

REPORTABLE (62)

DELTA CORPORATION LIMITED
v
ZIMBABWE REVENUE AUTHORITY

SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, UCHENA JA & KUDYA JA
HARARE: 23 JANUARY 2024 & 9 JULY 2024

M. Tshuma, for the appellant

S. Bhebhe, for the respondent

UCHENA JA: This is an appeal against the whole judgment of the High Court (the court *a quo*) dated 25 October 2023 in which it dismissed the appellant’s application for a *declaratur*.

BACKGROUND FACTS

The appellant is a beverage manufacturing company which manufactures, sells and distributes alcoholic and non-alcoholic beverages of local and international brands. The appellant earns its income in both local and foreign currency and incurs expenses in both local and foreign currency. The respondent is the collector of revenue on behalf of the Government. The appellant submitted its value added tax (VAT) returns for the period March 2019 to October 2021 as well as Income Tax returns for the years ended 2019 and 2020 and paid all its taxes in full for these years in Zimbabwe dollars (ZWL).

On 17 November 2021, the respondent gave the appellant notice of its intention to carry out a tax review of its tax affairs covering the period 1 January 2019 to 31 October 2021. The respondent raised issues with the appellant on whether its VAT returns for 1 January 2019 to December 2020 and the income tax payments for the period January 2019 to 30 September 2021 were paid in the currency of trade. In response, the appellant wrote a letter to the respondent dated 24 November 2021 stating that s 4A of the Finance Act [*Chapter 23:04*] requiring the payment of taxes in foreign currency, followed the promulgation of s 23 of the Finance Act No. 2 of 2019 which made local currency the sole legal tender.

On 11 June 2022, after a tax audit of the appellant's returns, the respondent informed the appellant about discrepancies which were found in its self-assessments. The respondent found that the appellant failed or neglected to pay income tax and VAT in foreign currency from the income which it received or accrued to it in whole or in part in foreign currency. The respondent further found that the appellant had received foreign currency in respect of local sales during the period between April 2019 and March 2021. After the audits, the respondent issued additional assessments against the appellant. The respondent re-computed the appellant's tax liability and issued it with amended tax returns which required it to pay its taxes in foreign currency in accordance with the revenue it received in foreign currency and to also pay its taxes in local currency proportionate to the revenue it received in local currency.

On 14 June 2022, the appellant responded arguing that the Finance Act No.2 of 2019 should prevail over s 4A of the Finance Act as it was enacted before it. The appellant further contended that the turnover apportionment method was inapplicable in relation to VAT and therefore, payment of taxes in ZWL was legally correct. On 5 July 2022, the respondent wrote a

letter to the appellant notifying it of the adjustments it made to the USD VAT assessments and tax computation schedules for October 2020 to October 2021. On the same day, the respondent served on the appellant an income tax notice of assessment for the tax period January 2021 to December 2021.

Later, on 3 August 2022, the respondent wrote another letter to the appellant addressing issues raised by the appellant on 14 June 2022. The respondent explained that the law on VAT and Income Tax required that payment of taxes must be made in the currency of trade and that s 4A of the Finance Act was not amended nor repealed. The respondent further observed that the appellant's VAT returns were incomplete for the reason that the section that separates foreign currency input and output tax from local currency input and output tax was not completed. On the same day, the respondent issued an additional VAT notice of assessment for the tax period covering the period March 2019 to September 2020 requiring that local currency input and output tax be computed and paid separately from the foreign currency input and output tax.

Aggrieved by the respondent's re-assessments, the appellant applied to the court *a quo* for a declaration of invalidity firstly in respect of the additional income tax assessments for the tax years ended 2019 and 2020 and secondly, the additional value added tax assessments issued against it by the respondent for the period March 2019 to October 2021. It submitted that the re-assessment was invalid on account of the fact that it referred to the term 'gross tax' which is foreign to all tax statutes and that the amended tax returns did not compute the appellant's taxable income rendering the re-assessment invalid. The appellant further submitted that it was unlawful for the respondent to reject payment in the form of local currency as it was declared the sole legal tender of Zimbabwe.

It argued that the enactment of s 4A of the Finance Act which stipulates that the Zimbabwean currency was to be the sole legal tender, must prevail over all older provisions.

The appellant argued that s 4A (1) (c) of the Finance Act and s 38 (4) of the VAT Act both referred to s 41 of the RBZ Act and therefore the non-obstante provisions ought to be restricted to the old bond notes and should not be extended to the Real Time Gross Settlement dollar (RTGS) currency. The appellant further submitted that s 4A (1) (C) predated s 44C of the RBZ Act which made the RTGS \$ the sole legal tender in Zimbabwe. It also argued that when Statutory Instrument 212 of 2019 was promulgated, it excluded the payment of taxes in foreign currency as an exception to the use of sole legal tender. The appellant submitted that there were no jurisdictional facts present for the respondent to have issued it with the additional notices of assessment. The appellant further submitted that the respondent violated its rights enshrined in s 15 (3) of the VAT Act, by denying the deduction of the input tax paid by it in local currency from the output tax received by it in foreign currency. On that note, the appellant submitted that the respondent's Public Notice No. 26 of 2019 which set out the manner of computation was unlawful and an attempt to legislate. The appellant argued that the penalty on its foreign currency tax was not recoverable in foreign currency as there was no legal provision to that effect.

