follows:

'the holder of a Certificate of Incentives which is valid at the commencement of this Act may make an election in writing to the Commissioner General by December 31, 1997 for:

(a) the exemption from taxes on corporate profits; and

(b) the exemption from withholding tax paid on dividends and interest paid to resident persons as provided under section 25 of the *Investment Code* to continue until the exemption expires in accordance with that section, as if the same had not been repealed."

Section 168 (21) of the Act grants exemption only in two instances, i.e., corporate profits and Withholding Tax paid on dividends and interest to resident persons. Put another way only a resident person is exempt from paying withholding tax on dividends and interest.

3. The respondent does not agree with the interpretation of the section as construed by the applicant. The applicant has imparted into the section a whole new phrase "the exemption of withholding tax paid on interest" distortion of the intention of the legislature and meant to mislead the Tribunal. The word "and" was used between dividends and interest as conjunctive to connote togetherness.

4. It is a well-known basic rule that the word "and" is used when the intention is to refer to one thing. In this, section the word "and" is used to relate exemptions from withholding tax paid on dividends and interest to resident persons. This means that the exemption only benefits a resident person in so far as such person will not be liable to Withholding Tax on dividends and interest.

5. The election in section 168 (21) was restricted to resident shareholders who could then inform the Commissioner General in writing within a specific period of the said election. This election clearly applied to only resident shareholders."

In dismissing the application; thus upholding the arguments of the respondent, the Tribunal held:

"The main issue before the Tribunal is whether the exemption in section 168 (21) applied to non resident shareholders as well. The Tribunal has studied the authorities cited in support of the applicant's case. It however agrees with the respondent that the exemption was not intended to cover non-resident persons as well. It is restricted to resident persons. Why this is the case is clearly laid out in the submissions of the respondent which need not be repeated here.

On this issue therefore, the Tribunal rules that a holder of a Certificate of Incentives who has elected to continue under section 168 (21) of the *Income Tax Act* is not entitled to exemption on withholding tax on dividends paid to non-resident shareholders."

I have also studied all the arguments presented by counsel in this court and the two tribunals below. I have also studied the relevant tax law and the rules of interpretation contained in the authorities cited. I find that the way the word “Exemption” (which appears only three times in section 168 (21)) is used can only mean that:

(a) Corporate profits.

(b) Withholding tax on dividends and interest to resident persons were exempted from tax. The use of the word “and” does not create a third category of a tax exemption. It is used conjunctively to relate *withholding tax on dividends and withholding tax on interest paid to non resident shareholders*, as the second category of the two taxes from which a holder of a Certificate of Incentives is exempt. In the circumstances, I agree with the interpretation of section 168 (21) accepted by the Tax Appeals Tribunal. I find no merit in this appeal, which I would dismiss with costs to the respondent.

A.E.N. MP AGI-BAHIGEINE, J.A: I have read in draft the judgment of my Lord TWINOMUJUNI, J.A. I concur fully with all that he has said. Since my Lord , KITUMBA, JA also agrees, the appeal is accordingly dismissed with costs to the respondent.

C.N.B. KITUMBA, JA: I have had the opportunity of reading in draft the judgment of TWINOMUJUNI, J.A. I entirely agree with it and I have nothing useful to add.