V
versus
ZIMRA

FISCAL APPEAL COURT
NDOU AJ
HARARE 1 & 7 OCTOBER 2019.

VAT Appeal

H. Muromba, for the respondent

NDOU AJ: This is an appeal in terms of s 33 of the Value Added Tax Act [*Chapter 23:12*] (herein after referred to as "VAT") against a determination made by the respondent in respect of objections raised by the appellant consequent to the value added tax assessment. From the Rule 5 documents and the minutes of the Pre-trial Conference the sole issue which remains before the court is the issue of the penalty. What I discern from the papers, in particular the Joint Minute of a Pre-trial Hearing, the appellant has abandoned the other grounds of its appeal. The appellant argues that the respondent ought not charge any penalty in this matter.

The background facts of this matter are the following. The respondent carried out an audit into the tax affairs of the appellant and the audit revealed the following.

The appellant is an International Air Transport Association travel agent appointed in terms of a Passenger Sales Agency Agreement. In terms of the agreement, the appellant is authorized to sell air passenger transport services on behalf of airlines. The appellant is remunerated for the services rendered to the carriers under Clause 9.

From 2009 to 2014 the appellant was receiving commission for the sale of tickets. In its books and records the appellant was not distinguishing between resident and non-resident airlines. Appellant was not charging VAT on all of the commission it was earning as it argued that no VAT was due at all on the transactions. After a number of meetings around September 2016 the appellant

finally admitted that there were some airlines that were resident in Zimbabwe and that VAT was due on the commissions earned from those airlines.

On 22 September 2016 the respondent issued an amended assessment and called upon the appellant to furnish the respondent with the breakdown of the commission earned from resident and non-resident airlines to enable the respondent to further amend its assessment if necessary. Despite this request the appellant for over a year did not provide the necessary information and in the interim filed the present appeal. It was not until after the Appeal Pre-Trial hearing that the appellant finally decided to provide the requested information on 3 November 2017.

After taking into account of the information supplied by the appellant, the respondent issued amended assessments and levied at 10% penalty on the appellant as provided for in terms of s 39 of VAT Act. The appellant initially persisted with its ground that no penalty should be charged in the present case. The appellant hired and parted. company with the legal practitioners on more than two occasions.

At the hearing of the appeal the appellant was a "self-actor" in the sense that it was represented by its managing director.

At the time that the appellant was legally represented by Mr *AMajachani* of Alex Fard Associates Legal Practitioners the parties filed with the Registrar of this court a Joint Minute of Appeal Pre-trial Hearing dated 3 October 2018. In this minute there was only one issue adopted for trial *viz.*

"Whether or not the penalty charged against the appellant by the respondent was appropriate."

In the circumstances this is the only issue before me in the present appeal. I should point out that the initial assessed liability was US$135 834.00 with 100% penalty thereon.

In the pre-trial hearing presided over by my brother KUDYA J, some considerable progress was achieved in reducing the issues for determination at this appeal hearing. The principal liability was reduced by the respondent to $69 005.50 with penalty levied at 10% (i.e. from 100%).

Is the 10% penalty fair in this matter?

It is trite that the blameworthiness of each taxpayer depends on the particular facts of each case. The general objectives of penalties are retribution, deterrence, prevention and rehabilitation. The penalising provision enjoins the Commissioner or this Court to conduct an inquiry on the intention of the tax payer. It is clear that s 39 of the VATA enjoins the Commissioner to enquire

whether in default the taxpayer had the intention of evading tax. In this regard it was submitted it the objections that there was never an intention to evade tax. It was contended that the failure was due to an incorrect interpretation of the law. The travel agents, including the appellant believed that the "commission" was a "discount" and therefore no VAT was charged.

However, the issue was settled in *T (Pvt) Ltd v ZIMRA* case number 2015 ZWHHC 285, when it was held that it was a commission and not a discount. Thus, until that judgment it was submitted that the appellant genuinely believed that the service was zero rated. Further, it was submitted that the appellant believed that the services were zero rated as they were rendered to non-residents of Zimbabwe and that the transport services were rendered from Zimbabwe to foreign destination and therefore no VAT at standard rate was charged. It was submitted that the appellant genuinely believed that it was paying the correct tax. It is contended by the respondent that the appellant was no cooperative and did not provide information timeously.

In my view, a penalty is by definition punishment, it may also be compensatory in effect, but that is not why it exists. The quantum of the penalty is determined by the nature of the wrongdoing for which the taxpayer is responsible; expressed as a percentage, that factor is then applied to the amount of tax concerned. For a given amount of tax in effect withheld, the penalty will be higher or lower, depending not on the prejudice suffered by ZIMRA or the fiscus, but on the level of blameworthiness attributed to the conduct – *A… & Anor* v *Comm. for SARS* [2018] ZATC 10.

The appellant's public officer had some working knowledge of the taxation system. The appellant on its own volition decided that the commission was zero rate. During this hearing the public officer gave detailed submissions on the taxation applicable to his industry. Up to the very last minute the appellant evinced reluctance to pay VAT and the penalty. The appellant's public officer took almost a year just to provide the respondent with information requested in terms of the Act. Whatever the appellant's interpretation of the Act is, it had no justification to withhold the information. Even after the filing of this appeal the appellant withheld the information required by the respondent until the pre-trial hearing. It took the appellant more than a year to provide the respondent with the breakdown of the commission earned in order to assist in the calculations. This conduct clearly reflects that the appellant was not keen or cooperating with the respondent. The reduction of the penalty from 100% to 10% by the respondent was reasonable and sufficiently

generous. The penalty of 10% strikes a balance between the need to punish the appellant for breaching the law and its viability concerns – *PL Mines (Pvt) Ltd* v *ZIMRA* 2015 (1) ZLR 708 (H) at 735. 10% penalty is in my view, on the lenient side for a taxpayer who did not cooperate over a year.

The appeal is devoid of merit.

Accordingly, the appeal is dismissed with costs and the penalty of 10% on the revised assessment is hereby confirmed.

Kantor & Immerman, respondent's legal practitioners