MYLO (PVT) LTD
versus
ZIMBABWE REVENUE AUTHORITY

FISCAL APPEAL COURT OF ZIMBABWE
KUDYA J
HARARE 22 May 2015 and 18 November 2016

Value Added Tax appeal

T Zhuwarara, for the appellant
NT Mbiriri, for the respondent

KUDYA J: The issues referred on appeal at the pre-trial hearing of 3 February 2015 for determination were whether or not the fuel transportation services rendered by the appellant to a fuel supplying company, the third party, in exchange for petroleum products constituted a supply of services under s 6 (1) (a) of the Value Added Tax Act [*Chapter 23:12*] and whether or not the appellant understated its sales in respect of those transport services.

The appeal proceeded by way of a statement of agreed facts in which the parties agreed on the juristic facts and argued on the law pertaining to those facts.

The facts

The appellant is a duly incorporated local company, carrying on the business of fuel and transport operations in Zimbabwe[1]. The fuel business consists of a service station, which dispenses fuel and petroleum products to the general public and to its own transportation service. The transport operations, which consist of 21 fuel tankers and trucks, is dedicated to the delivery of petroleum products to the third party. The appellant executed two agreements with the third party. The first, the "contract for the transportation of fuel", Exh A[2], was concluded on 1 March 2010 while the second, the "memorandum of agreement for the supply of petroleum products", Exh B[3], was concluded on 10 March 2010. The appellant was identified in each agreement as the "Transporter" and "the Service Station Dealer" while the third party was called "the Client" and "the Supplier", respectively.

[1] Notice of appeal, statement of agreed facts and summaries of evidence filed by both parties
[2] To statement of agreed facts is annexure F to notice of appeal, p63-66 r 5 (c) documents
[3] To statement of agreed facts is also annexure E to notice of appeal, p 53-62 r 5 (c) documents

The tenure of the first agreement was 5 years and was subject to renewal for another 5 year period on three months' notice given by the appellant. The "before value added tax" rates charged "in the course of its business during the term of the agreement" were set out by route, distance and size of the tanker and truck in clause 1. In terms of clause 3 (c) the transport charges were "due on presentation of invoice and payments not made when due" would bear a late administration penalty. In terms of clause 4, the third party was required to pay all levies, duty and any other imposts required by law in the transportation of fuel by the appellant. The remaining 10 clauses establish that the appellant operated the transportation service as a separate business unit to the service station.

The second agreement was entered into on 10 June 2010. The third party supplied fuel to the appellant, the purchaser, on a 5 day credit facility to a specified limit. In terms of clause 2 the date of delivery was the date signed on the delivery note and proof of payment was to be determined by "the relevant bank deposit slip" and late payments attracted a specified interest penalty. The management of deliveries was set out in clause 4. The detailed payment arrangements were stated in clause 5. Clause 5.2 provided that:

> "Payments shall be either in cash or transfer into the [third party's] bank account or in kind by transport charges for use of the Service Station Dealer's trucks and tankers to deliver fuel nationwide at agreed rates from time to time. Any transport charges above the supplied fuel shall be paid to the Service station after a full reconciliation."

In terms of clause 6 fuel coupons issued by the third party to other parties were redeemable at the appellant's service station and constituted payment in kind of fuel of equivalent value supplied by the third party. The remaining 8 clauses are not relevant to the consideration of the issues on appeal.

In the 39 months from July 2010 to September 2013, the appellant purchased petroleum products from the third party worth US$9 000 409.19. It provided transportation services to the third party valued at US$7 339 989.38 from which US$6 206 785.09 was utilised in part settlement of the purchases[4].

In the period between 7 November 2013[5] and 7 February 2014 the respondent conducted a tax review of the appellant for the 39 months in question. The appellant voluntarily registered its transport business for value added tax. In that regard it paid value added tax on the net receipts of US$ 1 133 204.29 from the total transport revenue after

[4] Exh C to statement of agreed facts; annexure c of respondent's reply ,p 67-68 of r 5 (c) documents
[5] Letter of 12 November 2013 o p 40 of r 5 (c) documents

allocating US$ 6 206 785 .09 towards the purchase of fuel[6]. On 7 February 2014, Exhibit D[7], the respondent issued 29 notices of value added tax amended assessments in the aggregate sum of US$ 809 580.66 representing the understated value added tax, excluding penalty and interest, arising from the supply of transport services to the third party.

