CONDUIT INVESTMENTS (PVT) LTD
versus
ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 20 October 2020 & 15 April 2021

Opposed Application

T. Tanyanyiwa, for applicant
L Chipateni, for respondent

DUBE J:

Introduction

1. In this tax dispute, the applicant seeks an order interdicting the respondent from appointing an agent to collect assessed tax from it and reversing a garnishee of its bank account with the respondent's agent, CBZ.
2. The applicant is a company carrying on the business of importing motor vehicles. The respondent is the Zimbabwe Revenue Authority, (ZRA), an entity established in terms of the Revenue Authority Act [*Chapter 23:11*], and tasked with the responsibility to collect revenue on behalf of the Government of Zimbabwe.

Background facts

3. Sometime in 2011, the respondent carried out an audit of the applicant's books and approached the applicant with evidence that it had won tenders from the State Procurement Board, (SPB) and was supposed to pay value added tax, (VAT), for payments made on motor vehicle sales by it in terms of s8(1) of the Value Added Tax Act [*Chapter 23:12*], (the Act).
4. The applicant advised the respondent that payment was made as a deposit because the vehicles it was supposed to supply had not been delivered and VAT could not have been paid as it was in the process of fulfilling its obligations. It considered that costs for the

transactions were bound to change as a result of various factors which included price increases.

5. The applicant filed amended returns together with *pro forma* invoices which were not accepted as correct. By March 2013, the respondent had raised its own tax assessment depicting the liability of the applicant. The respondent maintained that VAT ought to have been paid using the earlier date when payment was received, the tax invoice date or based on the deposits received.
6. The applicant failed to pay. It met respondent's officials on 26 March 2013 and consensus was reached that the assessment was put in error. Amounts billed as VAT returns for the period November 2010 to January 2011 were to be reversed taking into account the relevant input tax of those transactions. On 4 July 2013, the applicant wrote to the respondent requesting a written undertaking to reverse the assessment. The respondent's response was that although consensus had been reached between the applicant and its audit manager for the reversal, the consensus still had to be reviewed by the Commissioner of Taxes, (hereinafter referred to as the Commissioner), who had the final say on the stance to be adopted by the respondent.
7. The papers reveal that the Commissioner considered the matter resulting in the respondent advising the applicant on 18 February 2014 that the invoices produced by the applicant were not authentic and were generated after the prescription period. It maintained that the assessment raised for the period November 2010 to January 2011 was correctly raised and stands as it is. The applicant was asked to pay VAT as assessed in the sum of US $293 517.70.
8. The applicant did not comply resulting in the respondent placing a garnishee order of US$357 350.52 on its account with CBZ Bank. Aggrieved, the applicant filed an urgent chamber application seeking a mandatory interdict and reversal of the garnishee order. The application was dismissed and deemed not urgent resulting in it filing this application on the ordinary roll.
9. The applicant submitted as follows: The Commissioner made an initial tax assessment after which the applicant was afforded an opportunity to file a written objection to the assessment. The meeting held informally by the parties on 26 March 2013 does not point to a determination of the objection which is still pending. The respondent reversed amounts billed as VAT. The decision to reverse the tax assessment after an objection was lodged is final in terms of s32(5) of the VAT Act. The respondent must stick to the

initial tax. By revising its tax assessment and asking the applicant to pay US $293 517.70 in VAT, the respondent is revising its assessment which it cannot do in terms of the law.

10. The respondent challenged the propriety of this application on the basis that the urgent chamber application was dismissed and hence the application cannot be dealt with once again. According to the respondent the applicant failed to account for VAT in terms of s 8(1) of the Act and is liable for VAT because the invoices produced by the applicant were not authentic, were generated after the prescription period and had not been issued by the supplier at the time the applicant lodged its claim contrary to s 15(2) of the Act.
11. It refutes that there was any objection filed in respect of the assessment in terms of s32(1) and s32(2) of the Act and that there is any objection pending. It contended that if an objection was raised, it is not an objection as envisaged by the law and is not a formal objection and has been deemed dismissed by operation of law. The respondent maintained that there was no reversal of a tax assessment nor did the respondent alter the assessment issued to the applicant. It contended that even assuming that it did, the respondent has an entitlement in terms of the law to alter its assessment.
12. The urgent chamber application was dismissed and deemed not urgent. The application was not dealt with on the basis that it lacked urgency. The fact that the urgent chamber application was dismissed does not detract from the fact that the matter was not dealt with on the merits entitling this court to proceed and deal with this current application. The *point in limine* fails.
13. The court is required to determine when a final and conclusive tax assessment was made and determine whether the respondent should be interdicted from appointing an agent to collect tax amounts on its behalf from the applicant for the period November 2010 to January 2011.

