1. PL ITC 06/15
versus
ZIMBABWE REVENUE AUTHORITY

2. PL ITC 10/16
versus
ZIMBABWE REVENUE AUTHORITY

SPECIAL COURT FOR INCOME TAX APPEALS
NDOU AJ
HARARE, 3 & 7 October 2019

Income Tax Appeal

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

NDOU AJ: The two consolidated appeals relate to issues which are predominately similar. On 23 February 2018, the matters were consolidated and it was agreed that they would be heard as one matter. A statement of agreed facts summarising the factual basis of the appeals was argued upon and filed of record on 2 May 2019. The background facts of these appeals are the following;

The appellant undertakes mining and processing operations in terms of a special mining lease number ("SML1") supported by a Mining Agreement dated 24 August 1994. Prior to the appellant becoming involved in the mining operations (as a shareholder and financier) it received various written undertakings from the Government of Zimbabwe ("GoZ"). The rights under those two agreements have been assumed with the consent of GoZ, by the appellant.

The appellant had since 2001, in determining its taxable income assessed losses, capital redemption allowances and deductions applied the provisions of the Income Tax Act applicable to general mining operations where these were more favourable than those applicable to special mining lease operations.

Statement of agreed facts

The statement of agreed facts turns on to the facts relating to (a) prescription, (b) additional profits tax ("ATP") and (c) penalty on ATP.

(a) Prescription of amended assessments for 2003 to 2006:

The appellant submitted its Income Tax Return for the 2003 tax year on 18 June 2004. The return was accompanied by the Income Tax Computation based on USD financial statements. It further submitted its income tax returns for the years 2004, 2005 and 2006 on 12 April 2007. These returns were accompanied by the Income Tax Computations the USD based financial statements.

The assessments for the 2004, 2005 and 2006 tax years were issued on the appellant by the respondent on 27 September 2007. The date of issue of the assessment for 2003 cannot be discerned from the documents but it was issued prior 27 September 2007.

On 29 October 2007 the appellant objected to these assessments on the basis that they were denominated in Zimbabwe currency, and it also objected to the rate of tax used to tax the appellant. The respondent acknowledged receipt of the letter of objection on 9 November 2007. In the absence of any decision by the respondent on 29 January 2008 the appellant gave its notice of appeal against the Zimbabwe dollar denominated assessments for 2004, 2005 and 2006.

On 30 January 2008, the respondent allowed the objection of the appellant in respect of the assessments for 2004, 2005 and 2006. Consequently on 31 January 2008 the appellant withdrew its appeal in this regard.

On 6 August 2009, the appellant requested the US dollar denominated assessments as had been promised by the respondent. In 2012, the respondent commenced investigation into the tax affairs of the appellant. During the tax investigations, the respondent's officers made the following findings in respect to capital redemption allowances.

1. Capital redemption allowances are deductions allowable in the determination of a mining company's taxable income;
2. The appellant as the holder of an SML, should claim capital redemption allowances under the 22nd Schedule of the Income Tax Act (:the Act") as opposed to claiming these under the 5th Schedule of the Act which is applicable to miners undertaking general mining operations;

3. The 22nd Schedule deals with the determination of gross income and taxable income as assessed losses from SML operations whilst the 5th Schedule of the Act deals with allowances and deductions in respect of income from general mining operations;
4. The 22nd Schedule allows for capital expenditure on development operations to be deducted over four years whilst the 5th Schedule allows for capital expenditure to be deducted in full in the year that the expenditure incurred. Thus the respondent disallowed the appellant's deduction of capital redemption allowances in full in the year of expenditure.
5. Following the respondent's disallowance of the appellant's claim of capital expenditure in full in the year in which it was incurred, the respondent determined that the appellant was liable to pay additional taxes together with penalties and interest.

Following correspondence and discussions on the issues between the parties a meeting was held on 25 September 2012 at the offices of the respondent chaired byL.Dube on behalf of the respondent. At that meeting it was minuted that the parties agreed on the issue of prescription in respect of the years of assessment up to 2006 and that the appellant would therefore withdraw its objection on that issue. That was confirmed in a letter from the appellant to the respondent of 28 September 2012 in which the appellant formally withdrew its objection in relation to the assessments issued in the prescribed period.

