**Commissioner-General v MacArthur and Baker International (Inc)**

**Division:** Court of Appeal of Tanzania at Dar-es-Salaam

**Date of judgment:** 20 December 2000

**Case Number:** 42/99

**Before:** Makame, Kisanga and lugakingira JJA

**Sourced by:** L J S Mwandambo

**Summarised by:** H K Mutai

*[1] Companies – Resident company – Registration – Effect of registration – Whether a foreign company*

*registered under sections 320A and 321 was entitled to resident status – Companies Ordinance (Chapter*

*212), sections 14, 15, 320A and 321.*

*[2] Statutes – Construction – “Registered” –* Ejusdem generis *– Natural meaning – Whether the term*

*“registered” should be construed narrowly.*

*[3] Tax – Foreign corporation – Management fees withholding tax – Resident company – Exemption*

*from payment – Whether the Respondent was a resident company for the purposes of paying withholding*

*tax – Income Tax Act No 33 of 1974, sections 2(1), (2)(*b*)(i) and 34(1).*

**JUDGMENT**

**KISANGA JA:** This appeal arises from the decision of the High Court (Mapigano J) granting *certiorari* to the Respondent. Most of the facts are not in dispute. MacArthur and Baker International (Inc), hereinafter referred to as the Respondent company or MBI, concluded a debt collection agreement with the then National Bank of Commerce on 15 May 1997. At the time of concluding the contract MBI, a foreign company incorporated in Delaware, the United States of America (USA), was not yet registered in Tanzania; it was registered only subsequently under sections 320A and 321 of the Companies Ordinance (Chapter 212). The registration was done within the first year of income, but rather surprisingly such registration was effected on 25 August 1997 before the registration fees were paid on 29 August 1997 and, indeed, before the documents submitted for the purposes of the registration were approved by the registrar on 2 September 1997. One of the terms of the contract was that the fees payable to MBI for the services rendered to National Bank of Commerce were to be wired direct to the USA and the first instalment of TShs 147 865 625 paid to MBI on 31 May 1997 was so wired without the payment of any management fees withholding tax on it. On discovering this the Commissioner of Income Tax (Second Respondent) served on the National Bank of Commerce notice, and later recovered from it deductions, for management fees withholding tax. The Commissioner acted under section 34(1) of the Income Tax Act 1973 (hereinafter called the Act). Under the Act such tax is payable by a corporation which is not resident and which has no permanent establishment in the United Republic of Tanzania. Acting under that same provision of the Act the Commissioner recovered from National Bank of Commerce withholding tax in respect of a further five instalments paid to MBI starting from 2 October 1997 and ending on 19 May 1998. MBI was aggrieved and sought redress by applying to the High Court for prerogative orders of *certiorari* and prohibition. The High Court granted the application but the Commissioner was aggrieved hence this appeal. Before us the Appellants were advocated for by Mr H T *Songoro* while Mr *Kibuta* and Dr *Mapunda* appeared for the Respondent. The Appellants filed a memorandum of appeal containing the following four grounds: “1. That the Honourable Judge erred in law by not taking into account that Respondent compliance with section 320A and 321 of the Companies Ordinance Chapter 212 does not amount to registration envisage under section 2(2)(*b*)(*i*) of the Income Tax Act 33 of 1973. 2. The Honourable Judge erred in law and in fact by not taking into account that at the time of signing the Debt Collection Agreement with National Bank of Commerce and at the period of receiving first instalment which is chargeable to tax the Respondent was not registered under the Companies Ordinance and its subsequent registration does not make it a resident company in terms of section 2(2)(*b*)(i) of the Income Tax Act 33 of 1973. 3. That the Honourable Judge erred in law by holding that the Respondent is a resident company and not liable to pay withholding tax on management fees in terms of section 34(1) of the Income Tax Act 33 of 1973. 4. The Honourable Judge erred in law by granting application without stating reliefs which the Respondent is entitled in the application”. We shall consider grounds 1 and 3 together which essentially raise the question whether or not MBI was a resident company for the purpose of paying withholding tax. This question was raised and argued before the trial Judge who ruled that the company was resident and, therefore, not liable to pay withholding tax. Mr *Songoro* is now seeking to fault that finding. Section 2(2)(*b*)(*i*) of the Act provides that: “(1) For the purposes of this Act a person shall be deemed to be a resident in relation to any year of income: ( *b*) i n the case of a corporation. (i) i f the corporation was incorporated, established or registered under any Act or Ordinance or any law of Zanzibar; . . .” and a corporation is defined under section 2(1) as: “any company or other body corporate established, incorporated, registered by or under any law in force in the United Republic or elsewhere”. Mr *Songoro* submitted that registration under sections 320A and 321 of Chapter 212 did not confer on MBI the status of residence within the meaning of subsection (2)(*b*)(i) quoted above. Such registration which led to the issuing of a certificate