The law

14. An applicant in an application for a mandatory interdict is required to establish a clear right, a well-grounded apprehension of irreparable harm, that the balance of convenience favours the granting of the interdict and that there is no other satisfactory remedy available to him. See *Setlogelo v Setlogelo* 1914 AD 221, *Airfield Investments (Pvt) Ltd* v *Min of Lands* 2004 (1) ZLR 511.
15. Generally, the concept of a final and conclusive decision or tax assessment entails that a decision or tax assessment becomes final and conclusive where a taxpayer fails to take

steps to challenge a decision or assessment within time limits specified by the law. As a result, he loses the right to question or challenge the amount of tax imposed.

16. In an article titled, *''Overview of the Concept of Final and Conclusive Tax Assessment in Nigeria,'' The Gravitas Review of Business & Property Law*, Vol.9 No.2 (June 2018), Maxwell Ukpebor, comments on s 76 of the Companies Income Tax Act, [*Chapter C21*], Laws of the Federation of Nigeria, 2004(CITA), which makes provision for filing of an objection within 30 days of receipt of an assessment .The author defines the concept of a final and conclusive decision or assessment and states as follows;

> "A tax assessment is final and conclusive when the taxpayer loses the right to question or challenge the amount of tax imposed due to his failure to carry out some steps within specified periods set out under applicable laws. ''

17. The author gives four instances when a decision or tax assessment is final and conclusive as follows; Where the taxpayer fails to present a valid objection to an assessment within the number of days prescribed by statute, fails to appeal within the number of days prescribed against any decision of the tax authority refusing to revise or amend an assessment, fails to appeal against the decision within the number of days prescribed by statute and fails to present a valid objection to an assessment within the time prescribed in the law.

18. The cases of *Medox Limited v. Commissioner for South African Revenue Service* (2016) 21 TLRN 73; *Commissioner for Inland Revenue v Bowman NO* 1990 (3) SA 311 (AD) at 316B-C; 22; *FIRS v. Vital Needs Engineering Ltd* (2016) 23TLRN 83 at 87, advance the proposition that where a taxpayer fails to lodge an objection to an assessment within times stipulated in an enabling law, the assessment becomes final and conclusive , " as between the tax authority and the taxpayer,'' and the tax assessment ''becomes binding upon the taxpayer as a statutory obligation''

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19. In this jurisdiction, the concept of a final and conclusive decision and assessment finds expression in s32(5) of the Act. A decision or tax assessment is final and conclusive if taken in circumstances prescribed under s 32(5) of the Act which stipulates as follows;

> "(5) Where no objection is lodged against any decision or tax assessment by the Commissioner as contemplated in subsection (1), or where any objection has been disallowed or withdrawn or any decision has been altered or any tax assessment has been altered or reduced, as the case may be, such decision or altered decision or such tax

assessment or altered or reduced tax assessment, as the case may be, shall, subject to the right of appeal hereinafter provided, be final and conclusive.''