The appellant's liability was thus restricted to the period 2007 to 2012 only. This culminated in a payment plan which was submitted by the appellant on 4 October 2012 for the settlement of the resultant principal amount, penalty and interest.

In a letter of 1 November 2012 the respondent invoked the provisions of s 47 of the Act and indicted to the appellant that prescription did not apply to the earlier periods 2001 to 2006 because there was misrepresentation in the way that capital redemption allowances had been claimed. This was repeated in the letter of 19 March 2014, in which the respondent maintained that in light of misrepresented information the prescription period fell away and that he appellant remained liable for the tax in question. In response, by letter dated 14 May 2014, the appellant maintained that the prescription period still applied. In its letters to the appellant of 21 July 2014 and 20 August 2014, the respondent maintained the positon stated on 19 March 2014.

This resulted in the issuance of assessments covering the tax years 2003 to 2006 on 9 October 2014. By letter dated 26 October 2014 the appellant raised the issue of the agreement in

2012 that amended assessments would not cover the period 2003 to2006, but only the period from 2007 to 2012 of the earlier dates had prescribed.

The appellant then managed to convince the respondent that the 2003 to 2006 assessments had long been accepted by case manager L P Dube to be prescribed. This resulted in the assessments of 9 October 2014 being cancelled by the assessments dated 24 December 2014. Thus, by letter of 24 December 2014 the respondent cancelled the additional assessments for the years 2003 to 2006 in recognition of the prescription period and issued further amended additional assessments for those four years. By letter dated 23 February 2015 the respondent took the position that the assessments for the years 2003 to 2006 issued on 24 December 2014 had been issued in error and were withdrawn. Additional amended assessments for those four years were issued reinstating the 9 October 2014 assessments.

On 27 April 2015 further amended assessment were issued by the respondent to the appellant covering the years 2004, 2005 and 2006 which had the effect of reducing allowable royalties deduction in line with a court ruling which reduced royalties payable by the appellant to 2.5% from 5% which meant that the appellant was only allowed to claim 2.5% royalties as a deduction.

In a letter dated 11 May 2015, the respondent notified the appellant that it had amended the income tax and additional profit tax assessments for the 2014 tax year.

On 26 May 2015 the appellant objected to the various amended assessments. The objection was accompanied by various attachments. By letter dated 27 May 2015 the respondent acknowledged receipt of the objection.

On 17 July 2015 the respondent dealt with the objections and, in respect of prescription, disallowed the objection and found that there was misrepresentation and wilful non disclosure on the part of the appellant and disallowed the appellant's objection to the inclusion in the assessments of adjustments to income tax in respect to periods that had prescribed, with the disallowance being only in respect of capital allowances. The respondent allowed it in respect to other matters other than capital allowances..

The Commissioner General ("C-G") allowed the appellant's objection to the adjustment of royalty overpayments in the incorrect periods.

The C.G disallowed the appellant's objection to the tax effects (income tax and ATP) caused by the adjustments made prior to 2009 in so far as they related to matters other than those arising directly from the assessed losses case that had been heard and determined by this court under case number FA 02/11 ("the Assessed Loss Case").

The C – G disallowed the appellant's objection of ATP in so far as additional taxes paid by appellant were not included in such determination.

The C-G disallowed the appellant's objection to the imposition of a 30% penalty on the additional ATP.

Following upon the C-G's 17 July 2015 determination, the appellant lodged an appeal to this court on 7 August 2015 against those aspects the appellant's objection which C.G. had disallowed. This appeal is case number IT 06/15.

Following the C.G.'s 17 July 2015 determination, in a separate process to the appeal that the appellant lodged (IT 06/15), the appellant wrote to the respondent on 29 July 2015 (on a without prejudice basis, and without in any way accepting liability for the matter which are subject of the appeal) attaching amended income tax and ATP computation.

In that 29 July 2015 letter the appellant stated, in respect of management fees, that "these (had) been allowed as deductions for year 2002 to 2006 as the Commissioner had confirmed that the re-opening of (the) prescribed years (was) only in respect of capital allowances and no other matters.