Per contra, the respondent opposed the application on the premise that 'gross tax' is an administrative term applied to denote an amount of the taxable income that will still be subject to further deductions before arriving at the net tax amount due to be paid to the respondent. The respondent further argued that the assessment complied with all the requirements prescribed by law. It further submitted that payment of taxes in foreign currency on income received in foreign currency is exempted from being paid using the nation's sole legal tender as provided by s 23 of

the Finance Act. The respondent contended that the legal requirements that warranted the re-assessment were that it found taxable income which was not subjected to tax, in determining an alleged loss, there was some income which ought to have been taken into consideration but was not and there was credit which was granted that should not have been granted.

The respondent submitted that deductions of input taxes from output taxes should be separated according to currencies and that the law prohibits deductions of input taxes from output taxes across currencies. The respondent further submitted that Public Notice No. 26 of 2019 was issued for the purpose of administering advice and information to assist taxpayers whose receipts from trade were specifically in both local and foreign currency. The respondent argued that a penalty was a tax and as such, any outstanding foreign currency tax is payable in foreign currency and a penalty on any outstanding local currency is payable in local currency.

The court *a quo* determined that if the notices of assessment conformed with s 2 as read with s 51 (2), of the Income Tax Act [Chapter 23:06] (ITA) and as long as the VAT evaluation complied with s 31 (5) of the VAT Act, then the assessments cannot be rendered invalid on the basis of an alien term. The court *a quo* held that the respondent's argument that the term 'gross tax' was an administrative reference to a provisional figure obtained during the computation process, which would still be subject to further consideration, is acceptable. The court *a quo* held that the RTGS currency and bond notes and coins are all legal tender for the reason that the RBZ Act does not expressly stipulate otherwise. The court further held that Statutory Instrument 142 of 2019 which introduced the sole legal tender concept did not single out the electronic currency. The court *a quo* determined that there were exemptions to the introduction and use of the sole legal tender such as the payment of customs duty and the payment of VAT on imports. The court *a quo*

further held that all relevant legislation should be taken into consideration, in determining in which currency tax assessment forms should be submitted, and tax be paid. Therefore the court *a quo* determined that the reference to ‘any other law’ was with respect to s 4A of the Finance Act and s 38 (4) and (9) of the Value Added Tax Act. The court *a quo* held that the jurisdictional facts which triggered the additional assessments were the appellant’s computation of all taxes in the local currency when part of its income had been received in foreign currency and there were improper deductions to the taxable income. Regarding VAT, the court *a quo* determined that the respondent had found that the appellant had not submitted the VAT returns in the prescribed form and had completely avoided completing the section dealing with the calculation of VAT in foreign currency. The court *a quo* held that s 38 (9) of the VAT Act declares that all provisions of the Act shall apply with such changes as may be necessary to the payment of tax in foreign currency in the same way as they apply to the payment of tax in local currency. The court *a quo* further held that a reading of s 38 (4) and (9) of the VAT Act, makes it apparent that the legislature has not sanctioned a cross-currency deduction of input tax from output tax.

The court *a quo* held that a penalty is a tax in accordance with tax legislation and therefore, s 4A (7) of the Finance Act applies given that it states that all provisions of the Act shall apply with such changes as may be necessary to the payment of tax in foreign currency in the same way as they apply to the payment of tax in local currency. In the result, the court *a quo* held that the submissions made by the appellant lacked merit and proceeded to dismiss the application. Dissatisfied with the determination of the court *a quo*, the appellant noted an appeal to this Court on the following grounds of appeal.

GROUNDS OF APPEAL

1. The court *a quo* erred at law and misdirected itself by failing to consider and determine material issues raised by the appellant, thus rendering the proceedings grossly irregular. In particular, the court *a quo* failed to consider and determine the following issues raised by the appellant:
 - (a) Whether there is a penalty for payment of taxes purportedly due in foreign currency in the local legal tender, and what that penalty is?
 - (b) Whether the apportionment formulae used by the respondent exists in the taxing Act, and if so in which provisions of the taxing Acts?
 - (c) Whether the formulae used by the respondent in computing both income tax and VAT was rational, and possible to comply with?
 - (d) Whether there is a constitutional bar to the respondent utilizing s 4 (A) (7) of the Finance Act and s 38 (9) of the VAT Act to amend primary legislation?
 - (e) The implication of the contra-fiscum rule to uncertain tax legislation.
2. The court *a quo* erred at law and misdirected itself in finding that the assessments issued were valid at law when such assessments referred to a line item described as “gross tax”, which ‘gross tax’ is not included in any taxing statute and is not a necessary component in the computation of taxable income.
3. The court *a quo* erred at law and misdirected itself in finding that the jurisdictional facts to issue additional assessments were present permitting the respondent to issue additional assessments on the appellant.
4. The court *a quo* erred at law and misdirected itself in finding that the appellant was not entitled to deduct its input tax on purchases made in foreign currency and in ZWL from its output in foreign currency.
5. The court *a quo* erred at law in finding that penalties were chargeable in foreign currency, this despite neither s 4 (A) of the Finance Act nor s 38 of the VAT Act providing for the charging of penalties in foreign currency.

