**REPORTABLE** **(157)**

**ZIMBABWE PLATINUM MINES (PRIVATE) LIMITED**
**v**
**ZIMBABWE REVENUE AUTHORITY**

**SUPREME COURT OF ZIMBABWE**
**MAVANGIRA JA, MAKONI JA AND MATHONSI JA**
**HARARE 29 OCTOBER 2020 AND 26 NOVEMBER 2021**

*K. Kachambwa,* for the appellant

*T. Magwaliba,* for the respondent

**MAVANGIRA JA:**

[1] This is an appeal against the whole judgment of the Special Court of Income Tax Appeals dismissing the appellant's appeal against the respondent's decisions disallowing certain objections that he had raised relating to (a) prescription, (b) additional profits tax (APT) and (c) penalty on additional profits tax.

**FACTUAL BACKGROUND**

[2] The appellant undertakes mining and processing operations in terms of a special mining lease (SML) supported by a mining agreement. The respondent is a regulatory body responsible for collecting revenue in terms of the Revenue Authority Act [*Chapter 23:11*].

[3] Before the court *a quo*, two appeals were consolidated. The parties filed a statement of agreed facts which the court captured in its judgment and from which the pertinent facts therefrom appear hereunder.

(a) Prescription of amended assessments for 2003 to 2006

[4] The appellant submitted its Income Tax Return for the 2003 tax year on 18 June 2004. The return was accompanied by the Income Tax Computation based on United States Dollar (USD) financial statements. It submitted its income tax returns for the years 2004, 2005 and 2006 on 12 April 2007. These returns were accompanied by the Income Tax Computations and the USD based financial statements.

[5] The assessments for the 2004, 2005 and 2006 tax years were issued to the appellant by the respondent on 27 September 2007. The date of issue of the assessment for 2003 could not be ascertained from the documents but it was accepted that it was issued before 27 September 2007.

[6] On 29 October 2007 the appellant objected to the assessments for the tax years 2004, 2005 and 2006 on the basis that they were denominated in Zimbabwe currency and it also objected to the rate of tax that was used to tax it. The respondent acknowledged receipt of the letter of objection.

[7] In the absence of any decision by the respondent, on 29 January 2008 the appellant gave its notice of appeal against the Zimbabwe dollar denominated assessments for 2004, 2005 and 2006. On 30 January 2008 the respondent allowed the appellant's

objection in respect of the 2004, 2005 and 2006 assessments. As a result, the appellant withdrew its appeal.

[8] On 6 August 2009 the appellant requested the USD denominated assessments as had been promised by the respondent.

[9] In 2012 the respondent commenced investigation into the tax affairs of the appellant. The following findings were made in respect of capital redemption allowances:

1. Capital redemption allowances are deductions allowable in the determination of a mining company's taxable income.
2. The appellant as the holder of an SML should claim capital redemption allowances under the 22nd Schedule of the Income Tax Act as opposed to claiming these under the 5th Schedule of the Act which is applicable to miners undertaking general mining operations.
3. The 22nd Schedule deals with the determination of gross income and taxable income and assessed losses from SML operations whilst the 5th Schedule of the Act deals with allowances and deductions in respect of income from general mining operations.
4. The 22nd Schedule allows for capital expenditure on development operations to be deducted over four years whilst the 5th Schedule allows for capital expenditure to be deducted in full in the year that the expenditure is incurred. The respondent thus disallowed the appellant's deduction of capital redemption allowances in full in the year of expenditure.
5. Following the respondent's disallowance of the appellant's claim of capital expenditure in full in the year in which it was incurred, the respondent determined

that the appellant was liable to pay additional taxes together with penalties and interest.

[10] Correspondence and discussions between the parties culminated in a meeting on 25 September 2012 chaired by one L. Dube, on behalf of the respondent. It was agreed thereat that the assessments up to the year 2006 had prescribed and that the appellant would withdraw its objection on that issue. This was subsequently, on 28 September 2012, confirmed in a letter by the appellant, formally withdrawing its objection in relation to the assessments issued in the prescribed period. The appellant's liability was thus restricted to the period 2007 to 2012 only. This, in turn, culminated in a payment plan which was submitted by the appellant on 4 October 2012 for the settlement of the resultant principal amount, penalty and interest.

[11] In a letter dated 1 November 2013, the respondent invoked the provisions of s 47 of the Income Tax Act and advised the appellant that prescription did not apply to the earlier periods 2001 to 2006 because there was misrepresentation in the way that capital redemption allowances had been claimed. This was repeated in a letter dated 19 March 2014 in which the respondent maintained that because of the misrepresented information, the prescription fell away and the appellant remained liable for the tax in question. The appellant wrote on 14 May 2014 maintaining that the prescription period still applied. In letters dated 21 July 2014 and 20 August 2014 the respondent maintained the position stated in its letter of 19 March 2014.

[12] Subsequently, assessments covering the tax years 2003 to 2006 were issued on 9 October 2014. On 26 October 2014 the appellant wrote a letter to the respondent

raising the issue of the agreement reached in 2012 that amended assessments would not cover the period 2003 to 2006 but only the period from 2007 to 2012 as the assessments for the earlier dates had prescribed. The appellant managed to convince the respondent that the 2003 to 2006 assessments had long been accepted by the case manager, L.P. Dube, to be prescribed. As a result, the assessments of 9 October 2014 were cancelled by assessments dated 24 December 2014. By letter dated 24 December 2014 the respondent cancelled the additional assessments for the years 2003 to 2006 in recognition of the prescription period and issued further amended assessments for those four years.

