



WHEN TO PAY WITHHOLDING TAX IS NOW CEMENTED:

The Tax Revenue Appeals Tribunal (TRAT) rules that Withholding Tax is due on actual payment

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The Tax Revenue Appeals Tribunal (The Tribunal) recently ruled that Withholding Tax is due and payable on actual payment and not on accrual. This ruling by TRAT follows judgment by TRAB in favor of Vodacom Tanzania Public Limited Company dated 15th October 2021 whereby TRA was aggrieved by TRAB's decision, and referred an appeal to the Tax Revenue Appeals Tribunal (TRAT).

The key question in this was "*at what point in time, the withholding obligation arises, whether when interest is paid or when it is accrued?*"

Background of the Case

The Tax Revenue Appeals Board (TRAB) has on 15th October 2021 ruled in Tax Appeal No. 50 of 2018 between Vodacom Tanzania Public Limited Company and Commissioner General, Tanzania Revenue Authority:

- THAT Withholding tax is due and payable on actual payment and not on accrual;
- THAT TRA wrongly applied section 3 and 23 of the ITA, 2004 in disregard of section 82 of the ITA 2004;
- THAT it is a cardinal principle of law that a specific provision prevails over a general provision;

- THAT Section 82 of the ITA 2004 being a specific provision, places the withholding obligation when a taxpayer pays the payments in question;
- THAT definition of the word "payment" in section 3 of the ITA 2004 must be read subject to the context provided in section 82 of the ITA 2004; and
- THAT TRA's imposition of interest for late payment was incorrect.

In general, the appeal before the Tribunal emanated from TRA's determination of the Vodacom's Notice of Objection against Withholding Tax on Interest on Shareholders' Loans. TRA served upon Vodacom, the Notice of Confirmation of Assessment affirming its position that withholding tax on interest on shareholders' loans is due and payable to the Authority on accrual. Whilst, Vodacom had been accounting for Withholding Tax when actual interest payments were made to the lenders, TRA viewed Vodacom's practice as incorrect and consequently assessed the taxpayer with interest for late payment of Withholding Tax on interest on shareholders' loans.

Aggrieved by TRAB's judgement on 15th October 2021 in favor of Vodacom, TRA filed an appeal at the Tax Revenue Appeals Tribunal which recently delivered a judgment on the appeal that, ***"withholding tax on interest is due and payable when it is paid and not when it accrues"***.

This issue of when withholding tax is due has been a subject of debate and interpretation for quite some time now in the history of taxation in Tanzania for taxpayers, tax practitioners, Chief Finance Officers and regulators as well. The distinction between whether Withholding Tax on interest is due on "actual payment" or on "accrual" of the same has significant implications for cash flow management, financial reporting and compliance for businesses operating in Tanzania.

Therefore, this ruling by TRAT brings great relief to all tax stakeholders.

Facts of the Appeal

In the financial years of income 2011/2012, Vodacom Tanzania Public Limited Company acquired intra-group financing in the form of loans from its affiliated shareholder companies on which it was required to pay interest annually. However, Vodacom did not pay the interest annually as agreed but rather, deferred the interest payment to subsequent periods until 2017 when actual payment of interest was made. Consequently, at this point when Vodacom paid the interest to the shareholders, the company held back Withholding Tax and remitted to the TRA.



In the meantime, TRA conducted tax audit on Vodacom and later issued an assessment and demand for late payment interest charges in respect of Withholding Tax on interest paid by Vodacom to shareholders for the years of income 2011/2012. TRA's decision was on the basis that the withholding tax obligation ought to arise when the interest was accrued during this period. Vodacom maintained her position that, the obligation to withhold tax ought to occur when actual payment of interest was made in 2017.

Issues Under Discussion

In principle the discussion centered around the following key issues when the appeal was called for hearing, in which, the Tribunal adopted and recorded:

- Whether withholding tax is due on interest when the interest is paid or when it accrues; and
- Whether the imposition of interest on late payment is correct at law.