On 27 February 2014[8], the appellant objected to the assessments on the ground that the US$ 6 206 785.09 constituted payment and not supply. By letter of 13 May 2014[9], the respondent disallowed the objection. The appellant filed the notice of appeal on 21 May 2014[10] and filed the present appeal on 23 May 2014. The respondent filed its reply on 7 July 2014.

The appellant contended that as the transportation services valued at US$ 6 206 785.09 constituted payment in kind[11] and not supply, they were not vatable under the provisions of s 6 (1) (a) of the Act. The respondent contended that the transportation services were a supply as contemplated by the provisions in question and were properly assessed for value added tax.[12]

The dispute referred on appeal in the statement of agreed facts was whether or not the US$ 6 206 785.09 constituted a supply in terms of s 6 (1) (a) of the Value Added Tax [*Chapter 23:12]*.

Resolution of the issues

The section bearing upon the matter is s 6 (1) (a) of the Value Added Tax Act which in relevant provides:

> **"6 Value added tax**
> (1) Subject to this Act, there shall be charged, levied and collected, for the benefit of the Consolidated Revenue Fund a tax at such rate as may be fixed by the Charging Act on the value of—
> (*a*) the supply by any registered operator of goods or services supplied by him on or after the 1st January, 2004, in the course or furtherance of any trade carried on by him:"

In *S (Pvt) Ltd* v *Zimra* 2014 (2) ZLR 580 (H) at 583H-584A I set out the conjunctive requirements that must be met for a taxpayer to fall within the provisions of this sub-section. There must be:

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[6] VAT number 10053950 on self-assessment sample for 30 June 2011 on p 69 of r 5 (c) documents
[7] Also as annexure A1-A29 to notice of appeal and p3-31 of r 5 (c) documents
[8] Annexure B to notice of appeal and p32-36 of r5 (c) documents
[9] Annexure C to notice of appeal and p37-39 of r 5 (c) documents
[10] Annexure D to notice of appeal and p52 of r5 (c) documents
[11] Letter from tax consultants of 18 December 2013 at p 45
[12] Letter of 11 December 2013 p 43 and letter of 13 January on p 46-47 and 29 January 2014 at p 49-51 of r 5 (c) documents

1. the supply by any registered operator;
2. of goods or services
3. supplied by him on or after 1 January 2004
4. in the course or furtherance of any trade carried on by him.

It was common ground that the appellant was a registered operator in respect of the transportation services and that the transportation transactions took place after 1 January 2004. The appellant regarded the transport operations as a separate business unit. It referred to this transport business unit variously as "transport operations", "fuel transport services" "provision of transport services" and "transportation services" in the notice of appeal, grounds of appeal and contentions of fact and contentions of law, the letter of objection, the memorandum of agreement for the supply of petroleum products, the contract for the transportation of fuel, the statement of agreed facts and the appellant's written heads of argument. In terms of clause 4.5 of the memorandum of agreement for the supply of petroleum products "the transporter shall be paid for his services based on the product actually received by the meter". The transporter was identified with the appellant in the contract for the transportation of fuel, where in terms of clause 1, the third party engaged the transporter to perform and the transporter agreed to perform, transport and handle fuel at the agreed rates "in the course of its business during the term of this agreement". In addition in para 8 of the statement of agreed facts the applicant contended that "the transport services valued at US$ 6 206 785.09 were payment". It was therefore common cause that the transportation transactions were services.

The appellant disputed that these services constituted a supply and further that they were conducted in furtherance of its business activities. It was contended on its behalf that the transportation services were payment in kind for the fuel purchased from the third party and as such were not subject to value added tax. The respondent contended that they fell into the definition of supply and were therefore vatable.

The word supply and supplier are defined in s 2 of the Act in the following manner:

> "supply" includes all forms of supply, irrespective of where the supply is effected, and any derivative of "supply" shall be construed accordingly;
> "supplier", in relation to any supply of goods or services, means the person supplying the goods or services;

In *S (Pvt) Ltd* v *Zimra, supra,* based on the ordinary meaning of the word supply rendered in the *Shorter Oxford English Dictionary* I held at 588C-D that:

> "The legislature was aware of the variety of meanings of the word "supply". It seems to me that the intention of the legislature was to catch all the shades of meaning of the word

> "supply" hence the use of the wide, broad, deep, extensive and all-embracing phrase "all forms of" prefacing it. The purpose of the Act as set out in the preamble is to "*provide for taxation in respect of the supply of goods and services…….and to provide for matters connected therewith".* It is in this architectural design that the context of the Act resides. VAT is levied in respect of the supply of goods and services. That is the context in which the controlling words in s 6 (1) (a) operate."

