NISSAN ZIMBABWE (1996) (PVT) (LTD)
versus
THE COMMISSIONER GENERAL
ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
HLATSHWAYO J
HARARE, 5 October 2011

Fiscal Appeal Court

HLATSHWAYO J: The background giving rise to the present litigation is as follows:

The appellant, Nissan Zimbabwe (1996) (Private) Limited (hereinafter referred to as 'Nissan Z') is a company carrying on business in Zimbabwe as a motor dealer and importer. It is a subsidiary of Nissan South Africa. It does not directly sell vehicles to the general public but only to franchised motor dealers. The manner in which it does so was presented in open court supported by detailed agreements governing the whole distribution chain from Nissan Japan through Nissan SA, Nissan Z, franchised motor dealers right up to the individual purchaser of a Nissan vehicle.

The authenticity of the agreements was conceded as well as the quality control and commercial justification thereof. Thus, in the normal course of business where Nissan Z would import using its own foreign currency, ownership of the vehicle would pass sequentially through the supply chain. However, in the unique situation of acute shortage of foreign currency existing in Zimbabwe then, individual purchasers of Nissan vehicles were required to pay the full foreign currency price of the vehicle to Nissan SA before the vehicle was released through the supply chain, in the so-called non-currency involved (NCI) purchases. These NCI purchases, it was contended on behalf of the respondent, the Commissioner General of the Zimbabwe Revenue Authority (hereinafter called "Zimra" or "the Commissioner"), fell outside the ambit of the general agreements, leading to different tax consequences as detailed in the respondent's letter to the appellant dated 19 November 2005:

> "Please be advised that it has been noted the use of (the company's) sales tax number on the importation of motor vehicles under the non-currency involved (NCI) resulted in the suppression of import tax, which was supposed to have been paid at the port of entry. May I also advise that the sale tax number was to be used when the company was importing vehicles for its showroom not when they are agents facilitating the importation of motor vehicles by various individuals and companies who make direct payments to the supplier."

By a letter dated 26 January 2006, the respondent claimed an amount of almost Z$15,5 billion as unpaid import duty. The appellant commenced, under protest, to pay certain monthly instalments, while making further submissions and objections. By a letter dated 24 April 2006, the respondent disallowed the objection and the appellant noted this appeal.

The grounds of appeal are captured succinctly in the appellant's letter of objection and may be summarized as follows:

a) Nissan Z, a subsidiary of Nissan SA as noted already, sells vehicles to franchised motor dealers. Ownership in the vehicles passed from Nissan SA to Nissan Z. Nissan Z was the consignee named in the Bill of Entry. Nissan Z then sold the vehicle after its charges to a franchised dealer. Sales tax was chargeable in terms of Section 4(1)(a) and (d) of the Sales Tax Act [*Cap 23:08*].

b) With reference to Section 20(1) of the Act, Nissan Z's normal course of business was the importation of vehicles for sale to dealers who then resold these to customers. This being the case, the Act enforces import tax only on non-registered operators.

c) Nissan Z was correct in quoting its sales tax number as the NCI vehicles were sold in the sales tax exempt ring according to Section 8(1)(d) as read with Section 13(1) of the Act, which provides that a registered operator would declare that they are registered operators if the goods are intended for resale when purchasing the goods from another registered operator.

d) Legitimate expectation: The appellant was subjected to sales tax examination in and around the years 2001 and 2002. Therefore, Zimra is estopped from revisiting this issue in terms of the doctrine of legitimate expectation. However, this ground of appeal was subsequently abandoned.

e) Prejudice to the fiscus: In charging the sales tax on the whole amount at the last stage in the chain the import tax and the sales tax would constitute the same amount as the actual amount of sales tax paid by the customer. This aspect was formally incorporated into the ground of appeal through a notice of amendment filed and admitted subsequently. In the notice of amendment it is elaborated upon as follows: "At the time of importation of the vehicles there was little difference between the tax on imports and sales tax only one of which was payable. Sales tax was paid by the eventual owner of the vehicles".

f) Appellant then prays for the assessment to be set aside and amounts paid to be refunded, alternatively that the interest and penalties should not have been levied at all or, at most, should have been levied in a lesser amount.

I shall examine the grounds of appeal *seriatim* below:

Whether there was a sale between Nissan Z and Nissan SA and whether ownership of the vehicles ever passed to Nissan Z.