Vodacom's Key Arguments

In the appeal, Vodacom put forward the following key legal arguments in the course of prosecuting the appeal:

- The word "pays" in Section 82 (1) of the ITA 2004, must be interpreted strictly and should be accorded its natural meaning.
- In order to fully appreciate the context of the applicability of Section 82 (1) of the ITA 2004, it is pertinent that one looks at Section 3 of the ITA, 2004 providing for the definition of the word payment.
- From the statutory definition: payment is the transfer of asset or money; or the transfer or decrease of a liability. Vodacom had not transferred interest on loan to the shareholders at the time the TRA issued the disputed assessment. Vodacom's interest on loan liability had not been transferred nor had it been reduced at the time the TRA issued the disputed assessment. Vodacom had not paid the interest on shareholders loan the subject of the appeal. It was only when actual payment was made, then, Vodacom in compliance with Section 82 (1) of the ITA 2004, withheld tax on interest on loan and remitted the same to the TRA. On this basis, the Vodacom had not been late in remitting the withholding tax on loan, and hence, the interest charges for late payment is unjustified.

The term "payment" as statutorily defined under section 3 of the ITA 2004, must be construed in the context of the discharge of a debt obligation and not otherwise. TRA's reliance on the words: ".... the creation of an asset in another person", to presume that when an interest is accrued, it should be presumed that it is paid, is a flawed thinking in three key respects:

First, presuming that the words "creation of an asset in another person", means accruing interest, is against the cardinal principle of income taxation. The principle which is well founded in tax jurisprudence, does not allow the Respondent to impose a withholding obligation based on the presumptions. The clear words of the statute must be given their natural meaning.

Second, the meaning of the words "creation of an asset into another person" must be interpreted subject to the *ejusdem generis* rule, that is, they must be interpreted in the context of discharge of a debt obligation and nothing else. This applies for instance, where an asset is created as part of an arrangement for the discharge of a debt, such as where the loan is sold or reassigned to another person such that the debtor is released from the obligation, then, there is payment. That is not the case with the Vodacom where the interest had never been sold nor reassigned to another person; and;

Third, once a loan is contracted an asset is created and must be reported in accordance with the Generally Accepted Accounting Principles (GAAP). The reporting of a liability in accordance with the GAAP, does not create a new asset. An accounting entry does not create an income. This means that a mere book-keeping entry cannot be an income unless income has actually resulted. The withholding obligation under section 82 (1) of the ITA, 2004 therefore, arises where the withholdee makes actual payment, and not when the interest is accrued.

Assuming that the definition of the words "creation of an asset in another person" in the meaning assigned to the word "payment" under section 3 of the ITA, 2004, meant that withholding obligations arises on accrual as alleged by the Respondent, (which the Vodacom strongly disagrees), section 3 of the ITA 2004 cannot override section 82 (1) of the ITA 2004 on the following two key reasons:

First, the definition of the term "payment" under section 3, must be read in the context of section 82 (1) of the ITA, 2004. This is because the applicability of the definition is subject to the context not requiring otherwise. The context in section 82 (1) of the ITA, 2004 require a taxpayer to withhold when he/she pays the interest in question. This understanding is implicit in section 3 of the ITA, 2004, which starts with operative words: "In this Act, unless the context requires otherwise." This means the definition of the word "payment" under



section 3 is subject to the context provided under section 82 (1) of the ITA 2004; and

Second, section 82 (1) of the ITA 2004, being a specific provision with regards to withholding obligation, overrides any general provision including section 3 and 23 of the ITA 2004. It is a settled principle of law that a specific provision overrides a general provision.

That the bundle of authorities has been overwhelmingly consistent in holding that a specific provision overrides a general provision. Section 82 (1) of the ITA 2004, being a specific provision overrides any general provision, let alone, being a general provision that is sought to be applied based on presumptions.