6. The court *a quo* erred at law and misdirected itself in applying s 4 (A)(7) of the Finance Act and s 38 (9) of the VAT Act through the instrument of public notices in such a manner that they permit the amendment of primary legislation by institutions other than parliament, which is unconstitutional and therefore unlawful.

RELIEF SOUGHT

1. That the instant appeal succeeds with costs.
2. That the order of the court *a quo* in case number HC 5952/22 be and is hereby set aside and substituted with the following:

“It is hereby ordered that:

1. The application be and hereby (sic) succeeds with costs
2. The additional VAT assessments issued on the applicant for the tax period March 2019 to October 2021 be and are hereby declared invalid.
3. The additional income tax assessment issued on the applicant for the tax year ended 2020 be and is hereby declared invalid.”

SUBMISSIONS BEFORE THIS COURT

At the hearing of the appeal, Mr *Tshuma* counsel for the appellant submitted that the six issues mentioned in ground of appeal number one were raised by the appellant and addressed by the respondent before the court *a quo*, yet the judgment *a quo* was silent on the issues listed in the appellant’s first ground of appeal. He further submitted that the issues were dispositive of the disputes between the parties. In that regard, counsel submitted that the decision of the court *a quo* ought to be set aside on account of the fact that a party is entitled to reasons for a court’s decision on all issues raised and argued before it.

Counsel further argued that the assessment was invalid as it, in its notice of assessment referred to an amount it referred to as ‘gross tax’ which term is foreign to tax legislation. Counsel relied on the case of *Nestle v Zimbabwe Revenue Authority* SC 148/21 to argue that an assessment must only contain information provided for in the Income Tax Act for the reason that an assessment is a statutory document. He further submitted that the court *a quo* disposed of the matter on the premise that the term did not prejudice the appellant yet it did considering that the appellant was unfamiliar with the term. Counsel also submitted that the assessment by the respondent was intended to be an amendment of its self-assessment therefore using an alien term baffles the appellant on what exactly was amended. Counsel submitted that since there was no original foreign currency assessment, the respondent lacked the basis on which to issue an additional assessment. He further submitted that the apportionment formula was irrational and inconsistent with the provisions of the Income Tax Act and Value Added Tax Act.

Counsel further stated that, in accordance with the case of *Breastplate Service (Pvt) Ltd v Cambria Africa PLC* SC 66/20, once a currency is recognized as the sole legal tender, one cannot refuse it. He argued that the Zimbabwean dollar is the only currency acknowledged in Zimbabwe.

Per contra, Mr *Bhebhe* counsel for the respondent submitted that the actual material issues dispositive of the matter were all addressed in the judgment *a quo* and that the issues mentioned in the appellants ground of appeal number one are not dispositive of the issues between the parties. He further argued that the case of *Inamo Investments (Pvt) Ltd v Zimbabwe Revenue Authority* SC 96/23 established that even when the local currency is legal tender, revenue earned in foreign currency shall be remitted in foreign currency. He submitted that s 47 of the Income

Tax Act and s 31 of the VAT Act permit the Commissioner of the respondent to make additional assessments.

Counsel submitted that the rationale of the court *a quo* was not on the notion of prejudice but it found that, in spite of the term ‘gross tax’, the assessment met all the obligatory requirements to render it valid. Counsel submitted that the term was explained in its heads of argument and before the court *a quo*. He further submitted that an assessment should consist of the taxable income to which a tax rate is applied, before arriving at a taxable figure. Counsel submitted that the appellant cannot seek a relief different from that prayed for in its relief sought.

THE ISSUES

The appeal raises the following issues for determination by this Court.

1. Whether or not the court *a quo* erred in not determining all issues raised by the appellant.
2. Whether or not the use of the phrase “gross tax” in the notice of assessment renders it invalid.
3. Whether or not the court *a quo* erred at law and misdirected itself in finding that the jurisdictional facts entitling the respondent to issue additional assessments were present.
4. Whether or not the court *a quo* erred in holding that tax for revenue earned in foreign currency and vat paid in foreign currency and additional tax incurred for not paying tax in foreign currency should be paid in foreign currency.