20. A taxpayer who is aggrieved by a decision or tax assessment of the Commissioner is expected to lodge an objection in terms s 32(1) and s32(2) of the Act. In terms of s 32(5), a decision or tax assessment is final and conclusive where a tax payer fails to lodge an objection, in which case he loses the right to challenge the decision or tax assessment, rendering the decision or tax assessment final and conclusive subject to the right of appeal. The taxpayer becomes liable for the tax as assessed.
21. Secondly, where there is disagreement over a decision or tax assessment and an objection has been filed, been either disallowed or withdrawn or where the decision or tax assessment has been altered or reduced , such decision , altered decision , tax assessment or altered or reduced tax assessment becomes final and conclusive subject to the right of appeal.
22. Where an objection has been lodged but has been disallowed by the Commissioner or been withdrawn by the taxpayer, the act of disallowing the objection or its withdrawal renders the decision or tax assessment final and conclusive. A tax assessment or decision is final and conclusive at the stage when the taxpayer loses the right to query or contest the assessment or decision in terms of the legal framework available. A taxpayer whose objection has been disallowed or withdrawn loses the right to challenge the decision or tax assessment which becomes final and conclusive leaving the taxpayer with the option to appeal the decision or tax assessment.
23. Similarly, where a decision or tax assessment has been altered or reduced, either because an objection has been successful or because the Commissioner has altered or reduced it out of his own volition, the alteration or reduction becomes final and conclusive subject only to an appeal. The use of the word "or'' creates different scenarios where a decision or tax assessment is deemed final and conclusive.
24. It is important to note that a decision or tax assessment is only final and conclusive where it is made in terms of the law applicable. The legislative intention in introducing s 32(5) was to provide for circumstances when a decision or tax assessment shall be deemed to be final and conclusive. The mischief sought to be addressed by s32(5) is to ensure that decisions are made in terms of the law. Where a taxpayer fails to query or challenge a decision or tax assessment in terms of the legal framework available, the decision or tax assessment becomes final and conclusive, bringing the matter to a

close. Where an objection has disallowed, the decision or tax assessment altered or reduced, the decision or tax assessment becomes final and conclusive as between the tax authority and the taxpayer. The decision or tax assessment becomes binding upon the taxpayer subject of course to an appeal.

25. The application of s32 (5) is subject to the provisions of s(4a) of the Act which makes provision for the Commissioner's power to set aside or revise anything done by an officer and stipulates as follows;

> "5 (4) Anything done by an officer in the exercise of a function delegated to him by the commissioner in terms of subsection (1)—
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> May be set aside or revised, subject to this act, by that officer or by the commissioner; and (b) shall be deemed, until set aside, to have been done by the commissioner''.

26. Section 5(4a) makes provision for revisional power of the Commissioner and his officers. Section 5(4a) empowers the Commissioner to revise or set it aside, ''anything done'' by his subordinates in the exercise of a function delegated to them by him. An officer who has done anything in the exercise of a function delegated to him by the Commissioner also has the same entitlement as the Commissioner to revise anything he has done and set it aside.
27. The phrase, " anything done'', used in s5(4a) covers a wide array of acts or things such as decisions, tax assessments , undertakings , agreements or any other conduct on the part of the Commissioner or his officers. The power to revise, alter, set aside or reduce a decision or tax assessment is therefore very wide as it covers all acts and anything done by the Commissioner and his officers.
28. The intention of the legislature in introducing this section was to protect mainly the fiscus. The provisions of s5(4a) may be invoked where anything done by the Commissioner and his officers causes prejudice to the fiscus or even to a taxpayer. The power to review and revise a decision or tax assessment is invoked in cases of error, fraudulent conduct, under and over assessment of tax or any other situation requiring correction. The decision or assessment must be shown to be prejudicial to the interest of revenue collection. Regrettably, s5 (4a) does not specify the actual grounds for revising or setting aside anything done by an officer.

The objection

29. Whilst the tussle over the existence or otherwise of the objection gives a sense of a material dispute of fact, the dispute is capable of resolution on the papers filed. The procedure for filing an objection is provided in s 32 (1) and 32(2) of the Act which provides that any person dissatisfied with a tax assessment made by the Commissioner may lodge an objection in writing detailing the grounds upon which it is made. An objection to a tax assessment constitutes an objection where it is filed in accordance with s 32(1) and s 32(2) of the VAT Act.

30. In a memorandum to the applicant dated 5 July 2013, the respondent stated as follows;

"…The client objected to the assessment raised. The case was reviewed and those assessment will be reversed once the system is operational. The client cannot get a tax clearance because of these assessment which need to be reversed.''

31. The respondent insisted that there was no valid objection filed. The applicant did not, despite the respondent's challenge produce the written objection or state in its founding papers when it fled an objection and the grounds thereof. I am unable to find that there was an objection filed in accordance with the provisions of the Act.

32. Even assuming that a valid objection was filed, it is deemed disallowed. The said objection would have been filed around March 2013. Section 32(4) deems an objection that has not been determined within three months after the objection has been received or within such longer period as the Commissioner and the person may agree disallowed.