of compliance merely entitled MBI to conduct business in Tanzania. He strenuously contended that the word “registered” in subsection (2)(*b*)(i) is to be construed *ejusdem generis* with the words “incorporated” and “establishment” to mean the creation of a corporate body. So that in order to confer the status of residence, MBI ought to have been incorporated under sections 14 and 15 of Chapter 212. As this was not done, counsel concluded, MBI was not resident and, therefore, was liable to pay withholding tax. Responding to this, Mr *Kibuta* submitted, in effect, that registration under sections 320A and 321 of Chapter 212 conferred the status of residence on MBI. The term “registered” in subsection (2)(*b*)(i) of the Act is to be construed literally. When this is so construed and read together with sections 320A and 321 of Chapter 212 the effect of it in the context of the present case is that the certificate of compliance issued to MBI under sections 320A and 321 amounted to registration conferring on the company the status of residence within subsection (2)(*b*)(i). Residence conferred under this subsection is *de jure* residence which has relevance to foreign companies only. Learned counsel took the view that registration under subsection (2)(*b*)(i) does not envisage or contemplate registration under section 14 and 15 of Chapter 212. And to underscore this point he drew our attention to the recent amendment in subsection (2)(*b*)(*i*) which now requires that a company in order to be resident must be incorporated under a law of the United Republic. The law was so amended only after the dispute in this case arose. This, counsel submitted, means that there was a mischief or lacuna which was not contemplated or envisaged at the time of enacting the subsection originally but which was noticed later and steps were promptly taken to remedy it. Counsel, therefore, concluded that MBI, having been duly registered in the United Republic, was a resident company which was not liable under section 34(1) of the Act to pay withholding tax. That was the summary of counsel submissions for both sides. Today the law is clear that tax provisions must be interpreted strictly, and that in a taxing Act one has to look merely at what is clearly stated. In line with that approach we are inclined to the view that the word “registered” as used in section 2(1) and (2)(*b*)(i) of the Act must be given its natural meaning, and we can see nothing to justify departure from that rule. We reject Mr *Songoro*’s contention of construing the word “registered” in subsection (2)(*b*)(i) *ejusdem generis* with the words “incorporated” and “established’. In our opinion Mr *Kibuta*’s submission is to be preferred that registration in the context of section 2(1) and (2)(*b*)(i) of the Act does not contemplate or envisage registration under sections 14 and 15 of Chapter 212. We go along with the view that while subsection (2)(*b*)(i) in its original form did not contemplate registration under sections 14 and 15 of Chapter 212, subsequently, and in the wake of the present case, it was realised or discovered that this left room for tax evasion, and that upon such discovery appropriate steps were taken promptly to remedy the situation by re-enacting the subsection in its amended form. This is well demonstrated by the fact that this dispute which started in July–August 1997 was referred to court on 5 June 1998 and hardly a week later was the Bill to amend the law on the subject published in the Official *Gazette* dated 11 June 1998. Like the trial Judge, therefore, we hold that registration under sections 320A and 321 of Chapter 212 conferred the status of residence on MBI. Accordingly grounds 1 and 3 of the memorandum of appeal fail. In ground 2 the trial Judge is criticised for failing to take into account that MBI was not registered at the time of concluding the debt collecting agreement with National Bank of Commerce or at the time of receiving the first instalment of its fees. We think this complaint is justified insofar as it relates to the first instalment of TShs 147 865 625. It is common ground that when this money was paid to MBI on 31 May 1997, the company was not yet registered under any Act or Ordinance or under any law of Zanzibar. The company was registered only subsequently under sections 320A and 321 of Chapter 212 on 2 May 1997. It is plain that for as long as MBI was not registered under any Act or Ordinance or under any law of Zanzibar, it could not claim exemption from paying withholding tax in respect of the first instalment on the ground of being a resident company. And since the company’s claim of exemption from paying withholding tax is based on the ground of residence alone, that claim must fail. Thus we hold that MBI was not a resident company at the time it received the first instalment of TShs 147 865 625. As such it was liable under section 4(1) of the Act to pay management fees withholding tax on that sum. Mr *Kibuta* contended that once MBI registered in Tanzania within the year of income, it was then liable to pay only corporation tax for that year of income and not withholding tax. Registration at any time during the year of income, counsel maintained, made the company resident for the whole of that year of income and so it was immaterial that the instalment in question was paid to MBI before the registration. We cannot accede to this argument. Section 34(1) of the Act insofar as it is relevant to the facts of this case says that:

