EJ (PVT) LTD
versus
ZIMRA

FISCAL APPEAL COURT
KUDYA J
HARARE, 7 November 2016 and 31 July 2019

Value Added Tax Appeal

D Tivadar, for the appellant
T. Magwaliba, for the respondent

KUDYA J: The present appeal seeks to determine whether both value added tax, VAT and capital gains tax, CGT are conterminous fiscal charges in the disposal of immovable property. The answer lies in the further determination of the question whether the disposal of the three capital assets pertaining to this appeal was done in the course of or in furtherance of the trade carried on by the appellant at the time of disposal.

The Facts

The facts in this matter are generally common ground. The appellant was incorporated on 2 June 1980[1] and commenced operations in the retail of hardware products from various locations in the Masvingo and Midlands Provinces of Zimbabwe. Between 3 January 1983 and 1 September 1999 it acquired a further 11 immovable properties for that purpose, amongst which were the three properties that have given rise to the dispute before the Court. The two properties in Masvingo Town were acquired on 3 January 1983 and 23 December 1991 respectively while the Zvishavane property was acquired on in 1996.

The appellant disinvested from the retail hardware business in 2002 ostensibly due to an economic downturn and leased out all but two of its immovable commercial properties to various tenants. It also ran a transport business on the remaining two properties until 2006 when these premises were also leased out.

[1] Pp 91 of r 5 documents

It was common ground that at the time of the audit the appellant was in the business of commercial renting[2]. In respect of the first of the two Masvingo properties, the appellant continually leased it to HB (Pvt) Ltd between 25 March 2002 and 31 December 2012[3]. An agreement of sale [4]for the business operations and the immovable property between the appellant and HB (Pvt) Ltd executed on 24 August 2002 was novated when the appellant purchased the business operations as a going concern and leased the property until it was purchased by CI (Pvt) Ltd. The property was disposed, subject to the existing lease, to CI (Pvt) Ltd, a wholly owned subsidiary of HB (Pvt) Ltd, on 4 May 2012 notwithstanding that it was incorporated on 9 May 2012 for US$1 045 000[5]. Clause 3 (b) of the agreement of sale read:

> "The property is sold subject to the existing lease listed in clause 11 hereof, and the purchaser acknowledges that he is fully acquainted with the terms and conditions of such leases. The seller undertakes to cede and assign to and in favour of the purchaser, all of the Sellers's rights and obligations in terms of such lease, with effect from the date of receipt of the initial payment."

The purchase price was paid in monthly instalments commencing on 1 June 2012 and ending on 1 February 2013. The appellant was issued with a capital gains tax clearance certificate by the respondent's officials at Masvingo on 11 June 2012. The reason indicated on the CGT clearance certificate for the disposal was given as "normal"[6]. The purchaser was registered for VAT with the respondent on 18 March 2015 effective 1 April 2015.

The second Masvingo property was leased to various tenants until it was purchased by a faith based organisation on 7 December 2011 for a cash sum of US$168 500 against the signing of the agreement of sale.[7] It was also subject to the existing lease agreement. Clause 3(b) read:

> "The property is sold subject to the existing lease listed in clause 11 hereof, and the purchaser acknowledges that he is fully acquainted with the terms and conditions of such leases. The seller undertakes to cede and assign to and in favour of the purchaser, all of the Sellers's rights and obligations in terms of such lease, with effect from the date of receipt of the final payment."

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[2] Appellant's notes to 2012 and 2013 financial statements on pp 121 and 127 and respondent's letter to appellant of 7 August 2014 at p 186, regional manager's letter of 10 June 2015 para 1.2.3 p 282 of r 5 documents and para 13 of respondent's case.
[3] Pp 69-81, 89-93 of r 5 documents
[4] P210 r 5 documents
[5] Pp 112-117 of r 5 documents
[6] Pp94 of r 5 documents
[7] Agreement of sale on pp

A CGT clearance certificate was issued at Masvingo on 21 February 2012. The reason for the disposal was captured as "disposal"[8]. There was however an earlier agreement executed by the faith based organisation and appellant for the same property on 28 March 2010[9], which was submitted by the public officer to the investigator on 5 March 2015. The sum of US$ 75 000 was paid on signing and the last instalment was due on 7 January 2011. The parties agreed that the later agreement of sale was the correct one. The faith based organisation was VAT registered during the audit retrospective to 1 January 2013[10].

