SHARON JEANE ROUSE
versus
ZIMBABWE REVENUE AUTHORITY

SPECIAL COURT FOR INCOME TAX APPEALS
MAFUSIRE J
HARARE,

Date of hearing: 25 November 2024
Date of judgment: 9 June 2025

Income tax appeal – stated case

Mr F. Manyuchi, for the appellant
Mr S. Bhebhe, for the respondent

MAFUSIRE J

a Introduction

[1] This is an appeal to the Special Court for Income Tax Appeals which has been lodged in terms of s 25 of the Capital Gains Tax Act [*Chapter 23:01*], ["***the Act***"], as read with s 63 to 70 of the of the Income Tax Act [*Chapter 23:06*], ["***the Tax Act***"]. It was argued as a stated case, the dispute purely being legal.

[2] The enquiry, in a nutshell, was the extent of the appellant's liability for capital gains tax in terms of the Act in respect of a residential property that she sold in 2010 but only submitted the tax return for the capital gains tax due by her in 2022.

[3] There is a legal dispute simply because the monetary regime in 2010, including as relating to taxation, was different from that in 2022 on account of the changes brought about by central Government through the various pieces of legislation. The finer details on this aspect emerge later.

b Background

[4] The appellant is a private individual. In September 2010 she sold her residential property in Borrowdale Brook, Harare, to someone else for US$110 000-00.

[5] The purchaser paid cash via the conveyancers. The conveyancers withheld 5% of the purchase price for, among other things, capital gains tax. They handed over to the

seller the balance of the purchase price. However, the conveyancers did not remit the amount of the capital gains tax to the respondent, or apply for assessment, until twelve years later, that is to say in August 2022. Needless to say, the appellant did not pay the capital gains tax due on the sale.

[6] The reason for the twelve year delay was that the apperllant did not have title to the property. It was only in August 2022 that she obtained transfer through the Deeds Registry.

[7] The respondent is an administrative authority. In terms of s 4 of the Revenue Authority Act [*Chapter 23:11*] it is tasked with, among other things, the duty to levy, assess and collect all kinds of taxes for central government, including capital gains tax.

[8] Upon the conveyancers' application for an assessment of the appellant's capital gains tax liability as aforesaid, the respondent assessed the tax at US$5 500. The appellant objected to the assessment on the basis that the respondent used rates obtaining in 2022 instead of those obtaining in 2010. The details also emerge later.

c **<u>Appellant's case</u>**

[9] In paraphrase, the appellant's case is this. Due to the currency changes in the monetary policies and laws by central Government, particularly Statutory Instrument 33 of 2019[1] [SI 33 of 2019], which later became incorporated in the Finance [No 2] Act 7 of 2019, her liability for the capital gains tax should have been assessed in local currency as opposed to foreign currency.

[10] The appellant explains that the conveyancers did deduct the money for capital gains tax from the purchase price. They kept the money in the bank. They would remit it when it was due. But owing to the intervention of SI 33 of 2019, that money converted to RTGS dollars. As such, the respondent is not entitled to reject the RTGS dollars, or the prevailing local currency equivalence, because that is what the money withheld for capital gains tax had become upon the changes in the law.

[1] Presidential Powers [Temporary Measures] [Amendment of Reserve Bank of Zimbabwe Act and Issue of Real Time Gross Settlement Electronic Dollars (RTGS Dollars)] Regulations, 2019.

[11] The appellant further argues that in 2010 she did not have a real right over the property as contemplated by s 2 of the Deeds Registries Act [*Chapter 20:05*]. As such, she did not have standing, or *locus standi*, to approach the respondent for an assessment in respect of a property in which the real right was owned by someone else.

[12] The appellant stresses that the liability for capital gains tax does not arise from the act of an assessment, which in this case was in 2022. Rather, by operation of the law, it arises upon the completion of a sale, which in this case was in 2010. That being the case, by virtue of SI 33 of 2019 which, among other things, converted all financial or contractual obligations concluded before 22 February 2019 valued and expressed in United States dollars to RTGS dollars at a rate of one-to-one, her liability should have been assessed in the local currency.

[13] The appellant concludes that since SI 33 of 2019 also decreed that the RTGS dollar would be the sole legal tender, the respondent could only assess the appellant's liability for the capital gains tax in question in RTGS dollars. At the relevant time, no other currency is legal tender. Payment of a debt by the medium of a currency that was legal tender constitutes good payment for all times and for all purposes.