On 17 August 2015 the respondent informed the appellant that the management fees for the 2002 to 2006 tax years, that the latter had claimed as allowable deductions in its revised tax computation submitted to the former of 29 July 2015, had been disallowed. The appellant was requested to submit amended tax returns. This letter was accompanied by adjusted income tax and APT assessment to the appellant for the years 2004, 2005 and 2006. This was in line with the C.G.'s determination of 17 July 2015 and also incorporated, amongst other matters, the disallowance of the management fees.

On 16 September 2015, the appellant objected to these assessments. Following a meeting that had been held between appellant's officers and the respondent's officers on 8 September 2015, the respondent on 17 September 2015 issued amended APT assessments to correct various aspects of the earlier assessment, which amended assessments were sent to the appellant under cover of the respondent's letter dated 18 September 2015. The appellant, following its receipt of this letter, issued on 16 October 2015, a supplement to its objection in which it stated that the notice of objection issued on 16 September 2015 extended to and applied to the amended assessments issued on 18 September 2015.

On 6 April 2016 the C.G. issued his determination on the objection as follows:

a) He advised that he did not agree with the appellant's interpretation of s 47 of the Act. He stated that in his view the section does not restrict the Commissioner to making adjustments only in cases where there are assessed losses.
b) He stated that, in his view, the method which the appellant sought to use in determining its taxable income did not equate to a "practice generally prevailing."
c) He advised that he did not agree with the appellant's view that conditions of fraud, misrepresentation or wilful non-disclosure of facts required by s 47 of the Act to re-open the prescribed periods had not been met on the issue of technical and management fees.
d) He advised that the statement in his determination of 17 July 2015 which the appellant understood to have excluded other issues other than capital allowance was addressing specific statements made by the appellant in its previous objection.
e) He found that the APT assessment for the years in question were aligned to and were therefore affected by the issues and reasons given concerning the income tax assessments.

Following upon the C.G.'s determination as detailed above, the appellant lodged appeal to this court on 27 April 2016 against the C.G.'s disallowance of the appellant's objection. This appeal is under case number IT 10/16.

(b) Additional Profit Tax

By 6 August 2009, the respondent had issued USD denominated APT assessments for the period 2002 to 2007 to the appellant. On 8 May 2015 the respondent advised the appellant that it had amended the APT assessment to give effect to the computing of capital redemption allowances in terms of the 22nd Schedule to the Act rather than the 5th Schedule to the Act and in line with judgment on royalties.

This letter was accompanied by amended APT assessments relating specifically to APT covering the years 2002 to 2007 and original assessment for the years 2008 to 2014. The APT assessment for the tax year was further amended on 11 May 2015 to correct the penalty. The APT assessments for the period 2002 to 2014 were further amended on 17 August 2015 to give effect to the C-G's determination dated 17 July 2015.

Further amendments of the APT assessment were issued on 17 September 2015. These were accompanied by an explanatory letter of 18 September 2015.

Thus, the respondent also re-opened the "prescribed" periods of 2004 to 2009 in respect of APT when it issued the amended APT assessments on 8 May 2015.

The respondent's original claim under the assessed loss case was initiated in 2010 covering the periods 2004 to 2007. Thus, the periods 2007 and prior remained open pending the determination of the assessed loss case but only in respect of that specific matter.

APT is not on self-assessment. Thus, there is no APT return that is submitted by the tax payer to the respondent. The tax payer submits information for APT computations, and it is the Commissioner who then assesses the APT.

(c) Penalty on Additional Profits Tax

After the judgment on the correct treatment of assessed losses, on 8 May 2015, when the respondent issued amended assessments (2002 – 2007) and original assessments (2008 – 2014), the respondent imposed a 30% penalty on additional APT.