33. There is no suggestion of any agreement over any longer period when the objection would be determined. More than three months have passed since the objection is supposed to have been filed. There was no notification of its outcome and the objection has been deemed disallowed. Where an objection is deemed disallowed, the tax assessment cannot be reopened and the tax assessment impugned becomes the final and conclusive assessment and remains in place. The objection cannot still be pending. This puts the issue of the objection to rest.

Revision by the Commissioner

34. Whilst there was an agreement to revise the assessment, there was no actual reversal of the tax position nor any notification of a reversal or any new tax assessment. The actual tax obligation was never altered or changed and there is no question of a different or initial tax assessment as the assessed amount remained the same. The applicant was unable to say what the figure involved in the supposed initial assessment is that it is trying to hang onto.

35. It is not correct that the US$2580 referred to in correspondence dated 21 January 2014 was the reviewed or revised tax assessment amount. The respondent indicated that as at 31st December 2013, this was the current debt position which was undisputed VAT which was admitted and signed for. The respondent's contention that this amount did not emanate from the audit in issue and that the tax assessment was not reversed was not disputed.
36. For the reason that there was no actual reversal of a tax assessment after the consensus, it cannot be said that there was a final and conclusive decision or assessment at that stage. The applicant lost sight of the fact that the agreement was subject to the power of the Commissioner to revise it.
37. What the Commissioner did is to examine or revise the agreement to reverse the assessment of tax .The Commissioner, declined to reverse the assessment and reaffirmed the position on the assessment and backed out of an agreement to reverse the tax assessment. The Commissioner was entitled to step in and correct the mistaken position by endorsing the amount of US $293 517.70 as the correct tax assessment. Whichever way one looks at this dispute, the tax assessment impugned remains in place.
38. The agreement to reverse the tax assessment was liable to revision by the Commissioner in terms of s5(4a) of the Act .The Commissioner was entitled in to revise,'' anything done by an officer'' in terms of s5(4a). He thus was entitled to revise the assessment and did so in terms of the legal framework available. For as long as it is shown that his conduct in revising the decision or assessment is legal, the revision cannot be impugned.
39. Section 32(5) in no way bars the Commissioner from exercising powers conferred upon him by s 5(4a). The two sections complement each other. The applicant misconstrued the implications of s 32(5).The intention of the legislature was not to bar the Commissioner from exercising powers conferred upon him by s 5(4a) but enable him to make decisions that suit each case in terms of the law. The focus of the provision was undoubtedly to bar abuse of the system by outlawing tax challenges, decisions and assessment that are made outside the legal framework available.
40. I must conclude that it is not correct that once a review was done by the respondent's officers that was the end of the matter, rendering the tax assessment final and conclusive. Such an approach would have the effect of rendering the Commissioners power vested

in him in terms of s5 (4a) nugatory. The Commissioner's decision revising the decision of his officers constitutes the final and conclusive tax assessment. It was open to the applicant to challenge the refusal to reverse the tax assessment by way of an appeal in terms of the applicable law. The decision of the Commissioner confirming the assessment is binding on the applicant.

41. Interestingly, the applicant does not dispute owing this sum in VAT. The applicant ought to pay the tax due because it sold vehicles, obtained some profit and must remit VAT in terms of the law. If the tax assessment is not enforced, the result is that the fiscus will be prejudiced of revenue.
42. The respondent is mandated in terms of s 36 of the Act to collect taxes. The applicant has failed to pay the tax as assessed. The respondent has an entitlement to collect and recover the tax .Section 48 empowers the respondent to appoint a person as an agent to collect tax on its behalf.
43. Consequently, the respondent has thus shown an entitlement to garnishee the applicant's account with CBZ, which bank has already been appointed an agent. No legal basis has been shown to bar the respondent from performing its statutory duties. The applicant's prayer barring the appointment of an agent for purposes of collecting tax lacks merit. The applicant cannot seek to bar a lawful exercise. The applicant has failed to show an entitlement to the relief sought. Accordingly, I order as follows;

The application is dismissed with costs.

Manase and Manase, Attorneys for the applicant
ZRA Legal and Corporate Division, Attorneys for the respondent