The Zvishavane property was leased to HB (Pvt) Ltd until 2008 and thereafter to MB (Pvt) Ltd[11], general dealers, until its sale to CENI (Pvt) Ltd on 21 January 2013 for cash sum of US$280 000, which was paid against the signing of the agreement.[12] The sale was subject to the existing lease agreement and had a clause 3 (b) similarly worded as in the second Masvingo property. The appellant was issued with a capital gains tax certificate by the respondent's Masvingo based officials on 13 December 2013. The reason for disposal was cited in the clearance certificate as "economic"[13] while in the CGT return of 28 November 2013 the reason was supplied by the appellant as "not required". The purchaser disputed purchasing the business operating on the property and maintained buying the immovable property only[14] to run its own hardware business, which it proceeded to do at the expiration of the lease. The purchaser was VAT registered prior to the purchase of the property.

The appellant treated the payments as capital and not income. The respondent did not demand VAT on the transactions but issued tax clearance certificates ITF 263 in 2013, 2014 and 2015[15]. These signified that the appellant's tax position was satisfactory in respect of all taxes under all the Acts administered by the respondent and precluded the appellant's trading partners from withholding 10% of the gross proceeds due to the appellant[16].

The respondent conducted a tax compliance audit on the appellant from 17 June 2014. The initial interview set for 20 June 2014 failed to take off for two reasons. The first was that the appellant's public officer was yet to compile the requested records. The second was that he

[8] P 88 of r 5 documents
[9] Pp252-255 of r 5 documents
[10] P 277 of r 5 documents
[11] Pp62-66 of r 5 documents retail business associated with the sale of general goods
[12] P 97-111 of r 5 documents
[13] Attachment on p 4 of appellant's summary of evidence
[14] P 218 dated 26 September 2014 , a response to respondent's letter on p 217 of 25 September 2014
[15] Pp 5-7 of appellant's summary of evidence
[16] According to a download from the respondent's website on p 8 of appellant's summary of evidence

was tired of attending the respondent's repetitive interviews. The investigator and the public officer eventually met on 5 August 2014. After a series of meetings and an exchange of correspondence between the parties, the respondent published its final position on the VAT tax head on 23 March 2015. The respondent issued VAT assessments and imposed a penalty of 100% and interest on 3 June 2015[17] in respect of the disposal of each of the three immovable properties in question. The appellant's objection of 10 July 2015 was received by the Commissioner on 20 July 2015.

In terms of s 32 (3) of VATA objection must be within 30 days from date of notice the notice of assessment. The notice was raised on 28 May 2015 but was given on 3 June 2015. On that date the Regional Manager requested the appellant to supply further documents for her consideration. These were supplied on 4 June 2015. On 10 June 2015 she maintained the investigator's position. The letter was received by the appellant on 17 June 2015. In my view the intervention of the Regional Manager constituted reasonable grounds that would satisfy the Commissioner for the delay in lodging the objection. The Commissioner thus properly condoned the delay. The Commissioner did not make decision within the 3 months provided in the proviso to s 32 (4) of the VAT Act. The objection was in terms of that proviso deemed to have been disallowed by 19 October 2015. The appellant was required to file the notice of appeal within one month of the deemed decision, that is by 18 November 2015. It filed it 2 days later on 20 November 2015. By consent, of the Commissioner, the delay was condoned. The respondent filed its 21 December 2015 reply timeously[18].

The appellant contended that as the dispositions were not made in the course of or in furtherance of any trade carried on by it, they were not vatable. The respondent contended that the dispositions were made in the course of or in furtherance of the appellant's business and were therefore vatable.

The issues

At the pre-trial hearing of 24 June 2016, the following issues were referred on appeal.

1. Whether or not the appellant was liable for VAT on the sale of each of the three immovable properties, in particular-
    a. Whether or not the sales by the appellant were done in the course or furtherance of the appellant's trade?
    b. Whether or not the dispositions/sales were zero rated

[17] P 266 of r 5 documents

[18] In terms of r 4 of Fiscal Appeal Court Rules SI 41/2002 had 30 court days within which to do so. They would have expired on 6 January 2016.

c. Whether or not payment of CGT has any bearing on the appellant's liability to pay VAT?

2. Whether or not appellant is liable for interest for its non-payment of VAT on the sale of the aforementioned three immovable properties?
3. Whether or not appellant is liable for penalty for its non-payment of VAT on the sale of the aforementioned three immovable properties? If so, what is the appropriate penalty?

I proceed to determine each issue in turn.