The *Shorter Oxford English Dictionary* defines supply as "the action of supplying or condition of being supplied, the act of making a deficiency or of fulfilling a want or demand, to furnish with and to provide". All these shades of meaning appropriately apply to the transportation business activity undertaken by the appellant. The appellant provided or furnished transport for the carriage of fuel to the third party. It supplied the transport and fulfilled a want and deficiency suffered by the third party.

Mr *Zhuwarara,* for the appellant, contended that the payment of value added tax was dependent on whether the registered operator was a seller or a purchaser and submitted on the authority of *Strydom* v *Duvenhage NO & Anor* [1998] 4 All SA 492 (SCA) that as the purchaser of fuel, the appellant was not liable for VAT for the payment by way of transportation services. The facts of *Strydom v Duvenhage NO & Anor*, *supra*, are distinguishable from the present case. That case involved a straight forward purchase and sale of three farms where the purchaser agreed to pay transfer duty. The agreement was silent in regards to the payment of VAT. The seller contended that the purchaser by agreeing to pay transfer duty had tacitly agreed to pay VAT. The contention was dismissed and the seller was found liable for the payment of VAT. In terms of s 6 (1) (a) of the Act the payment of VAT depends on whether the registered operator is a supplier or a receiver who, off course, depending on the nature of the transaction may be a seller or a purchaser. Broadly speaking a supplier charges output tax and a receiver pays input tax.

The appellant and both its tax advisers and counsel fell into the error of conflating its two separate and distinct business units into a single unit. It was common cause that it operated a service station and a transportation service. It sought to subsume the transport business into the service station business. The objective and correct position revealed by the pleadings and confirmed amongst other documents by the two separate agreements with the third party was that the two were separate and distinct operations. Again, the very fact that the appellant voluntarily registered the transportation business for VAT, excluded VAT in the mileage rates in the contract for transportation of fuel and in some instances paid VAT on such services provided to the third party confirmed that these were two distinct operations,

otherwise it would not have done so were they a single unit. In regards to fuel for the service station, the appellant was the receiver while the third party was the supplier, a commodity exempt from value added tax.[13] While for the transport service the appellant was the supplier and the third party was the receiver of the supply of the service, which was neither zero rated nor exempted from payment of value added tax.

In any event, I am inclined to agree with Mr *Mbiriri*, for the respondent, that the payment arrangements between the appellant and the third party could properly be regarded as either set-off or barter trade, both of which would not preclude the payment of VAT. In *Murowa Diamonds* v *Commissioner General Zimra* HH 2011 (1) ZLR 37 (H) at 44D GOWORA J, as she then was, defined set off as a process whereby liquid debts which are mutually owed between the same parties are extinguished. In *Commissioner of Taxes* v *First Merchant Bank Ltd* 1997 (1) ZLR 350 (S) at 353C GUBBAY CJ was to the same effect. The learned Chief Justice clarified that the liquidation of the mutual debts by operation of law were, if equal, extinguished but if one was greater than the other the smaller was discharged and the larger was proportionally reduced.

In my view, that was what the appellant and the third party contemplated in clause 5.2 of the fuel supply agreement. The contract for transportation of fuel was executed first and in terms of clause 3 (c) the third party was obliged to pay for the transportation of fuel on presentation of the invoice. In terms of clause 5.2 of the latter agreement three methods of payment for the purchase of fuel were contemplated. These were either by cash or transfer or in kind by transport charges arising from the use of the appellant's trucks and tankers. The same clause contemplated that transport charges would be greater than the cost of fuel purchases as the third party undertook to pay the higher amounts after reconciliation. However, in reality the third party ended up paying the appellant for the transport services for which VAT was paid notwithstanding that the amount owing and due to the appellant was the smaller of the two mutual debts. In terms of clause 3 of the contract for the supply of fuel the appellant was accorded a 5 day credit facility calculated from the date of signing the delivery note, which appeared to have been honoured more in breach than in observance. The arrangement was such that the third party owed the appellant transport charges due on presentation of invoice and the appellant owed the third party for the fuel supplied and due within 5 days of signing the delivery note. In my view, each party became mutually indebted

[13] P 49-51 of r5 documents: Zimra letter of 29 January 2014 to the public officer of the appellant

to the other before payment was actually made. The third settlement arrangement permitted by clause 5.2 in essence constituted a set off.