APPLICATION OF THE LAW TO THE FACTS

Whether or not the court *a quo* erred in not dealing with all the issues raised by the appellant.

In the case of *Afaras Mtausi Gwaradzimba v C. J. Petron & Company (Pty) Limited* 2016 (1) ZLR 28 (S) at 31G to 32E this Court commenting on the need to give reasons in respect of issues raised and argued before a court said:

- “[21] In general, I agree with the respondent’s submission that, in a case where a number of issues are raised, it is not always incumbent upon the court to deal with each and every issue raised in argument by the parties. It is also correct that a court may well take the view that, in view of its finding on a particular issue, it may not be necessary to deal with the remaining issues raised. However this is subject to the rider that the issue that is determined in these circumstances must be one capable of finally disposing of the matter.
- [22] In the present case, the substantive issue that was determined by the court *a quo* did not dispose of the matter. The question still remained whether the application was, in the first instance, properly before the court. This was not an issue that the court *a quo* could ignore or wish away. The court was obliged to consider it and decide whether the matter was properly before it. It was, in short, improper for the court to, proceed to determine the substantive factual and legal issues without first determining the propriety or otherwise of the application itself. If the court, as it appears to have done, tacitly accepted that the matter was properly before it, then reasons for such tacit acceptance should have been given.
- [23] The position is well settled that a court must not make a determination on only one of the issues raised by the parties and say nothing about other equally important issues raised, “unless the issue so determined can put the whole matter to rest” – *Longman Zimbabwe (Pvt) Limited v Midzi & Others* 2008 (1) ZLR 198, 203 (S)
- [24] The position is also settled that where there is a dispute on some question of law or fact, there must be a judicial decision or determination on the issue in dispute. Indeed the failure to resolve the dispute or give reasons for a determination is a misdirection, one that vitiates the order given at the end of the trial – *Charles Kazingizi v Revesai Dzinoruma* HH 106/2006; *Muchapondwa v Madake & Others* 2006 (1) ZLR 196 D-G, 201 A (H); *GMB v Muchero* 2008 (1) ZLR 216, 221 C-D (S).
- [25] Although it is apparent in this case that the judge in the court *a quo* may have considered the question whether the matter was properly before him when he considered the merits, a large portion of those considerations remained stored in his mind instead of being committed to paper. In the circumstances, this amounts to an

omission **to consider and give reasons**, which is a gross irregularity – *S v Makawa & Another* 1991 (1) ZLR 142

[26] Consequently the failure by the court *a quo* to specifically determine the question whether or not the application was properly before it, its tacit acceptance that this was the position and the consequent failure on its part to give reasons why it had proceeded to deal with the substantive issues in the light of the preliminary point taken, vitiated the proceedings.” (Emphasis added)

At the hearing of this appeal, the appellant raised a preliminary point to the effect that the court *a quo* erred by not determining the six issues stated in its first ground of appeal. Mr *Tshuma* for the appellant submitted that these issues were dispositive of the dispute between the parties. A reading of the court *a quo*’s judgment establishes that although the appellant raised several issues, the court severely summarized, truncated and distilled them and made a determination on which of them were relevant and had to be fully ventilated in its judgment. On p 2, para 3 of its judgment the court *a quo* clearly stated as follows:

“The matter before the court is largely one of the law, more precisely, the interpretation of the relevant provisions of tax statutes the facts being largely common cause and useful only as background material” (Emphasis added)

On p 3 of the same judgment the court went on to state thus:

“...the case before the court crystallized into five areas as laid out below. I proceed to deal with each one of them in turn summarizing the arguments for and against and immediately afterwards pronouncing my decision on each.” (Emphasis added)

On p 3 para [7] the court *a quo* said:

“The applicant objected to the respondent’s re-assessments on multiple grounds. The case was argued on several fronts. Severely truncated, the case before the court crystallised into five areas as laid out below. I proceed to deal with each of them in turn, summarising the arguments for and against and immediately afterwards pronouncing my decision on each.” (Emphasis added)

On p 5 para [15] the court *a quo* said:

“In the main the applicant’s grounds of objection, **severely truncated**, was that the respondent’s refusal to accept the payment of all the applicant’s taxes in the local currency is unlawful because the new Zimbabwe currency has by statute been made the sole legal tender” (Emphasis added)

At para [36] the court *a quo* said:

“The next objection by the applicant, **again much distilled**, was that the respondent’s insistence that the applicant could not deduct the input tax paid by it in local currency from the output tax received by it in foreign currency in effect violated the applicant’s right to deduct input tax from output tax as enshrined in s 15(3) of the VAT Act”--- (emphasis added)