Resolution of the issues

Whether the sales were done in the course or furtherance of any trade carried on by the appellant

The answer to this question depends on the satisfaction of the fourth constituent element of s 6 (1) (a) of the Act as set out *in S (Pvt) Ltd* v *Zimra*, that is, whether the dispositions were done in the course or furtherance of any trade carried on by the appellant. It was common cause that at the time of the dispositions in 2011, 2012 and 2013 the appellant was exclusively engaged in the business of property renting. In his letter of 29 August 2014[19] the public officer for the appellant averred that the appellant was not in the trade of selling immovable property and argued that "disposing of the property (was) certainly not in furtherance of any trade as it constituted the reduction of the business and not the furtherance thereof." I therefore agree with Mr *Tivadar's* contention that the appellant was not in the business of selling immovable property for two reasons. The first being the concessions made by the respondent to this effect during the investigations and the second being the charging of capital gains tax against the dispositions instead of income tax.

That is however, not the end of the matter. It is axiomatic that our income tax law recognises the existence of what may generally be called two types of income. The first is what I would term revenue income, to which income tax applies and the second would be capital income to which capital gains tax applies. There is no doubt in my mind that as long as the essential elements of s 6 (1) (a) of the VAT Act are met, then revenue raising dispositions are subject to VAT[20], a position conceded by Mr *Tivadar* in his written heads of argument. The subtext posed by this appeal, which the appellant termed double taxation then is whether s 6 (1) (a) of the VAT Act applies to capital income. The general answer must also be that if the essential elements of s 6 (1) (a) of the VAT Act are met, then capital income would be vatable

[19] P198 of r 5 documents
[20] Para 50 of those heads

notwithstanding the correct observation of both Mr *Tivadar* and the public officer that the expenses incurred in earning such income would not be deductible under the provisions of Income Tax Act and that the dispositions would result in the reduction of the business of the seller.

In *casu*, the answer to the issue under consideration must *inter alia* repose in the definition of trade. In terms of s 2 of the Act:

> "trade" means—
> (*a*) in the case of any registered operator,…… any trade or activity which is carried on continuously or regularly by any person in Zimbabwe or partly in Zimbabwe and in the course or furtherance of which goods or services are supplied to any other person for a consideration, whether or not for profit, including any trade or activity carried on in the form of a commercial, ……concern or any other concern of a continuing nature..
> (*b*) without limiting the applicability of paragraph (*a*) in respect of any activity carried on in the form of a commercial…… concern—
> Provided that—
> I. anything done in connection with the commencement or termination of any such trade or activity shall be deemed to be done in the course or furtherance of that trade or activity;

There is no doubt that the phrases "any activity carried on continuously or regularly", "whether or not for profit", "any other concern of a continuing nature" and "without limiting the applicability of para (a)" in the definition of trade are all-embracing. Thus far the definition resonates with the sentiments expressed by both KORSAH JA in *Young* v *Van Rensberg* 1991 (2) ZLR 149 (S) at 154F to the effect a trade must be one of a continuing nature and not a single and isolated transaction. In my view, trade denotes transactions which are carried out regularly and frequently over a period of time and would preclude the three isolated dispositions, which were carried out by the appellant in this case.

The definition of trade is further supplemented by proviso I, above, which deems anything done in connection with the commencement or termination of any trade or activity conducted by a taxpayer to encompass the course of or furtherance of that trade or activity. This proviso appears to contradict the averment made by the public officer that the dispositions constituted a reduction of the business rather than the furtherance thereof. In my view, while the dispositions did not terminate the appellant's property renting trade as correctly contended by Mr *Tivadar*, they were connected to the termination of the very activity of renting out those particular properties that were sold. Accordingly, I agree with Mr *Magwaliba* that the sale of the properties fell into the ambit of trade as defined in s 2 of the VAT Act.

The added meaning of "in the course of or in furtherance of any trade" is provided in s 7 of the VAT Act. The section deems certain activities to be supplies made in the course or

furtherance of a registered operator's trade. Of particular relevance to the present matter are subsections (6) and (14) thereof, which provide:

> "**7 Certain supplies of goods or services deemed to be made or not made**
> (6) For the purposes of this Act, the disposal of a trade as a going concern, or a part thereof which is capable of separate operation, shall be deemed to be a supply of goods made in the course or furtherance of such trade.
> (14) The supply by a registered operator of—
> (*a*) any goods (other than fixed property acquired prior to the 1st January, 2004, by a registered operator who is a natural person if such property was used by him mainly as his private residence and no deduction of any amount has been made by him under subsection (3) of section *fifteen* in respect of such property) or services, where such goods or services were acquired or imported by him partly for the purpose of consumption, use or supply in the course of making taxable supplies, including supplies which would have been taxable supplies if section *six* of this Act had been applicable prior to the 1st January, 2004,, and were held or utilised by him partly for the said purpose immediately prior to the supply by him of such goods or services, shall be deemed to be made wholly in the course or furtherance of his trade;
> (*b*) fixed property acquired prior to the 1st January, 2004, by such registered operator, being a natural person, shall be deemed to be made otherwise than in the course or furtherance of his trade:
> Provided that—
> (*a*) such property was used by him prior to such supply mainly as his private residence; and
> (*b*) no deduction of any amount has been made by him under subsection (3) of section *fifteen* in respect of such property."