Again, the facts appear to show that the appellant experienced some cash flow constraints which necessitated payment for transport services in cash by the third party notwithstanding that it was owed the greater amount. Over the 39 months in question the reconciliation of the cost of transport and cost of fuel indicated that the cost of fuel to the appellant was higher than the cost of the transport services supplied to the third party yet the third party made cash payments to the appellant. Over time, the arrangements between the parties resembled barter trade in respect of the mutual services that were set off. It is clear from *XYZ CC* v *CSARS* (2007) SATC 7 that barter transactions constitute supplies and are as such liable for value added tax. These arrangements confirm that the provision of transport services was in reality a taxable supply.

Mr *Zhuwarara* strenuously argued that the supply of transportation services was not in furtherance of the appellant's business. He completely ignored the words "in the course of" in both his written and oral argument, which are juxtaposed with "in furtherance of" in the alternative in s 6 (1) (a) of the Act. In *Express Newspapers Ltd* v *McShane & Anor* [1979] 2 All ER 369 (CA) at 364g Lord DENNING MR defined "furtherance" by reference to the *Shorter Oxford English Dictionary* as "the fact or state of being helped forward". In my view, the impact of the contract on transportation of fuel helped forward the transport business operations. The transport business derived income appropriately termed "total transport revenue" in the fuel and transport reconciliation document in the total sum of US$7 339 989.38 out of which US$ 6 206 785.09 was utilized to defray the cost of fuel for the service station and US$ 1 183 904.58, after paying VAT of US$169 980.64 was reinvested into that business. More importantly, however, the appellant accepted in clause 3 of the contract of transportation of fuel that the provision of transport was performed in the course of its business. I am satisfied that the transport business unit would fall into the ambit of s 6 (1) (a) of the Act.

Mr *Zhuwarara* further submitted on the authority of *Commissioner for the South African Revenue Service* v *Brummeria Renaissance (Pty) Ltd & Others* [2007] 4 All SA 1338 (SCA) that the provision of transport services as payment in kind for the carriage of exempt goods would by reason of such exemption be exempted from value added tax. Analogous to this argument was the further submission that treating such a payment as a supply would be as manifestly absurd as treating a cash payment as a supply. He further expressed the fear that

the respondent would impose double taxation on the same transaction against the supplier on the one hand and the receiver on the other. I disagree for three reasons. Firstly, the *Brummeria* case in question was not concerned with any value added tax issues but with whether or not the right to use loans interest free constituted gross income. Secondly, the spectre of double taxation is precluded by the very fact that the provision of transport services was separate and distinct from the supply of fuel. Lastly, as long as the payment in kind falls within the very wide definition of supply and satisfies the other elements of s 6 (1) (a) of the Act and is neither exempted nor zero rated it would be liable for value added tax. See *S (Pvt) Ltd* v *Zimra* at 590D-E where I stated that:

> "That consideration by way of goods and services constitutes supply is clearly recognised in the Act. I need only refer to the provisions of s 7 (1) (a) and (b) that deem payment of debt through the disposal of goods of the debtor by the creditor in certain circumstances constitutes supply in the course of trade. There is therefore no contradiction between the wide definition of "supply" and that of "consideration", and the various mechanisms found in ss 3(2) and (3) and 9 (2) for determining the open market value of that consideration in the Act."

In the present case, it was clear to me that the appellant first supplied the transportation service and then instead of receiving cash and handing it back to the third party, eschewed such cash in settlement of the fuel debt.

I would answer the two questions initially referred on appeal against the appellant. Accordingly I am satisfied that the US$ 6 206 785.09 constitutes a supply in terms of s 6 (1) (a) of the Value Added Tax Act [*Chapter 23:12*]. The respondent correctly assessed the appellant for value added tax for the period running from July 2010 to September 2013.

Costs

In terms of s 10 of the Fiscal Appeal Court Act [*Chapter 23:05*] I do not consider the grounds of appeal to have been frivolous and accordingly make no order of costs.

Disposition

In the result, the appeal is dismissed with no order as to costs.

Machingura legal practitioners, the appellant's legal practitioners