The court *a quo*’s findings as quoted above indicate that it considered all of the appellant’s issues and summarised, crystallised, truncated and distilled them into what was relevant and irrelevant after which it zeroed in on 5 issues which it decided to fully ventilate. These issues were in its view capable of determining the appellant’s rights as regards the payment of taxes in Zimbabwean dollars for taxable income and VAT returns which had been paid to it in foreign currency. It was satisfied that the interpretation of the tax statutes was dispositive of the case before it. The appellant had approached the court *a quo* for a declaratory order that it was entitled to pay income tax and VAT in local currency despite it having received the same in foreign currency. Therefore, the court made a determination which was dispositive of the real issues between the parties. It cannot be said that the court did not make a determination on the six issues when it clearly considered them and reasoned that they were not relevant in the determination of the real issue before it. In coming up with the five issues on which it determined the case the court *a quo* was aware that the applicant had objected to the respondent’s re-assessments on multiple grounds and that the case had been argued on many fronts. It then through severe summarization, truncating, crystallisation and distillation decided on what was relevant and irrelevant. That in our view is a consideration and determination of the issues the appellant alleges were not considered

and given reasons on. The adverse determination on the relevancy of those issues is a determination. The explanation that it severely summarised the appellant's grounds of objection and truncated and distilled the submissions made before it on many fronts is a giving of reasons why it settled for the five issues after discarding what it considered were irrelevant issues. In other words, the court found that some of the issues raised by the appellant which it left out were irrelevant. A brief and concise explanation of why a court arrives at a decision is proof of it having considered and determined the issues. There is therefore, no merit in the preliminary issue raised by the appellant.

Whether or not the use of the phrase “gross tax” in the notice of assessment renders it invalid.

In respect of ground of appeal number 2, the appellant submitted that the assessment issued by the respondent was invalid for the reason that it referred to an amount in the notice as “gross tax” which term is alien to tax legislation. In response, the respondent averred that the assessment is valid since the assessments complied with the provisions of s 2 of the Income Tax Act as read with s 31(5) of the VAT Act. The court *a quo* held that, if the assessment complied with the requirements of s 2 as read with s 51(2) of the ITA as well as s 31 (5) of the VAT Act, then it cannot be set aside merely because it contained some term of description which may not have been provided for in those Acts.

In its determination of this issue the court *a quo* said:

“[14] The respondent explains that ‘gross tax’ was an administrative reference to a provisional amount arrived at in the computation process from which statutory deductions would eventually be made. This makes sense. The term ‘gross tax’ as used by the respondent in its assessments was simply a reference to some provisional figure obtained during the computation process, which would still be subjected to further consideration. The applicant has shown no prejudice as might have been suffered by it, or any violation of its rights as might have been occasioned

by the respondent's use of the term 'gross tax'. This objection is fanciful. It is hereby dismissed."

A valid assessment must comply with the provisions of s 2 of the ITA. Section 2 of the ITA reads as follows:

"Assessment" means

- (a) The determination of taxable income and of the credits to which a person is entitled in terms of the charging Act; or
- (b) The determination of an assessed loss ranking for deduction; and includes a self-assessment in terms of section thirty-seven ..."

The primary issue is on the interpretation of the above provisions in relation to what a valid assessment is. In my view, the interpretation of the above provision entails that an assessment is a process of determining the amount of tax which is chargeable including taxable income and the credits to which the taxpayer is entitled to. In the case of *Barclays Bank of Zimbabwe Limited v ZIMRA* 2004(2) ZLR 151 (H) at 151 C-E, the court stated as follows:

"It is clear from the definition section that an assessment should determine and contain

- (i) income and
- (ii) credits to which a person is entitled.

This is not disputed by the respondent. In para 6 of its Heads of Argument the respondent clearly laid out the requirements of an assessment. In addition, in terms of s 51 of the Act, a notice of assessment should be issued whenever an assessment is carried out. Among other things s 51 of the Act stipulates the following:

- (i) Section 51 (2) – a notice of assessment and of the amount of tax payable shall be given to the tax payer.
- (ii) Section 51(3) – the commissioner shall give the taxpayer notice that any objection to the assessment shall be sent to the commissioner within 30 days after the date of such notice."

On close scrutiny of annexure A, it is apparent that it states the taxable income and credits to which the applicant is entitled. Annexure A contains the sums due to the respondent in the form of taxes, penalties and interest."

And concluded at 152D that:

“In view of the foregoing I find that Annexure A falls within the ambit of being an assessment or notice of assessment as envisaged by the Act.”

The aforementioned authority explains what a valid assessment contains. If a notice of assessment complies with the requirements set out above, it is valid. In the present case, the Notices of Assessment contained the following:

- (i) The appellant’s taxable income;
- (ii) The credits to which the appellant is entitled to;
- (iii) Tax payable by the appellant;
- (iv) A notice that any objection to the assessment must be lodged within 30 days.

It is therefore apparent that the validity of a notice of assessment does not depend on the minute details of the internal wording of the notice.

A correct description of a notice and the inclusion in the notice of the key requirements of a notice specified in ss 2 and 51 (2) of the ITA validates the notice. Sections 2, 51 (2) of ITA and s 31 (5) of VATA do not concern themselves with the, details which can be found in a notice other than the specified aspects.