The first subsection deems the disposal of a trade or part thereof as a going concern to be a supply of goods made in the course or furtherance of such trade. It was common ground that fixed property falls into the definition of goods found in s 2 of the VAT Act. If the averments of the appellant that the three dispositions were made as going concerns were correct, then the provisions of s 7 (6) would be fully met. The disposals would constitute supplies of goods made in the furtherance of the rental business.

I have cited the provisions of s 14 in full to demonstrate that the words in parenthesis in para (a) are given full expression in para (b). The meaning ascribed to those words and para (b) would be that any fixed property acquired before 1 January 2004 by a natural person who is a registered operator and which he used as his private residence prior to the supply by him and for which no s 15 (3) of the Act deduction was made would not constitute a supply made in the course or furtherance of his trade. In my view para (a) deems the supply by a registered operator of any goods acquired by him for use or supply in the making of taxable supplies including those supplies which would have been vatable had s 6 (1) (a) been in operation before 1 January 2004 to have been made wholly in the course or furtherance of trade. In *casu*, the

appellant was a registered operator at the time the dispositions were made. The dispositions constituted fixed property and were therefore goods. They were acquired by him to sell hardware equipment, which would have constituted taxable supplies were s 6 (1) (a) in force at the time. By the time of the dispositions the properties in question were being used by him to earn rentals, which again constituted taxable supplies. Therefore the three dispositions were deemed to be supplies made in the course or furtherance of the appellant's property renting trade.

While I agree with both counsel that sections 8 (3) (d) and (e), 15 ((3) (a) (iii) as read with (5) (b) and 14 (b) of the VAT Act were irrelevant in the resolution of the first issue, I hold that the dispositions by the appellant fell into the ambit of s 14 (a) of the same Act. In any event, so it seems to me, for the appellant to discharge the onus on it to show that the dispositions were not done in the course of or in furtherance of any trade carried on by it, it was required to disclose the reasons behind the dispositions and the application to which the proceeds were put. The failure to do so was fatal to the appellant's cause.

Whether or not the dispositions/sales were zero rated

In the letter of objection, the appellant, in the alternative contended that if it were found that the dispositions constituted vatable supplies, such supplies would, in terms of s 10 (1) (e), be zero rated. Mr *Tivadar* conceded that the dispositions could not have been zero rated, mainly for the reason that the purchasers in the two Masvingo dispositions were not VAT registered at the time of the sales. The evidence disclosed that the purchaser of the Zvishavane property was VAT registered at the time of purchase. During the investigations the appellant presupposed that each disposition was a sale of a going concern in view of the assumption of the existing leases by the purchasers. In terms of s 10 (1) (e) zero rating applies were the supply is made to a registered operator of a trade or part of a trade and the supplier and recipient agree in writing that such trade or part thereof would be disposed of as a going concern.

I am satisfied that the appellant did not establish that any of the dispositions were made as a going concern. In my view, the nature of a going concern was provided in the r 5 documents with respect to the sale of the business operations of the appellant to HB (Pvt) Ltd on 24 August 2002 and the sale of a related company of the appellant to a former employee on 20 August

2012[21]. In the former, the appellant sold its business operations lock, stock and barrel and transferred all employees to the purchaser. In the latter case, the related party sold and transferred all its equity, assets and liabilities to the former employee. It does not appear to me that the assumption of an existing lease agreement on notice to the tenant to vacate on the expiration of the lease agreement could ever be equated to the purchase of the appellant's rental business. It was apparent from the exchange of communication between the purchaser of the Zvishavane property and the respondent, that the purchaser intended to and did utilize the premises to operate a retail hardware shop in its own name[22]. Again, the appellant did not treat these transactions as zero rated in its books of account nor produce any documentary proof substantiating its entitlement to zero rating as required by s 10 (3) of the Act. Had the second issue not been withdrawn in argument, I would have found against the appellant.

Whether or not payment of CGT has any bearing on the appellant's liability to pay VAT?

