

MULENGA MUNDASHI LEGAL PRACTITIONERS



Memorandum on Teal Minerals Barbados Incorporated v Zambia Revenue Authority Appeal No. 4 of 2022

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Introduction

On 17 August 2022, the Supreme Court (“**the Court**”) rendered a judgment which touched on some provisions of the Mines and Minerals Act No. 11 of 2015 (the “**Mines Act**”) and the Property Transfer Tax Act Chapter 340 of the Laws of Zambia as amended by Act No.16 of 2015 (the “**PTT Act**”). This judgment upheld the ruling of the Tax Appeals Tribunal (“**the Tribunal**”) that was delivered on 14 February 2022. To the extent that this is the first time the highest court in the land has pronounced itself on the provisions that were under consideration, this is a ground-breaking judgment.

In this matter, Teal Minerals Barbados Incorporated (“**Teal**”) appealed against the Zambia Revenue Authority’s (“**ZRA**”) decision to impose property transfer tax (“**PTT**”) on a transaction involving two companies domiciled outside Zambia and consummated outside Zambia but affecting mining interests in Zambia. The essence of the transaction involved the transfer of shares and assignment of shareholder loans, between Teal and, EMR Capital Bid Co. (No.2) Limited (“**EMR**”).

In this case, the Court provided guidance on the definition of a mining interest, whether the transfer of a mining interest is an indirect transfer and

whether the execution of a share transfer agreement is outside Zambia, between companies that are incorporated and operate outside Zambia, can result in a change of interest in a mining right owned in a company incorporated in Zambia and thus trigger PTT.

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Background

Teal, a multinational company, incorporated in Barbados wholly owned a subsidiary known as Konnoco (B) Incorporated (“Konnoco”) also incorporated in Barbados, and Konnoco in turn held 80% shares of Lubambe Copper Mine Plc (“Lubambe”) a company incorporated in Zambia, while the remainder of the shares was held by ZCCM Investment Holdings Plc (“ZCCM- IH”). On 11 August 2017, Teal entered into a share purchase agreement (“SPA”) with EMR for the sale of all its shares. The SPA was executed in Barbados. The sale also involved the assignment of the shareholder loans advanced to Lubambe by Teal and its shareholders at a consideration for the transaction as agreed upon by the parties.

After the deal was struck, Teal applied to the Minister of Mines for consent for the transaction to be concluded pursuant to Section 66 of the Mines Act. The Minister granted consent on the basis that a tax clearance certificate would be obtained from the ZRA, in accordance with the law. Subsequently, Teal, through its tax advisors KPMG, applied to the ZRA for a tax clearance certificate explaining the new ownership structure and the fact that the loans owed to Teal and other shareholders by Lubambe would be transferred to EMR as consideration for the transaction.

On the basis of the foregoing, the ZRA in a letter dated 20 November 2017 concluded that the agreement was not subject to PTT.

However, in a letter dated 30 November 2017, the ZRA reversed its position, informing Teal that since the transfer of shares and loans would result in a change of interest in the mining right owned by Lubambe, it was subject to PTT which the ZRA assessed at K96, 970,981.35. This decision was based on the interpretation of section 66 of the Mines Act as read with sections 2(c), 4(1) and 5(3) of the PTT Act as amended by Act No 16 of 2015.

Despite Teal's objection to the assessment, the ZRA upheld its assessment prompting Teal to appeal to the Tax Appeal Tribunal ("**the Tribunal**") which upheld the ZRA assessment. Subsequently, Teal appealed to the Supreme Court which upheld the ruling of the Tribunal thereby upholding the ZRA's assessment.

The following were the legal issues that the Supreme Court had to consider:

- (a) Whether the transaction resulted in a change in the interest in a mining right;
- (b) Whether the transfer amounted to a transfer of property in Zambia;
- (c) Whether the PTT Act which was applicable at the time compelled Teal to pay PTT on the transaction;
- (d) The basis upon which PTT was levied; and
- (e) Whether the ZRA created a legitimate expectation.