It is therefore, my considered view that the inclusion of the words “gross tax” inside the notices does not invalidate the notices of assessment since all the requirements of a valid assessment have been met. As a result, the appellants’ argument that the notices of assessment are invalid because the respondent used the term “gross tax” in computing details in the notices is not correct.

Whether or not the court *a quo* erred at law and misdirected itself in finding that the jurisdictional facts entitling the respondent to issue additional assessments were present.

In determining this issue the court *a quo* held as follows:

- “[32] Plainly, and as per the applicant’s own explanation, the ‘jurisdictional facts’ existed before the respondent issued the amended assessments. With regards to income tax, and in terms of s 47 of the Income Tax Act, what triggers the additional assessments, is the consideration by the respondent’s Commissioner that an amount of taxable income which should have been charged to tax was not charged to tax, or that an amount which should have been taken into account in the determination of an assessed loss was not, or that an amount was incorrectly allowed as a deduction. If the Commissioner comes to such conclusion, the respondent is obliged to adjust the assessment.
- [33] The respondent has explained that what prompted scrutiny of the applicant’s self-assessments, for 2019 and 2020 was the computation of all taxes in the local currency when, as a matter of fact, part of its income for the tax years in question had been received in foreign currency. **Furthermore, for the year 2020, the applicant had improperly made some deductions to the taxable income. The respondent pointed them out to the applicant. The applicant reacted by correcting its assessments. But these are enough ‘jurisdictional facts.’**
- [34] Regarding VAT, s 31(3) of the VAT Act, in paraphrase, provides in part that where the Commissioner is not satisfied with any return or declaration furnished by a taxpayer, or where he [or she] has reason to believe that any person has become liable for the payment of any amount of tax but has not paid it, the Commissioner may make an assessment of the amount of tax payable by that person who shall have to pay it. **Furthermore, in terms of s 28 (1) of the Act, every registered operator is required to submit returns in the prescribed form, reflecting such information as may be required for the purpose of the calculation of tax.**
- [35] **The respondent has explained that the applicant did not submit the VAT returns in the prescribed form. The prescribed form has Part I to IV for the calculation of VAT in the local currency, and Part V for the calculation of VAT in foreign currency. The applicant did not complete Part V. Thus the necessary information required for the calculation of VAT in foreign currency was missing. None of all this has been refuted by the applicant. Yet these are the relevant ‘jurisdictional facts’ necessary to trigger the amended assessments by the respondent. The applicant’s objection under this head equally has no merit.”**

We agree with the court *a quo* that jurisdictional facts were present which justified the respondent's issuance of notices of assessments. As correctly pointed out by the court *a quo* the appellant admitted the following jurisdictional facts:

1. That it received payments in foreign currency hence it is seeking a *declaratur* that it was in spite of having been paid in foreign currency entitled by law to pay income tax and VAT for such payments in local currency.
2. That it was paid value added taxes by its customers in foreign currency which the law requires it to collect and pay it to the respondent but it with held the foreign currency taxes and sought to substitute them with local currency payments to the respondent.
3. That it had not completed part (V) of the VAT tax return which it was legally required to complete.
4. That it had by resubmitting corrected self- assessment returns admitted that it had not correctly completed its self-assessment forms.

The court *a quo*'s findings are correct. The appellant's appeal under this ground has no merit.

Whether or not the court *a quo* erred in holding that revenue earned in foreign currency and additional tax incurred for not paying tax in foreign currency is supposed to be remitted in foreign currency.

The appellant's application *a quo* was for a *declaratur* in which the appellant sought an order allowing it to pay taxes due in the local currency yet it received income in both local currency and foreign currency. The court *a quo* found that income earned in foreign currency is supposed to be taxed in foreign currency. An analysis of the court *a quo*'s judgment establishes that it applied its mind to the provisions of tax statutes governing the payment of taxes. The

provisions of s 4 of the 2019 Exchange Regulations, s 41 of the Reserve Bank of Zimbabwe Act [*Chapter 22:15*] (hereinafter referred to as the RBZ Act) and s 38 (4) and (9) of the Value Added Tax Act. Section 4 of S I 212 of 2019 (Exchange Regulations) provides as follows:

“4 (e) The following transactions are not within the scope of the definition of domestic transactions in subs (1) for the purposes of these regulations, transactions in respect of which any other law expressly mandates or allow for payment to be made in any or a specified foreign currency.”

Section 41 of the RBZ Act provides as follows:

“41. Legal tender of banknotes

- (1) A tender of a banknote which has been issued by the Bank and which has not been demonetized in terms of subs (2) shall be legal tender in payment within Zimbabwe of the amount expressed in the note.
- (2) The President may, by statutory instrument, call in and demonetise any banknotes issued by the Bank, and shall likewise determine the manner in which and the period within which payment for such banknotes shall be made to the holders thereof.”