Preliminary points

I now propose to deal with the issues in turn. But before I so think I have to start with the issue raised for the first time in the appellant's heads of argument. Mr *Tivadar*, for the appellant, also spent some time on this issue in his oral submissions in court. This is what is said in the heads of argument on this point of law—

> "No evidence that the Commissioner ever considered this matter
>
> 64. Section 47 is clear that it is "the Commissioner" who has to be satisfied that the requirements of the section are fulfilled.
>
> 65 None of the documents in the Bundle however, have been authored by the Commissioner.
>
> 66 This is fatal to respondent's case. As is clear from the wording of s 47 ITA – and from the case-law quoted above – it is the Commissioner who has to be satisfied that a permissible basis for the reopening of a prescribed tax year exists.
>
> 67 The "Commissioner" is defined in s 2 of the ITA ---
>
> 68 Section 3 of ITA – Delegation of functions by Commissioner – was repealed by the Finance Act 8 of 2011 with effect from 16 September 2011.
>
> 69 Accordingly, since September 2011 only the Commissioner himself/herself personally can be "satisfied" for the purpose of s 47. Since September 2011 no one else may be delegated this power.

The respondent in fact adduced no evidence that the Commissioner ever addressed his/her mind to the question of whether s 47 had been satisfied."

Generally, this is a correct statement of the law on this issue. This court should, ideally, not spend time on such matters where the Commissioner could file an affidavit/document that she or he is so satisfied. There is no room for the respondent to deal with this aspect in a *lackadaisical* fashion. Rule 11 documentation should be compiled with the above legal position in mind. When the Commissioner as no power to delegate after the amendment 2011 she/he should author the document.

Having said that I should, however, point out that the "legal" picture painted by the appellant is not complete without reference to s 65 (4) of the Act.This provision reads–

> "4. At the hearing of any such appeal the arguments of the appellant shall be limited to grounds stated in his notice of objection:
> Provided that the High Court or the special Court which hears such appeal may, <u>on good cause shown</u>, or <u>be agreement</u> of the parties' <u>grant leave</u> to the appellant to rely on other grounds." (emphasis added).

Although the appellant's counsel has not specifically stated so, I suspect he is raising it at this stage because he believes it is in essence a point of law. (Which can be raised at any stage before judgment).

On the facts, it is not correct to say that there is no evidence showing that the Commissioner. had note applied her mind to the facts. Annexure 15 of the appellant's case under IT 06/15 (filed on 6 October 2015) and pages 195 to 202 of r 11 documentation in case under IT 10/16 is a document authored by the Commissioner (Investigations and International Affairs), Mrs A Mutombodzi. She authored this document on 19 March 2014. Therein she states–

> "Find below my confirmation of ZIMRA's position on the issues discussed during the two meetings:
> 1) ---
> 2) ---
> 3) ---
> 4) <u>PRESCRIPTUION OF TAX YEAR 2006 AND PRIOR YEARS</u>
> Z misrepresented information to the Authority over a period of time---
> - It is therefore my view that Z continued to claim capital allowances in the manner they did, quite aware that they should not have relied on undertakings which were not law.
>
> In view of the above, the prescription period of 6 years falls away. *ZIMRA position., On this issue is also consists with its position taken in opposing the* two cases Z filed in the High Court and Appeals Court against the charging of penalty and interest respectively. ----" (emphasis added).

From this document it is clear that the Commissioner applied her mind and took a position on the matter.

In light of the foregoing this preliminary objection falls away I now proceeded to deal with the substantive issues between parties in turn.

PRESCRIPTION

The major issue for resolution is whether or not the assessments issued by the respondent in respect of tax years 2003 to 2006 had prescribed. The position of the respondent is that the question of prescription does not arise in relation to the assessment issued. Alternatively, if the question does arise, then, in terms of s 47 (1) of the Act, the respondent was entitled to re-open the assessments in respect of the relevant period on account of material misrepresentation and wilful non-disclosure on the part of the appellant.

Because the appellant was operating its mining enterprises in terms of a Special Mining Lease and a Mining Agreement, at the inception of its operations in Zimbabwe, it had elected on or about the 24th of August 1994 to maintain its books of accounts in United States dollars. The election was in terms of para 11 (1) of the 22nd Schedule to the Act. Paragraph 11 (1) to the Act. Paragraph 11 (1) to the 22nd Schedule provides that–

> "Maintenance of books in foreign currency
> The holder of a Special Mining Lease may, in the first year of assessment after the issue of his Special Mining Lease, elect to maintain all books and records relating to his special mining lease operations in the currency of the United States of America, and any such election shall be final."