The foregoing issues have been discussed in detail below.

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This decision was based on the interpretation of section 66 of the Mines Act as read with sections 2(c), 4(1) and 5(3) of the PTT Act as amended by Act No 16 of 2015.

Whether the transaction resulted in a change in the interest in a mining right, and thus amounted to a transfer of property in Zambia

Teal argued that the transaction did not result in a change in the interest in a mining right because its sale of the shares in Konnoco did not give EMR as the new shareholder a direct right, claim, title or legal share to the mining interest in Zambia. Consequently, there was no transfer in the mining right in Lubambe as it continued to hold the mining licence, and also because the PTT Act did not envisage charging PTT on indirect transfers of ownership. Teal went on to state that no transaction had occurred at the Zambian shareholder level and ownership of Lubambe remained unchanged. Thus, the transaction was not subject to PTT because the property that changed hands was not situate in Zambia, and as the only interest which was situated in Zambia was the mining right held by Lubambe which did change hands and therefore, it should not be subject to PTT.

In response, the ZRA contended that the transaction was subject to PTT because it involved the transfer of a controlling interest in the mining right held by Lubambe, which position had been made clear by the Minister of Mines.

Further that, according to the preamble to the PPT Act, the intention of the Legislature is to, inter alia, provide for charging and collection of tax based on the value realised from the transfer of property within Zambia. Further, section 2 of the PTT Act defines “property” to include a share issued by a company incorporated in Zambia.

The ZRA went on to state that although the word “interest” is not defined in the PPT Act or Mines Act, it is defined in Black’s Law Dictionary as including a legal share in something. Therefore, since Teal disposed of 100% of its shares in Konnoco, the controlling interest in Lubambe was assigned from Teal to EMR. As a corollary to the foregoing, the ZRA argued that it is the transfer of controlling interest in a mining right that triggered the payment of PTT.

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The Tribunal

When the matter came up before the Tribunal, the Tribunal begun its analysis of the case by stating that, as Teal wholly owned Konnoco prior to the sale and

Konnoco owned 80% of the shares issued in Lubambe, which was the holder of a large-scale mining license, Teal's sale of 100% of its shareholding in Konnoco which continued to hold the 80% shares in Lubambe, resulted in a new shareholder structure in Konnoco. According to the Tribunal, the provisions of the PTT Act in force at the time provided for charging and collecting of PTT based on the value realized from the transfer of certain property in Zambia. "Property" is defined in section 2 of the PTT Act to include a share issued by a company incorporated in Zambia, as well as a mining right issued under the Mines Act, and an interest therein. However, as the PTT Act does not define "interest", the Tribunal adopted the *Blacks Law Dictionary's* definition as argued by the ZRA.

Based on the foregoing, the Tribunal held that any transaction resulting in the change in either the ownership of a mining licence or the interest in a mining right is amenable to PTT. Therefore, as the transaction resulted in Teal's disposal of its interest in Lubambe by virtue of its holding 100% shares in Konnoco, which held 80% of Lubambe's shares, the transaction was amenable to PTT. Further that, the transaction was amenable to PTT despite the transfer of shares occurring outside Zambia, because the transfer of the interest in the mining right or the mineral licence took place in Zambia.

The Supreme Court

Before giving its analysis on the parties submissions, the Court first dealt with the

issue of corporate personality that had been raised by Teal on appeal.

In addressing the question of the effect of the transaction on the mining right owned by Lubambe, Teal had argued that a company is a separate legal entity from its shareholders and capable of, among other things, holding property in its own name. Further that Lubambe held its assets and /or rights assigned to it in its own name and separate from its shareholders, therefore, any right or interest in property which it held was held in its own name and not that of the shareholders. In conclusion, the sale of the shares in Konnoco, a shareholder in Lubambe, did not alter or change the shareholding in Lubambe. As such, there was no change in ownership, rights and/or interest which Lubambe had in any property or the mining licence which was still in its name. As the only change was in the shareholding in Konnoco, a foreign company, PTT was not chargeable.