[14] The respondent disallowed the appellant's objection.

d **<u>Respondent's case</u>**

[15] The respondent's position, also paraphrased, is that the appellant disposed of her property in 2010. She received the purchase price in 2010. It was in foreign currency. That transaction was consummated in 2010. The appellant should have submitted her capital gains tax return in 2010 because her liability to do so had arisen upon the completion and consummation of the sale transaction.

[16] The respondent argues that from 2010 to 2022 several monetary laws affecting taxpayors' rights and obligations had changed. The appellant's capital gains tax liability could only be assessed as at 2022. That is when it had arisen. It is the assessment that creates such a liability after a capital gain has accrued or been received.

[17] The respondent further argues that if the purchase price was paid via the appellant's conveyancers, then they were obliged to remit the capital gains withholding tax by not later than three [3] days from the date of payment. They did not.

[18] With regards to SI 33 of 2019, the respondent argues that this law does not apply to the appellant's situation because her liability was only assessed in October 2022. In 2010 she did not have a liability valued and expressed in United States dollars which could convert to RTGS dollars at a rate of one-to-one within the contemplation of SI 33 of 2019.

e **Issues for determination**

[19] The parties listed the issues for determination as follows:

- whether the [capital gains] tax liability of the appellant arose in 2010 [at the time of the conclusion of the sale of the property] or in 2022 [when the respondent assessed her liability], and
- whether SI 33 of 2019 applied to the appellant's tax liability.

f **Unpacking the law**

[20] The preliminary enquiries are, what is capital gains tax? When is it charged? How is it charged?

[21] In this case, what capital gains tax is and how it is charged are non-contentious. The parties are generally agreed. On the facts of this case, the real enquiry is ***when*** was the capital gains tax due by the appellant chargeable? The corollary question is, when was it payable? But nonetheless, any enquiry should begin by briefly explaining what capital gains tax is.

[22] In very simple terms, and almost colloquially, capital gains tax is the profit the seller gets on the disposal of a capital asset.

[23] Cutting out the tautology of legislative drafting, and in paraphrase, in terms of s 6 of the Act, as read with s 8, capital gains tax is charged on the gain received by, or accrued to, or in favour of, any person, after 1 August 1981, on the transfer of, among other things, their rights in a residential stand, whether or not their title to the stand is registered under the Deeds Registries Act [*Chapter 20:05*] [*emphasis added*].

[24] In paraphrase, in terms of s 38[b], as read with s 39A[9][b] of the Finance Act [*Chapter 24:04*], capital gains tax in respect of specified assets acquired in foreign currency before 22 February 2019 is chargeable and payable in foreign currency at the rate of five United States cents [US$0-05] for each United States dollar of the gross capital amount.

[25] In the present case, it is not in dispute that when the appellant sold her property in 2010 there was a capital gain received by, or accrued to her. It is also not in dispute that she became liable for capital gains tax. The only question is, when did this liability accrue? When did she have to discharge it?

[26] The same enquiry, expressed differently, is necessarily the question whether the liability for the appellant to pay the capital gains tax arose in 2010, that is, immediately upon the sale and receipt of the purchase price, or only in 2022 when the respondent finally assessed her.

[27] Expressed in yet another way, the enquiry is, was the appellant obliged to notify the respondent in 2010 immediately after the sale of the property, and to immediately apply for a capital gains assessment or exemption certificate, or did she have the liberty to wait for the title deed to the property to be issued before she could be assessed? In this case, she waited twelve [12] years. It is not in dispute that she only obtained transfer of the property in 2022.

[28] The law provides the answer to all these enquiries, which really are one enquiry.

[29] An analysis of s 6 and s 8 of the Act suggests that the liability of persons to pay tax on a capital gain accrued to, or received by them on the disposal of their specified assets is not dependent on their title to the property sold. In particular, s 8[2][g] of the Act provides as follows:

> "Where a person transfers to another person his or her rights in a residential, commercial or industrial stand, whether or not the stand is serviced and whether or not his or her title to the stand is registered under the Deeds Registries Act [*Chapter 20:05*], he or she shall be deemed to have sold a specified asset to that person for an amount equal to the whole amount received by or accruing to him or her as a result of the transfer." [*underlining for emphasis*]

[30] Firstly, the reference to '**transfer**' in s 8 above is manifestly not in the sense of Deeds Registries Act transfers. This construction is negated by what the same provision goes on to say, namely, '**whether or not his or her title to the stand is registered under the Deeds Registries Act …**'

[31] Secondly, the deeming process in the same section above is in respect of the '**gross capital amount**'. According to the Act, this is the total amount received by, or accrued to, a person, in any year of assessment, from the sale of a specified asset on or after 1 August 1981.