The contentions by both parties in this regard have already been canvassed above. The undisputed facts are that the end users in NCI imports paid the full purchase price of the motor vehicles to Nissan SA, which, in turn, dispatched the motor vehicles through Nissan Z and the franchised motor dealers to the end user. The respondent's contention must, therefore, be accepted that there was no sale between Nissan Z and Nissan SA and Nissan Z never became the beneficial owner of the vehicles. Thus, it is correct to view the whole transaction as the facilitation by Nissan Z of the importation of motor vehicles by various individuals and companies who had approached motor dealers. It is unnecessary in this regard to delve into the intricacies of the law of sale and the passing of ownership and risk to safely to come to this conclusion, nor is it fair to the appellant to compare the arrangement to disguised sales. It must simply be appreciated that the appellant was trying to maintain sufficient sales volumes in line with the distribution agreements at competitive prices in an environment of severe foreign currency shortages and thus found itself caught between the Scylla of economic challenges and the Charybdis of high taxation, between, as it were, the rock and a hard place.

Were the NCI vehicles imported in appellant's normal course of business?

The crucial section as far as this argument is concerned in section 20(1) of the Sales Tax Act, which reads as follows:

> "20. Tax on imports
>
> (1) Subject to this Act, there shall be charged, levied and collected, for the benefit of the Consolidated Revenue Fund, a tax on-
>
> (a) goods imported by any person who is not a registered operator; and
>
> (b) goods imported by a registered operator not being intended for resale in the normal course of his business as such."

The appellant submitted that the motor vehicles were imported by it in the normal course of its business and that its business was not restricted to show-room sales. The respondent argued that the importation of the vehicles was not in the ordinary course of the appellant's business as the goods could not possibly have been regarded as being for resale to persons who had already paid for them. Motor vehicles imported duty-free, acquired and dispatched in exactly the same manner as the NCI imports, were treated by Nissan Z as being imported by the end users who enjoy a rebate at importation. On p 33 of the Appellant's Bundle of Documents, it is clear that vehicles imported into the country by Nissan Z on behalf of returning residents, new immigrants, new investors and the disabled who all enjoyed rebates, were treated as being imported by the end-users.

It was then suggested, with justification in my view, that the NCI imports should have been treated in the same manner. In other words, the NCI end-users were liable for import duty where they were not entitled to any rebate. It was then submitted for the appellants that if import tax was payable by the owners of the NCI vehicles, then the respondent should not have tried to impose the tax on the appellant. The respondent had to look to the ultimate customers for the tax provided that the respondent had the right to levy it. This submission is not tenable for the simple reason that the importation of the NCI vehicles by the appellant, who was the party in possession of the vehicle at the time to importation, using its tax-exempt status in circumstances where the goods were not intended for resale in the normal course of its business as such should and did attract import tax in terms of the clear provisions of s.20(1)(b) of the Sales Tax and the appellant was properly assessed accordingly.

Prejudice to the Fiscus

As already noted, in the notice of amendment this issue is elaborated upon as follows: "At the time of importation of the vehicles there was little difference between the tax on imports and sales tax only one of which was payable. Sales tax was paid by the eventual owner of the vehicles" and therefore there was no prejudice to the fiscus. In earlier submission it was conceded slightly that the time difference between the importation and the final sale of the vehicle is about 30 days and thus any loss to the fiscus would be interest at 35% over a period that is not likely to be much in excess of 30 days. However, it would appear there is need to differentiate import tax on importation and sales tax which is paid much later. Sales tax on the local component would still have been paid regardless of whether import tax would have been paid or not. It is therefore not correct to say that only one of the tax heads was payable. Both were payable.

Interest and penalties

The appellant has submitted in the alternative that interest and penalties should be set aside because there was no culpability on the part of the appellant. It was not suggested in cross-examination or in any way that the appellant deliberately set out to evade or avoid tax. It was accepted that it was simply the method of trading of the appellant that led to the tax liability and as the appellant has cooperated with the respondent and not sought to withhold any information, there should be no penalties and interest and those so levied should be set aside. In terms of s.33(2) of the Sales Tax Act, a revenue officer may, if satisfied that there was reasonable cause for the failure to pay any tax, remit the additional tax or penalty in whole or in part. It would appear that on the same reasoning, the interest levied may be remitted as well. However, since interest is not a penalty or punishment as such and is more a restoration of the flow of expected revenue that was disrupted by the non-payment of the tax, unless the interest rate imposed is punitive, I am of the view that the case for remittal of interest has not been made out.

Conclusion

The appeal succeeds in part, and therefore it is fair that each party should bear its own costs. Accordingly, it be and is hereby ordered as follows: The assessment for the principal and interest is upheld. The penalties are set aside. Each party shall bear its own costs.

Atherstone and Cook, Appellant's legal practitioners
Zimbabwe Revenue Authority, Respondent's legal practitioners,