In response, the ZRA submitted that while the provisions of the Companies Act on the separate personality of companies are clear, the Court could not consider this argument as it had not been raised when the matter was argued before the Tribunal.

The Court agreed with the ZRA's submission and held that they would not consider the issue of separate legal personality because it was not addressed before the Tribunal

The Court begun its analysis of the party's submissions by interpreting sections 2(1) and 4(1) of the PTT Act. Section 2(1) of the PTT Act (as amended by Act No 13 of 2012) defines "property" to include "a mining right issued under the Mines and Minerals Development Act, or an interest therein," while section 4(1) of the PTT Act provides for the charging and collection of tax whenever any property is transferred. The Court's understanding of these two provisions was that all mineral rights or interests therein (as long as they are issued under the Mines Act) fall under the description of property as envisaged by the PTT Act and are subject to PTT whenever they are assigned. The Court reasoned that to the extent that the Lubambe shares were not transferred to EMR, the transfer of the interest in it was indirect. That this, however, did not mean that the transaction was not amenable to PTT because section 2(1) of the PTT Act refers to the transfer of mining rights or interests therein. That reference to "interest" in a mining right implies an indirect transfer in light of the definition ascribed to it using the words "including a legal share in something."

The Court therefore held that it stands to reason that an interest can be either legal, therefore direct or beneficial, therefore indirect. Further that the PTT Act does not distinguish between a direct or indirect transfer of such right or interest. On the basis of the forgoing, the consequence of the transaction was that as a result of the transferee, EMR, gained

indirect control of Lubambe and its mining right.

As such, the Court rejected Teal's argument that the transaction was not subject to PTT because it was an indirect transfer of the interest in the mining right. According to the Court, one key point which stood out in this transaction was the fact that Teal as 100% shareholder in Konnoco sold all its shares in Konnoco, which held 80% shares in Lubambe. Prior to the sale Konnoco was wholly owned by Teal and as such, Teal controlled and had a major interest in Lubambe by virtue of the 80% shares held by Konnoco, its wholly owned subsidiary. This is the interest which EMR acquired after the sale of the shares and it was subject to PTT because it targeted the mining licence, which is an interest in a mining right. .

” *The Court therefore held that it stands to reason that an interest can be either legal, therefore direct or beneficial, therefore indirect.*



Whether the PTT Act which was applicable at the time compelled Teal to pay PTT on the transaction

Teal posited that its argument that no PTT was payable on the transaction, was fortified by an intention decipherable from the 2017 amendment to the PTT Act which was to extend charging of PTT to interests transferred outside Zambia or indirect transfers. According to Teal, prior to the amendment of the PPT Act by Act No. 11 of 2017, PTT was only payable on property transferred within Zambia and situated in Zambia and since the change in ownership of shares did not occur in Zambia, PTT was not payable. Further that as the amendment to the PTT Act (Act No. 11 of 2017) which included taxation on property relating to

transactions occurring outside Zambia only took effect on 1 January 2018, after the transaction and therefore, it was not applicable to the transaction.

The ZRA submitted that it is not the provisions of the PTT Act as amended by Act No.11 of 2017 (law which was later in time) that triggered the payment of PTT, but it was the transfer of a controlling interest in a mining right that triggered the payment of PTT and not the provisions of PTT Act, as amended by Act No.11 of 2017. Thus, the assessment was not based on a retrospective application of the law. Additionally, section 5(3) of the PPT Act as amended by Act No.13 of 2012 and Section 66 of the Mines Act all refer to the transfer of an interest in a mining right which attracts PTT and requires the approval of the Minister.

According to the Tribunal, the charging of PTT on the transaction was not because of the amendment to the PTT Act which occurred in 2017 but the law as

it stood at the time of the transaction. The Tribunal further stated that PTT was chargeable regardless of the percentage of the interest transferred, as the law does not prescribe a threshold.