“34(1) Every person shall, upon payment of any amount to any non-resident person . . . in respect of: ( *a*) a ny management; which is chargeable to tax, deduct therefrom tax at the appropriate non-resident withholding tax rate”. The provision clearly imposes the obligation to deduct withholding tax in respect of management fees paid to a non-resident person. The question is, at what time is the deduction to be made? In this regard the operative words of the subsection are “upon payment of any amount”, and our understanding of the provision is that the obligation to make the deduction, which is mandatory, attaches at the time of making the payment. We could see no room for Mr *Kibuta*’s submission that where, as in this case, payment is made to a foreign company which registers subsequently then the company is liable to pay corporation tax only. Such interpretation, in our opinion, could easily open to tax evasions by unscrupulous companies which after being paid might run away without registering. In the instant case, for example, if MBI, after being paid on 31 May 1997 decided to run away before registering on 25 August 1997, Mr *Kibuta* did not indicate how the corporation tax could be recovered from it. We therefore hold that MBI was liable to pay withholding tax on the first instalment of TShs 147 865 625 management fees paid to it on 31 May 1997 when it was unregistered and hence non-resident in the country. The complaint in the last ground of appeal is that the trial court erred in granting the application without stating the reliefs to which the Respondent was entitled. We find little or no merit in this complaint. Before the trial court was an application for *certiorari* to remove to the High Court and quash the unlawful tax demands for the specific sum of money and the unlawful collection of that sum by the Commissioner of Income Tax. It is quite apparent to us that by granting that application the trial court was saying that the demand for and the collection of that sum by the Commissioner were, in fact, unlawful. Following that, in our view, the next obvious step was for the Commissioner to refund the said sum of money so unlawfully demanded and collected. We do not see any difficulty in that. Indeed if the Appellants were at all in doubt we think that this was a matter which could have easily been clarified by the trial court. In the light of our own finding, however, the decision of the High Court has to be varied slightly. As we have amply demonstrated, the Commissioner’s demand for and collection of withholding tax were lawful only in respect of the first instalment of TShs 147 865 625 management fees paid to MBI on 31 May 1997 before the company was registered in the United Republic and became resident. All the other collections, however, were unlawful because they relate to instalments of management fees paid to the company after the company was duly registered in the country and became resident. Such unlawful collections, therefore, must be refunded. Save to this limited extent, the appeal fails and it is dismissed with costs. (Makame and Lugakingire JJA concurred in the judgment of Kisanga JA.) For the Appellants:

*H T Songoro* instructed by the *Attorney-General*

For the Respondent:

*Dr Mapunda andKibuta* instructed by *F K Law Chambers*