The appellant objected to the issuance of the assessments in Zimbabwe dollars on 29 October 2007. On 30 December 2007, the Commissioner advised the appellant of the objection having been allowed in the following terms–

> "Your letter to me dated 29 October 2007 refers. Please note that the objection has been allowed and the notice of assessment will be done after our system has been adjusted."

It is apparent from the foregoing that the respondent was clear from the onset that it was going to re-issue notices of assessment in respect of the years under consideration. The assessment which had been undertaken in terms of the Zimbabwean currency were in contravention of the law and were accordingly a nullity. Accordingly, the respondent was entitled to issue fresh assessment denominated in United States dollars at any time without regard to the provisions of s 47(1) of the Act which relate to the re-opening of assessment. No valid assessments having been issued, there would be no re-opening of the assessments. In fact, no valid assessments having been issued, even the objection to the assessments was a mere formality. The assessments did not derive their validity from the objection which was noted. They derive their validity from provisions of the law.

In terms of para 11 (2) supra, the appellant was obligated to account for its taxes in the United States of America currency. Equally, under statutory command, the Commissioner was obligated to determine the taxable income tax or assessed loss in that currency. The appellant relied upon the agreement in a meeting of 25 September 2012 which was confirmed in the letter of 28 September 2012 to the effect that the assessments in respect of the period 2003 to 2006 had prescribed. The appellant seeks to bind the respondent in respect of an erroneous concession made by its officer which has the effect of untaxing the appellant. This issue is a matter of settled law. In *Commissioner of Taxes* v *Astra Holdings (Pvt) Ltd* 2003 (10 ZLR 417 (S) MALABA JA, as he then was, relied upon the remarks of BINGHAM LJ in *R* v *Board of Inland Revenue XP.MFKUnderwriting Agencies Ltd &Ors* [1997] ALL ER 91 at p 110 d-j to the following effect

> "Every ordinarily sophisticated tax payer knows that Revenue is a tax collecting agency, not a tax-imposing authority. The tax payer's legitimate expection is, *prima facie*, that he will be taxed according to statute not concession or a wrong view of the law.

(see*R* v *AG exp-Imperical Chemical Industries PLC* (1986) 60 TCI at 64 per Lord Oliver).

Such Tax payers would appreciate, if they could not so pithily express the truth of Walton J's aphorism:

> "One should be taxed by law, or not be untaxed by concession"

(See *Vestcy* v *ICR (No.1) [1977] 3 ALL* ER 1073 at 1098 [1979] ch 177 at 197)" Further MALABA JA made the following apposite statement:

> "There is no doubt that the purported contract would have been born out of a mistake of the law ..... Although unknown to the parties it would have been in contravention of the law.....
>
> In my view such an arrangement would be null and void *ab initio*. It is a bargain the Commissioner would not make at law because it would have the effect of being in breach of his statutory duty to collect tax which is due to revenue. It is one thing for revenue to enter into an arrangement with a tax payer on how, in the exercise of its managerial powers, it will collect tax, but it is another for it to seek to decide that a particular tax imposed by parliament is not due from a taxpayer when in fact it is and in so doing disclaim the right to the tax and abandon the statutory power to collect it."

In *casu*, the concession by the case manager has to be viewed in this light. The respondent could not have validly issued assessments in Zimbabwe dollars where the statute peremptorily required that those assessments should have been issued in United States dollars (See *York Estate Ltd* v *Wareham 1950* (1) SA 125 (SR) *Macfoy* v *United Africa Co. Ltd* [1961] 3 ALL ER 1169 (BC) at 1172, *X-trend-A-Home (Pvt) Ltd* v *Hoselaw Investments (Pvt) Ltd 2000* (2) ZLR 348 (S), *Chioza* v *Siziba*2015 (1) ZLR 252 (S) at 262 E – H and *Manning* v *Manning* 1986 (92) ZLR 1 (S)

The concession by the case manager in this matter cannot stand because it amounted to an attempt (innocently or otherwise) to abandon the tax collection responsibility by the respondent based on a mistaken view by its officers that the relevant period was covered by prescription when in fact such prescription is not applicable.