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The Court held that the scenario that this case presented was anticipated by the legislature in section 67(1)(b) of the Mines Act which prohibits a holder of a mining license from “entering into an agreement with any person, if the effect of doing so would be to give that person control of the company”. As Lubambe was under the control of Konnoco whose “strings” in terms of operations, were pulled by the “Puppeteer”- Teal Minerals, its holding company, the outcome of the transfer of shares was that control of Lubambe was transferred to EMR. This was confirmed by the Minister of Mines’ letter to the shareholders of Teal Minerals dated 17 September 2017, in which he rejected the position that the transaction did not involve the transfer of interest and control of Lubambe. The Minister took this view because the controlling interest which was held by the shareholders, was the subject of the transfer. As such consent of the Minister of Mines, and not just notification of the transaction, was required as this was an application for a transfer of interest and control of

Lubambe pursuant to section 66 and 67 of the Mines Act.

The basis upon which PTT was levied

Teal further argued that the ZRA’s assessment of PTT was too high in view of the fact that the shares in Konnoco were valued at USD 1 per share but the ZRA based their assessment on the amount paid as the purchase price for the assigned shareholder loans.

The ZRA responded by stating that the Commissioner General of the ZRA acted in accordance with Section 5(3) of the PTT Act which gives him discretion to base the tax payable in respect of the transfer of a mining right or interest therein on either the actual sale price or any amount he so deems, whichever is the higher.

In relation to the quantum chargeable as PTT, the Tribunal relied on section 5(3) of the PTT Act which stipulates the basis as being either the actual price of the mining right or any amount determined by the Commissioner General, whichever is higher. It then noted that the consideration passing between the parties was the assumption of debt by the purchaser which it found to be valuable consideration in the law of contract and concluded that the Commissioner General did not err when he used this as the basis for determining the amount of PTT to be charged.

On the issue of the assessment of PTT, the Court began by quoting section

5(3) of the PTT Act which states that, *“where the property to be valued is a mining right or interest in the mining right, the realized value of the mining right or interest shall be the actual price of the mining right or as determined by the Commissioner-General whichever is higher.”* The Court reasoned that the effect of section 5(3) of the PTT Act is that, in determining tax payable for the transfer of a mining right or interest therein, the Commissioner General will apply the percentage applicable to the actual price of the mining right. That is to say, 10% of the price at which the parties agreed it will be sold.

Further that, the Commissioner General is also mandated to consider any other amount of the tax to be paid as long as the latter is the higher amount, as such, this gives the Commissioner General discretion, where the parties to a sale agreement have deliberately deflated the sale price, to determine an appropriate figure as tax which should be paid.

Whether the ZRA created a legitimate expectation

According to Teal, the ZRA violated the doctrine of legitimate expectation when it reviewed its earlier decision contained in the letter dated 20 November 2017, that no PTT would be imposed on the transaction and imposed PTT.

The ZRA responded by submitting that no legitimate expectation was created in the ZRA’s letter dated 20th November 2022 as legitimate expectation cannot arise from an ultra vires relaxation of statute. Further that section 3(1) of the

PTT Act as read with section 63 of the Income Tax Act empower the Commissioner General to amend an assessment to give effect to the provisions of the PTT Act. The ZRA concluded that the only legitimate expectation that a taxpayer should have, is that they will be taxed in accordance with statute.

Having reviewed the correspondence between Teal, the Minister, and the ZRA, the Tribunal concluded that none of the correspondences revealed a clear, unambiguous promise devoid of qualification which is the basis upon which there can be a legitimate expectation in law.

This being the case as the ZRA had made a qualified decision when it stated that its decision was subject to other facts that may arise later.

In upholding the Tribunal’s decision, the Court reasoned that there is no legitimate expectation that can be found in the ignoring or relaxing of the law by the ZRA as it is bound to apply the law to the letter even if it means retracting an earlier decision. Further that, the Commissioner General is well within his right to retract his earlier decisions based on section 3 of the PTT Act as read with section 63(2) of the Income Tax Act Cap 323, which authorises him to amend an assessment as many times as is necessary to give effect to the provisions of the PTT Act and thus the liability to tax may be increased, reduced or cancelled, as the circumstances require.