It seems to me that the inevitable result of my finding on the first issue must be that the payment of CGT does not have any correlation with the appellant's liability to pay VAT. While Mr *Tivadar* argued that the Capital Gains Tax Act [*Chapter 23:01]* was mutually exclusive to the VAT Act, he implicitly recognised in para 51 of his written heads that this would not be the case where a taxpayer disposed of its capital asset in furtherance of its trade. He contended that:

> "If, however, a taxpayer does not dispose of the capital asset in furtherance of its trade, the VAT Act finds no application. If a 'capital gain' results from such a transaction, then CGT will become payable."

I agree with Mr *Magwaliba* that no prejudice would result to the appellant from the contemporaneous application of the CGT Act and the VAT Act. This is because CGT is borne by the seller, the appellant while VAT is borne by the recipient of the supply, the purchaser. The seller, in line with the sentiments expressed by KRIEGLER J in *Metcash Trading Private Limited* v *The Commissioner of the South African Revenue Services* 2009 (1) SA 1109 (CC) para [15-18], "has a duty to calculate and levy VAT on each supply of goods". The appellant was a statutory involuntary collector tasked with the duty to collect and remit the VAT to the respondent.

[21] P 178-180 of r 5 documents
[22] Letters of 25 and 26 September 2014 on pp 217-218 of r 5 documents

My answer to the inarticulate question raised in the present appeal is therefore that both VAT and CGT are conterminous fiscal charges in the disposition of immovable property provided the disposition of such property is done in the course of or in furtherance of any trade carried on by the seller at the time of the disposition.

Whether or not the appellant is liable for interest and penalties

Interest is imposed in terms of s 39 (2) (a) (ii) of the Act and may be waived in terms of s 39 (5) thereof. It is paid to compensate for the lost time value of money. The waiver of interest was not raised in the objection nor taken by consent of the respondent or leave of the Court. While it was given passing and unsubstantiated reference in written argument, it was wholly abandoned by counsel in oral submissions. That ground of appeal must therefore fail.

It is now trite that on appeal, penalties are in the discretion of the appeal court. The triad of the offender, the offence and the interests of society fall for consideration.

I agree with Mr *Tivadar* that the appellant was co-operative in its engagement with the respondent. The contention by Mr *Magwaliba* that the public officer was hostile and disdainful of the investigator by reference to the interview notes compiled by the investigator on 20 June 2014 overlooks the valid explanation supplied by the public officer on 7 July 2014, which apparently was accepted by the investigator on 11 July 2014. The public officer vented his frustration at being called for a meeting on short notice from Chiredzi to Masvingo before he had supplied the requested documentary information.

The subsequent exchanges of e-mails and letters together with frequent meetings to resolve points of disagreement clearly demonstrated that the appellant fully co-operated with the respondent during the investigations. The appellant timeously supplied all the requested information pertaining to VAT between 7 July and 29 August 2014. In addition, the appellant brought the property dispositions to the attention of the Masvingo based officers of the respondent and received CGT clearance certificates and ITF 263 tax clearance certificates that portrayed it as an exemplary taxpayer. Indeed the internal documents of the Masvingo office filed by the respondent in the r 5 documents showed that the investigators were uncertain as to whether VAT and CGT could be levied against the same transaction.

It seems to me that the belated reduction of the penalty from 100% to 50 % in the belated determination of 13 January 2016 was an admission that the appellant did not have any intention to avoid the payment of VAT. It simply acted in ignorance of the correct legal

position. Other than the hostility aspect, Mr *Magwaliba* was unable to submit any meaningful aggravating features that would justify the imposition of any measure of penalty in the circumstances of this case. I am unable to attribute any moral turpitude to the appellant. In my view, the novelty of the issue called for a full waiver of penalties. In the exercise of my discretion on appeal, I will waive the penalties in full.

Costs

The relief sought by way of declarations was incompetent. It was however clear that the appellant really sought the setting aside of the assessments and waiver of interest and penalties. It has succeeded in having the penalties waived in full but has failed on the other two aspects. In my view, the decision appealed against was not grossly unreasonable nor were the grounds of appeal frivolous so as to attract an adverse order of costs against either party. I will order each party to bear its own costs.

Disposition

Accordingly, it is ordered that:

1. The appeal against the principal VAT assessments and interest imposed thereon in respect of each the three immovable properties be and is hereby dismissed.
2. The assessments issued by the commissioner in respect of the disposition of the three immovable properties are set aside.
3. The Commissioner is directed to issue amended VAT assessments in respect of each of the three immovable properties discharging the penalties in full.
4. Each party shall bear its own costs.

Kevin Arnott, the appellant's legal practitioners