Any agreement arising from the concession which the appellant may seek to hold the respondent to would be unlawful it being contrary to statute. Such agreements are unenforceable in terms of *ex turpi causa non oritur actio* principle. This principle is absolute and admits of no exception. In the premises, the bargain which the respondent is being held to by the appellant is one which it could not lawfully give.

The subsequent assessments which were issued on 9 October 2014 were the first validily issued assessment. Their validity cannot be impugned on the basis of initial notices of assessment which are a nullity at law. The fact that they are inscribed “Original” or “amended” assessment is irrelevant. The court looks at the substance of these assessments and not their form.

Section 62 (6) of the Act does not apply to these facts because this provision presuppose an objection noted against a valid assessment. It does not create any waiver or estoppel or forebearance by the respondent in favour of a tax payer entitling the tax payer to hold respondent to an unlawful bargain. Whether or not the respondent purports to have “effectively nullified” the Zimbabwean dollar assessment is not the point. What nullified the Zimbabwean dollar assessments are the provisions of para 11 to the 22nd schedule of the Act. The respondent, as a creature of statute, could only recognize such nullification. It could not amend a nullity. The respondent cannot act outside its enabling statutes. This is not a case where a valid assessment was wrong in terms of minor details. It is a case where an “assessment” was issued contrary to the peremptory provisions of the law and was therefore *null* and *void ab initio*. With this finding, the issue of prescription does not arise. In light of this finding I deem it unnecessary to deal with the alternative argument submitted by the appellant on the engagement of s 47 of the Act. The issue of re-opening the assessment does not arise on account of the above finding.

ADDITIONAL PROFIT TAX

The appellant raises the contention that the assessment in respect of additional profit tax for the first time in 2015 relating to 2002 to 2006 was incompetent on account of prescription. The Respondent submits that the misrepresentation which affected the determination of income tax in terms of the 22nd schedule affects the assessment of additional profit tax in terms of the 23rd schedule of the Act. The assessments were from 2002 to 2007. The appellant contends that additional profit tax is not a tax on taxable income and relies on s 33 of the Act which provides

> "33 Additional Profit Tax in respect of Special Mining Lease Areas
>
> (1) The shall be charged, levied or collected throughout Zimbabwe for the benefit of the consolidated revenue fund an additional profit tax, determined in accordance with the 23rd schedule, in respect of the first accumulated net cash position and second accumulated net cash position, as so determined, in respect of any special mining lease area for any year of assessment."

The contention by the appellant is that once the tax payer has made a wrong return for purposes of income tax in terms of the 22nd Schedule, that consequently affects additional profit tax and therefore no penalty can be imposed on additional profit tax. This position is, in my view, not sustainable on account the definition of "tax" in s 2 of the Act. Tax is defined as "any tax or levy leviable under this Act." Additional profit tax is tax leviable under the Act. If any return in relation to additional profit tax is made in terms of para 5 of the 23rd schedule which does not disclose information which affects the quantum of the additional profit tax, a penalty (additional tax) is chargeable. Section 46 (1) of the Act which requires the tax payer to make a payment in respect of additional tax/penalty is therefore applicable. From the foregoing the appeal should be deprived of success.

THE PENALTY

The respondent imposed a penalty of 30% on the additional profit tax. It is trite that this court conducts a re-hearing of the matter. The appellant says the matter is *res judicata* in that relation to the tax years 2007 – 2012 the respondent imposed and this court upheld a penalty of 5%. I do not agree because the cause of action is different. Appellant states that the respondent must act consistently as there is no difference between the offender, the offence and the interest of society in the present case that would justify a six-fold interest in the rate of the penalty. In *casu*, the respondent had initially imposed a 100% penalty. However taking into account the factors favourable to the appellant as revealed in the papers, the respondent reduced it to 30%. I am unable to find an misdirection on the part of the respondent's exercise of discretion to warrant a lesser penalty.

In the result the appeal is dismissed in its entirety and the 30% penalties on additional profit tax imposed by the respondent on 8 May 2015 are hereby confirmed.

Each party will bear own costs.

Dube, Manikai and Hwacha, appellant's legal practitioners.