Section 38 of the VAT Act states as follows:

“38. Manner in which tax shall be paid

- (1) ...
- (2) ...
- (3) ...
- (4) Notwithstanding s 41 of the Reserve Bank of Zimbabwe Act [*Chapter 22:15*] and the Exchange Control Act [*Chapter 22:05*] where a registered operator—
 - (a) receives payment of any amount of tax in foreign currency in respect of the supply of goods or services, that operator shall pay that amount to the Commissioner in foreign currency;
 - (b) imports or is deemed in terms of s 12 (1) to have imported goods into Zimbabwe, that operator shall pay any tax thereon to the Commissioner in foreign currency.

In this subsection “foreign currency” means the euro, British pound, United States dollar, South African rand, Botswana pula or any other currency denominated under the Exchange Control (General) Order, 1996, published in Statutory Instrument 110 of 1996, or any other enactment that may be substituted for the same.

(5) ...

(6) ...

(7) ...

(8) ...

(9) For the avoidance of doubt it is declared that all the provisions of this Act shall apply, with such changes as may be necessary, to the payment in foreign currency of tax in terms of subs (4) in the same way as they apply to the payment of tax in Zimbabwean currency.”

Section 41 of the RBZ Act should not be read in isolation. Thus, a reading of s 4 of the Exchange Control Regulations expressly provides for a list of transactions which are exempted from the meaning of domestic transactions. Although the appellant is involved in domestic transactions, it receives income in both foreign currency and local currency. As a result, it is supposed to pay tax in both currencies since a foreign currency amount cannot be taxed in local currency. Therefore, the court *a quo* correctly held that “any other law” which expressly mandates or allows “for payment to be made in any or a specified foreign currency” (as provided under s 4 of the Exchange Control Regulations) refers to s 4A of the Finance Act and s 38 (4) and (9) of the VAT Act. Thus a reading of the above mentioned statutes proves that if a tax payer earns income in foreign currency, he or she is supposed to pay tax in foreign currency and if he or she earns income in local currency it follows that tax is paid in local currency and if he or she earns income in both local and foreign currency then he/she or it has an obligation to pay tax in both currencies.

It is absurd to hold that the legislature intended that income earned in foreign currency should be taxed in local currency contrary to the provisions of the statutes referred to above.

Clearly if that was the intention of the legislature, the whole purpose of raising revenue would be defeated as tax payers would have the liberty to convert the foreign currency earned into domestic or local currency for purposes of paying tax in local currency. In the case of *Prosperous Days Investment v ZIMRA* HH 24-21, it was held that where any output value added tax is received in foreign currency, it should be paid in foreign currency. The court is satisfied that this is the correct position of the law.

In the case of *Inamo Investments (Private) Limited v Zimbabwe Revenue Authority* SC 96/23 at paras 46 to 48 this Court in determining a similar taxation issue under s 38 (4) and (9) of the VAT Act said:

“[46] The law does not allow for any conversion of tax from a local-denominated currency to a foreign-denominated currency and neither does it allow input tax denominated in local currency to set off output tax denominated in foreign currency. Tax in local currency cannot be converted to become tax in foreign currency. This is why the respondent has a separate system under which goods and services offered under local currency and foreign currency are charged. That this is the position is reinforced by the provisions of s 15 (2) of the Act which require a registered operator, in submitting a Value Added Tax Return, to attach a tax invoice or debit note or credit note relating to the particular supply. In this regard, where the registered operator has been invoiced in local currency, how then does the amount in the invoice mutate to a foreign currency one. It is apparent that this interpretation would defeat the whole purpose of the strict requirement of this subsection. There being no legal basis upon which the appellant could claim such a right to convert local currency to foreign currency it had no legal right to protect.

[47] The appellant takes the view that the respondent’s interpretation of the law through the Public Notice Number 4 of 2020 is harsh and unfair. However, with taxation matters where the law is clear, as in this case, the ordinary meaning of the language of the statute must be given effect. The provisions of the Act are clear. The sentiments by GUBBAY CJ in *Commissioner of Taxes v CW (Pvt) Ltd* 1989 (3) ZLR 361 (S) at 372D-E apply with great force to the present matter. In that matter, the CJ held as follows:

“Generally speaking, where taxation is concerned, it has to be acknowledged that justice and equity have little significance. If the language of the statute is plain the court must give effect to it, even if the result to the taxpayer is harsh and unfair.”

[48] In this regard, the appellant cannot claim a right that has not been accorded to it by law. The court *a quo* thus correctly found that the appellant had no cause of action before it.

The appellant further contended that the respondent was not obliged to levy penalties in foreign currency. It is the court’s considered view that in the ordinary sense, a penalty is not income earned, received or accrued. In *R v Barger* [1908] H CA 43, a penalty was defined as follows:

“a penalty is ... an unlawful act or omission from a contribution to revenue irrespective of any legality or illegality in the circumstances upon which the liability depends.”