TRA's Key Arguments on the Appeal at the Tribunal

In the contrary, TRA argued that tax statutes should be interpreted with a purposive approach whereby reference is made from Section 23 of the Income Tax Act which provides that a person who accounts for income tax on an accrual basis derives an amount when it is receivable and incurs expenditure when it is payable by the person. Consequently, based on that fact, even if actual payment of interest is not made, the company ought to account for withholding tax since withholding tax by its nature is corporate tax paid in advance.

Furthermore, TRA argued that the word "pay" can validly be construed as creating an entitlement to receive an amount under section 23 of the Income Tax Act as opposed to actually receiving the amount. At the Tribunal, the TRA cemented that pursuant to section 23 of the Income Tax Act, where a person accounts for income tax on an accrual basis, the actual transfer of assets or cash is immaterial, and for related companies, such transfer may not occur at all. The TRA contended that the Board's decision would render the law irrelevant and create loopholes for taxpayers to avoid payment of withholding tax on interest, which is not the intention and spirit of the law.

Meanwhile, Vodacom restated its position that tax statutes should be interpreted strictly and there should be no room for anticipation. Vodacom challenged the TRA's submissions that the words "creation of an asset in another person" to presume when an interest is accrued, it should be presumed that it is paid. Vodacom submitted that the words should be interpreted in the context of the discharge of a debt obligation. Vodacom further submitted that section 23 of the Income Tax Act provides that an amount is treated as 'payable' in respect of interest on a loan when the person makes payment in full satisfaction of the liability. This therefore means that interest would be said to be due and payable for withholding tax purposes when it is actually paid.

Tribunal's Judgment

The Tax Revenue Appeals Tribunal upheld the decision by Tax Revenue Appeals Board that withholding tax on interest is due and payable upon actual payment, on the basis that; courts in Tanzania are bound to interpret statutes in their plain and ordinary meaning to give effect to the intention of the laws. But also, the provision relating to charging of withholding tax has no ambiguity whatsoever and a plain meaning of the provision is that withholding obligation arises where interest is actually paid and not on accrual basis. Finally, the provision that provides for accrual basis accounting is a general provision in nature as opposed to the provision relating to withholding tax which is a specific provision and therefore the specific provision overrides the general provision.

Finally, the Tribunal however noted that it is not upon it to remedy the situation but the duty of the legislature to address TRA's concerns that transactions between related parties may have tax leakages: as such, under the law, corporations are required to account for income tax purposes on accrual basis and not on actual payment. Meanwhile, deductions are made on accrual basis (thus reducing the tax payable) whereas, withholding tax is made on actual payment, as a result there would be a mismatch which would lead to tax leakage.

Our Assessment of the TRAT's Decision

Hanif Habib & Cco. hails the TRAT's decision as a decision that accords correct interpretation of the law in two respects: Firstly, the applicability of a specific provision against general provision. This principle is well established and cannot be easily departed from. Secondly, the TRAT's application of strict interpretation of taxing statutes, is a well celebrated principle of good taxation: that taxing statutes must be interpreted strictly within the foundations of taxation since its inception. It would be dangerous to accord a liberal interpretation of taxing statutes as by so doing, the canons of taxation, such as certainty, predictability and fairness shall not be achieved.

Meanwhile, to the taxpayers in specific, this decision is a huge relief since it states the legal position that addresses a very burning issue on the incidence of Withholding Tax in Tanzania after a long time.

Hanif Habib & Cco. as well, had a settled view that, the law as it is, Withholding Tax is due when actual payment is made and when an accrual is booked. It is our humble view that, if the Government desires to collect Withholding Tax on accrual basis, then, necessary amendments should be made to the Income Tax Act.



Do not hesitate to contact us should you require a copy of the ruling by TRAB and TRAT.

Caveat

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Hanif Fattehali Habib has an extensive auditing, tax and accounting career with experience in various roles spanning over 20 years. Prior to establishing his audit and tax consultancy firm M/S Hanif Habib & Cco., he served in leading audit firms in Tanzania. Hanif's solid experience, across various functions, is a testament to his diverse background within Audit, Tax and Finance.