Practical examples

Before coming to its conclusion, the Court gave two illustrations from the Indian **Vodafone** case and Ugandan **Zain** case, as the courts in these jurisdictions had dealt with issues similar to the ones in Teal's appeal. The Court acknowledged that there is a distinction between PTT (which was the issue in Teal's appeal) and capital gains tax ("CGT") (which was the issue in the two cases), however it took the view that these cases were relevant because issues that the two cases addressed were similar to the issues in the appeal. These issues being (i) the control by multinational companies of local companies and (ii) the extent of the jurisdiction of the Revenue Authority in reference to transactions concluded by offshore multinational

companies involving assets within the jurisdiction.

In the **Vodafone** case, Hutchinson (a Hong Kong based company) wholly owned a subsidiary in the Cayman Island ("**Cayman holding company**"), which in turn held its interest in a joint venture to operate a mobile phone company in India. In 2006, Hutchinson sold the Cayman holding company to a wholly owned subsidiary of Vodafone, which was resident in the Netherlands ("**Vodacom's Dutch Subsidiary**"). Although the entire transaction took place between the two non-resident companies, outside India, the Indian Tax Authority ("**ITA**") sought to collect the CGT that was realised by Hutchinson on the sale of the Cayman holding company, in view of the fact that Hutchinson no longer had assets in India after the transaction.

The ITA sought to collect the CGT from the purchaser, Vodacom's Dutch

Subsidiary, on the basis that it had the obligation to withhold tax from the purchase price. When the matter went before the court, in 2012, the Supreme Court of India rejected the ITA's broad reading of the law to extend its taxing jurisdiction to include indirect sales abroad, even though the transaction involved the acquisition of inputs located in India.

In the **Zain** case, in 2010 the Indian Multinational Barathi Airtel International BV (a Dutch subsidiary) purchased from Zain International BV (a Dutch Company), shares in Zain Africa BV (a Dutch Company), which in turn owned Celtel Uganda Limited (mobile operator in Uganda). According to the Uganda Revenue Authority ("URA"), Zain International BV was liable for CGT, however Uganda's Appeal Court, in contrast to the Indian case, ruled that the URA did have the jurisdiction to assess and tax the offshore seller (Zain International BV) of an indirect interest in local assets.

According to the Court, the decision in the **Vodafone** case contradicts the position of Zambian law, in that while the Mines Act does not distinguish between a direct and indirect transfer, the law in India (as it stood at the time) did not acknowledge indirect transfers of interests in property. In addition to the foregoing, the Mines Act is complimented by section 2(1) of the PTT Act which defines "property" liable

to be taxed on transfers, to include mining rights or an interest therein. As such, it is not surprising that the Indian government subsequently amended the law to allow the taxation of offshore indirect sales and tried to apply the new provision retroactively, in a second attempt to collect tax from Vodacom's Dutch Subsidiary.

Conclusion

The Court concluded its Judgement by stating that all four grounds of appeal lacked merit and as such, the transaction was taxable as contended by the ZRA. As a result of the foregoing, Teal was ordered to, within thirty days of the Judgment pay the PTT assessed, together with the interest and penalties for the late payment. The appeal was accordingly dismissed.

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Our Limitations

Kindly note that this legal note does not constitute legal or professional advice. In the event that you would like us to render a comprehensive legal opinion, kindly contact our Mr. Mulenga Chiteba on mchiteba@mmlp.co.zm. Alternatively, you may call any of the following numbers: Tel: +260 211 254248/50 | Direct: +260 211 254266

Authors

Chimwemwe Mulenga Bwalya - Associate

Pesanayi Chiduku - Trainee Associate

MULENGA MUNDASHI
LEGAL PRACTITIONERS

 @LegalMulenga

 @Mulenga Mundashi Legal Practitioners