[32] Thus, in the year of assessment in which the month of September 2010 fell, the appellant received a capital gain, or it accrued to her following the sale of her residential property. She became liable to be assessed for it. By virtue of s 6 of the Act, the capital gains tax became chargeable, and therefore payable, in that year of assessment, namely, 2010.

[33] In terms of s 22C of the Act, conveyancers, who together with other types of offices, are collectively described as 'depositories', are obliged to withhold capital gains withholding tax from the amount held by them in consequence of a sale or transfer of a property.

[34] In the present case, the conveyancers did withhold the capital gains withholding tax on the appellant's disposal of her property.

[35] Section 22C of the Act then goes further to direct the conveyancers to pay to the respondent's Commissioner, the amount withheld by them as aforesaid, by no later than the third working day from the date when they received the money, or within such other longer period as the Commissioner may allow.

[36] In the present case, the conveyancers nether paid the money within the three day stipulation, nor sought an extension from the Commissioner to pay later, until 12 years later when they applied for an assessment.

[37] For the sake of completion, relevant portions of s 22C[1] of the Act provide as follows:

> "Subject to subsections [5] and [7], every depository who, in consequence of the sale or transfer of a specified asset, pays any amount held by him as depository to or for the credit of the seller of the specified asset shall withhold capital gains withholding tax from that amount and shall pay the amount withheld to the Commissioner no later than the third working day from the date when the payment was made or within such further time as the Commissioner may for good cause allow."

[38] Subsection [5] referred to in the provision above empowers a depository to seek from the respondent's Commissioner a capital gains tax exemption certificate in lieu of actually paying the money there and then. In the present case this was not done.

[39] The other sub-section referred to in the above provision, namely sub-section [7], does not apply to the present situation. It relates to an instalment sale of property, and the treatment to be accorded the capital gains withholding tax by the conveyancers in such a sale. In the present case, the sale was not in instalments. The purchase price was paid in cash and at once.

[40] The appellant relies on s 18[1] and s 26[1][a] of the Act for the argument that her liability for capital gains tax arose in 2010 on the sale of the property but that the obligation to remit it only arose in 2022 upon her taking title to the property.

[41] The appellant's argument aforesaid is flawed, not only for the reasons already espoused above, but also for the fact that she has misunderstood the meaning, the reach and the purport of the same provisions that she is relying upon.

[42] Section 18[1] of the Act deals with sales of immovable properties subject to suspensive conditions. It reads:

> "If any taxpayer has entered into any agreement with any other person in respect of any specified asset the effect of which is that ownership shall pass from the taxpayer to that other person upon or after receipt by the taxpayer of the whole or a certain portion of the amount payable to the taxpayer under the agreement, the whole of the amount shall, for the purposes of this Act, be deemed to have accrued to the taxpayer on the date on which the agreement was entered into:
>
> Provided that … … [*irrelevant*] … …"

[43] Plainly, the above provision does not apply to the appellant's situation. Although the sale of her property was subject to some suspensive condition, it was a suspensive condition completely different from the one that s 81[1] of the Act is dealing with.

[44] The suspensive condition referred to by s 18[1] of the Act is one relating to the deferment of the passing of ownership until the whole or a portion of the purchase price has been paid. This was not the appellant's situation. The full purchase price was paid in 2010. But even in the situation of the deferment of the passing of title, the provision ***deems*** the purchase price to have accrued to the seller on the date of the agreement.

[45] Evidently, the purpose of s 18[1] of Act is to include the entire consideration of the sale, whether received or not, into the gross capital amount as at the date the agreement of sale is concluded. This applies notwithstanding that ownership of the specified asset may only pass to the purchaser upon receipt of the whole or a portion of the purchase price.

[46] Plainly, s 18[1] of the Act is intended to facilitate the calculation of capital gains tax by deeming the full purchase price to have accrued at the point of the sale agreement in cases where ownership is subject to suspensive conditions. The appellant cannot rely on this provision.

[47] The applicant can also not rely on s 26[1][1] of the Act. This provision reads:

> "[1] Tax shall become due and payable—
>
> [a] no later than thirty days from the date when a specified asset referred to in section 18[1] and section 19[1] accrues to the taxpayer in terms of those provisions; or …"

[48] Section 26[1] refers to a s 18[1] kind of sale. As already been demonstrated above, that provision does not apply to the appellant's situation. Section 26[1] also refers to a s 19[1] kind of sale. This too does not apply to the appellant's situation because a s 19[1] sale is a credit sale of an asset in instalments where ownership passes on delivery of the asset. This was not the appellant's situation.