On the issue of paying penalties in foreign currency the court *a quo* held as follows:

“[44] In my judgment, the answer lies in s 4A of the Finance Act aforesaid. It provides for the payment of certain taxes in foreign currency. In a nutshell, a company, trust or other juristic person is obliged to pay tax in the currency in which the income is earned, received or accrued. Of course, a penalty levied by the respondent on a taxpayer on failure to pay a tax is not, in ordinary parlance, an income ‘earned, received or accrued’. But in terms of the tax legislation, a penalty is a tax. Section 46 of the Income Tax Act provides for additional tax in the event of a default or omission by a taxpayer in an amount equal to the tax chargeable. In terms of ss (1) (a) (i) additional tax is payable if the taxpayer makes default in rendering a return. In terms of ss (1) (b) it is payable in the event of an omission from a return of any amount which ought to have been included. In respect paras (c), (d), (e) and (f) it is payable in respect of any incorrect statement on a return, any failure to disclose required information on a return, the making of a statement resulting in the granting of greater credit than would be warranted and the failure to disclose prescribed particulars, respectively.

[45] Significantly, the Income Tax Act uses the term ‘additional tax’ and not ‘penalty’. Section 2 defines ‘tax’ as any tax or levy leviable under the Act. Admittedly, s 39 of the VAT Act provides that a person who is liable for the payment of tax but fails to do so as prescribed, he (or she or it) shall be liable, in addition to such amount of tax, to pay a penalty of an amount equal to the said amount of tax. Furthermore, Counsel for the applicant has drawn attention to the *dicta* in *Commissioner for Inland Revenue v McNeil* 1959 (1) SA 481 (A), in relation to the word ‘penalty’ in a tax legislation. The *dicta* was this: “But when its true nature is examined it becomes difficult to regard it as a form of tax on income. It is not a part of the taxpayer’s ‘receipts or accruals’, taken by the State in order to meet the expenses of government. It is ‘in essence a penalty’; it is there to ensure, if possible, that returns shall be honest and accurate.”

[46] However, none of what the applicant says changes the character of the levy or penalty from being anything but a tax. It is manifestly the intention of the legislature that penalties or additional taxes levied on tax payable in foreign currency are also payable in foreign currency. Section 4A (7) of the Finance Act, in paraphrase, declares that for the avoidance of doubt the provisions of the Taxes Act shall apply, with such necessary changes as may be necessary, to the payment in foreign currency of the taxes in the same way as they apply to the payment of such taxes in Zimbabwean currency.

[47] The South African case of *McNeil* above is not relevant because, firstly, the language of the tax legislation that the court was considering in that case was subtly different from the language of the tax legislation presently under consideration. In regards to the additional tax payable for a default, the legislation in that case simply referred to "... an amount equal to...", whereas our legislation specifically refers to "... an amount *of tax* equal to ...". Undoubtedly, this is to stress the fact that the additional tax is a tax. Secondly, Counsel is guilty of selective quoting. The court in that judgment started from the premise of accepting that additional tax is a tax, albeit of an unusual kind. Thirdly, the focus of the court in that case was completely different from the focus in the present case. The focus in the present case is whether penalties on default of a tax chargeable in foreign currency are also chargeable in foreign currency or local currency. In that case the focus was the examination of whether or not a penalty is a tax. Our legislature deems a penalty on an outstanding tax as a tax, admittedly, of an unusual kind.

[48] All the objections by the applicant to the additional assessments by the respondent in respect of the tax years in question lack merit. The application is hereby dismissed with costs."

We agree with the court *a quo*'s observations. In terms of s 46 (1) (a) (i) of the ITA a penalty is referred to as "an amount of tax". In terms of s 46 (1a) of the ITA a penalty is referred to as "additional tax". Our law therefore differs from South African law whose legislation is different from ours. Therefore, the case of *DFC of T v Fontana* 88 ATC 4751 is not relevant in the determination of this case.

From the definitions of a penalty in terms of s 46, it cannot be denied that a penalty is a tax. In this case, the respondent imposed additional tax (a penalty) on the appellant after it had breached the duty to pay tax payable in foreign currency. The court is satisfied that a penalty for

any outstanding foreign currency tax is payable in foreign currency and it also follows that a penalty on any outstanding local currency tax is payable in local currency. Therefore, the court *a quo*'s decision is correct. There is no irregularity or irrationality in the court *a quo*'s determination of the application placed before it by the appellant.

DISPOSITION

The appellant's grounds of appeal have no merit. Costs shall as is the norm follow the result. It be and is hereby ordered that:

“The appeal be and is hereby dismissed with costs.”

GWAUNZA DCJ : I agree

KUDYA JA : I agree

Gill, Godlonton & Gerrans, appellant's legal practitioners

Zimbabwe Revenue Authority, respondent's legal practitioners