

## **DEBSWANA WINS BIG IN THE COURT OF APPEAL - (Sipho Ziga, Partner - Commercial)**

Last week, the Court of Appeal (“CoA”) delivered a landmark judgment in a case where the decision of the Commissioner General of the Botswana Unified Revenue Service (“the Commissioner”) in relation to a tax assessment was challenged by Debswana Diamond Company (Proprietary) Limited. In that case, the Commissioner had issued an assessment to the effect that employees of Debswana who participated in Debswana’s car benefit scheme, which involved providing employees with vehicles leased from its Avis Car Rentals (“Avis”), had to be taxed as if they were receiving cash from Debswana equal to the value of rentals payable by Debswana to Avis. The effect of the Commissioner’s decision was that the tax payable by employees (which had to be withheld by Debswana) was at a higher rate than if the scheme was considered to be a benefit for use of a company car, which is taxed at a lower rate.

In setting aside the assessment by the Commissioner (which had been upheld by the High Court), the CoA held that the concept of a salary sacrifice, ie, foregoing part of a salary in return for a benefit, is a perfectly legitimate tool in efficient structuring of employees emoluments, because the Botswana Income Tax Act makes provision, for differential rates of tax to be payable on cash income and on non cash benefits. Taxpayers are therefore entitled to take advantage of that differential and structure employee’s emoluments, in a manner that reduces their tax.

The CoA further held that there was no basis for suggesting that the scheme was simulated or a sham (which was originally argued by the Commissioner) because it made commercial sense to those who participated in it, and that it was openly conducted and the fact that there were tax advantages to employees who opted for the scheme, did not make it unlawful.

In effect, the CoA upheld the contention that taxpayers are entitled to arrange their affairs in any manner it deems fit and provided this was done honestly, this was not unlawful. This judgment, paves for employers to reduce employees tax by providing for benefits, rather than salaries in cash. This reduces the tax payable and is legitimate, provided that this is done by way of a salary sacrifice scheme, ie, foregoing part of a salary in return for some benefit.

As a result of this decision, which was granted with costs in favour of Debswana, the Commissioner has been ordered to refund Debswana the sum of BWP 14,000,000.00 (Fourteen Million Pula) Debswana had paid to the Commissioner as a result of incorrect assessment.

Sipho Ziga, our Commercial Partner represented Debswana in the matter.