[49] Thus, s 18[1] of the Act addresses sales concluded under suspensive conditions. Section 19[1] addresses credit sales in instalments. In the present case, the transaction was neither a credit sale nor a sale subject to suspensive conditions. Demonstrably, the appellant got mixed up.

g **Synthesis**

[50] To sum up the legal position so far:

- Upon the sale of her property in 2010, the appellant was required at law, specifically s 23[a] of the Act, as read with s 37 of the Tax Act, to submit a return in the prescribed form, containing all the information required for the calculation of the capital gains tax due.
- Having withheld 5% of the purchase price, the conveyancers were obliged to remit it to the respondent's Commissioner within 3 days or such other longer period as allowed by the Commissioner, or seek a capital gains tax exemption certificate.
- Upon being notified of the sale, and all things being equal, the respondent would have raised, in 2010, an assessment to establish the appellant's capital gains tax liability. The respondent would have served the appellant with a notice of assessment in the prescribed form in terms of s 23[n] of the Act, as read with s 51 of the Tax Act.
- In terms of s 23[n] of the Act, as read with s 51 of the Tax Act, it is the assessment, not the underlying transaction, which crystallizes a taxpayer's liability for tax.
- It is only after the notice of assessment has been issued that a taxpayer's liability is assessed and valued. It can only be the notice of assessment which can create an obligation to pay the tax.

[51] The appellant was not assessed in 2010. Corollary, she did not pay the tax in 2010. She waited for title to be registered. That was a mistake of law on her part. In terms of s 8[2] of the Act, sales of stands with no registered title, serviced or not, attract capital gains tax.

[52] The appellant's reliance on SI 33 of 2019 is an extension of her mistake of law. This instrument reduced pre-existing United States dollar values for debts and obligations to RTGS dollars on a ratio of one-to-one with effect from mid-night of 22 February 2019. The relevant provision was s 4[1][d]. It read as follows:

> "that, for accounting and other purposes, all assets and liabilities that were, immediately before the effective date, valued and expressed in United States dollars [other than assets and liabilities referred to in s 44C[2] of the Principal Act] shall on and after the effective date be deemed to be values in RTGS dollars at a rate of one-to-one to the United States dollar."

[53] By the effective date, namely, 22 February 2019, because the appellant had not yet submitted a return for her capital gains tax liability and had therefore not yet been assessed, she did not have an obligation sounding or valued or expressed in United States for the purposes of this new law.

[54] Therefore, by the effective date, there was nothing to convert for the appellant from United States dollars to RTGS dollars. Her liability for the capital gains tax was only assessed in 2022. That is when her obligation became valued or expressed to sound in money. She did not fall within the exceptions provided for in s 44C[2] of the Principal Act, namely, the Reserve Bank of Zimbabwe Act [*Chapter 22:15*]. Therefore, SI 33 of 2019 could not possibly apply to the appellant's situation.

[55] The issue of assets and liabilities valued and expressed in United States dollars immediately before the effective date was succinctly put beyond doubt by the Supreme Court in *Zambezi Gas Zimbabwe [Pvt] Ltd v N R Barber [Pvt] Ltd & Anor* 2020 [1] ZLR 138 [S]. The court, *per* MALABA CJ, said, at p 144E – F;

> "In interpreting s 4[1][d], regard should be had to assets and liabilities which existed immediately before the effective date of the promulgation of SI 33 of 2019. The value of the assets and liabilities should have been expressed in United States dollars immediately before 22 February 2019 for the provisions of s 4[1][d] of SI 33 of 2019 to apply to them.
>
> … … If, for example, the value of the assets and liabilities was, immediately before the effective date, still to be assessed by application of an agreed formula, s 4[1][d] of SI 33 of 2019 would not apply to such a transaction even if the payment would thereafter be in United States dollars. ***It is the assessment and expression of the value of assets and liabilities in United States dollars that matters***."[*my emphasis*]

h **Disposition**

[56] Manifestly, the applicant's stance is not consonant with the position of the law. Her appeal is liable to be dismissed. Costs follow the result. Consequently, the appeal is hereby dismissed with costs.

9 June 2025

Scanlen & Holderness, legal practitioners for the appellant
Kantor & Immerman, legal practitioners for the respondent