[13] By letter dated 23 February 2015, the respondent took the position that the assessments for the years 2003 to 2006 issued on 24 December 2014 had been issued in error and were withdrawn. Additional amended assessments for those four years were issued reinstating the 9 October 2014 assessments. On 27 April 2015 further amended assessments were issued by the respondent covering the years 2004, 2005 and 2006, which had the effect of reducing allowable royalties deduction in line with a court ruling which reduced royalties payable by the appellant from 5 per cent to 2.5 per cent which meant that the appellant was only allowed to claim 2.5 per cent royalties as a deduction.

[14] By letter dated 11 may 2015, the respondent notified the appellant that it had amended the income tax and additional profit tax assessments for the 2014 tax year. On 26 May 2015 the appellant objected to the various amended assessments. By letter dated 27 May 2015 the respondent acknowledged receipt of the objection. On 17 July 2015 the respondent dealt with the objections and disallowed the objection in respect of

prescription. It found that there was misrepresentation and wilful non-disclosure by the appellant. It also allowed the objection in respect of other matters other than capital allowances.

[15] The respondent allowed the appellant's objection to the adjustment of royalty overpayments "in the incorrect periods." It disallowed the appellant's objection to the tax effects (income tax and ATP) caused by the adjustments made prior to 2009 in so far as they related to matters other than those arising directly from the assessed losses case that had been heard and determined by the court a quo under case number FA 02/11 ("the Assessed Loss Case"). It disallowed the appellant's objection in relation to APT in so far as additional taxes paid by the appellant were not included in such determination. It also disallowed the appellant's objection to the imposition of a 30 per cent penalty on the additional APT.

[16] Following upon the above determination the appellant lodged an appeal to the court *a quo* on 7 August 2015, this being appeal number IT 06/15. Its appeal was against those aspects of its objection which had been disallowed. This is the first of the two appeals that were, as indicated earlier herein, consolidated *a quo*.

[17] Following the 17 July 2015 determination, in a separate process to the appeal in case number IT 06/15, the appellant wrote to the respondent on 29 July 2015 on a without prejudice basis and without in any way accepting liability for the matters which are the subject of case number IT 06/15. It attached to its letter amended income tax and APT computations. The appellant stated that management fees had been allowed as deductions for the years 2002 to 2006 as the respondent had confirmed that the re-

opening of the prescribed years was only in respect of capital allowances and no other matters.

[18] On 17 August 2015, the respondent informed the appellant that the management fees for the years 2002 to 2006 that it had claimed as allowable deductions in its revised tax computations submitted on 29 July 2015 had been disallowed. The appellant was requested to submit amended tax returns. The said letter was accompanied by adjusted income tax and APT assessments to the appellant for the years 2004, 2005 and 2006. This was in line with the respondent's 17 July 2015 determination. It also incorporated, amongst other matters, the disallowance of the management fees.

[19] On 16 September 2015, the appellant objected to these assessments. However, a meeting had earlier been held on 8 September 2015 between the parties' respective officers. Thus, on 17 September 2015 the respondent issued amended APT assessments to correct various aspects of the earlier assessments. These amended assessments were sent to the appellant under cover of the respondent's letter dated 18 September 2015. The appellant thereafter, on 6 October 2015, issued a supplement to its objection in which it stated that its notice of objection issued on 16 September 2015 extended to and applied to the amended assessments issued on 18 September 2015.

[20] On 6 April 2016 the respondent issued a determination on the issues as follows:

1. It did not agree with the appellant's interpretation of s 47 of the Income Tax Act. In its view the section did not restrict the respondent to making adjustments only in cases where there are assessed losses.

2. In its view the method which the appellant sought to use in determining its taxable income did not equate to a “practice generally prevailing.”
3. It did not agree with the appellant’s contention that conditions of fraud, misrepresentation or wilful non-disclosure of facts required by s 47 of the Act to re-open the prescribed periods had not been met on the issue of technical and management fees.
4. The statement in its determination of 17 July 2015 which the appellant understood to have excluded other issues other than capital allowance was addressing specific statements made by the appellant in its previous objection.
5. The APT assessments for the years in question were aligned to and were therefore affected by the issues and reasons given concerning the income tax assessments.

[21] Subsequent to the above determination the appellant lodged appeal number IT 10/16 against the respondent’s disallowance of its objection, this being the second of the two consolidated appeals.

<u>(b) Additional profit tax</u>

[22] By 6 August 2009 the respondent had issued USD denominated APT assessments for the period 2002 to 2007 to the appellant. On 8 May 2015 the respondent advised the appellant that it had amended the APT assessments to give effect to the computing of capital redemption allowances in terms of the 22$^{nd}$ Schedule to the Act rather than the 5$^{th}$ Schedule and in line with the judgment on royalties. The letter was accompanied by APT assessments relating specifically to APT covering the years 2002 to 2007 and original assessments for the years 2008 to 2014. The APT assessment for the 2014 tax

year was further amended on 11 May 2015 to correct the penalty. The APT assessments for the years 2002 to 2014 were further amended on 17 August 2015 to give effect to the respondent's determination dated 17 July 2015.

[23] Further amendments of the APT assessment were issued on 17 September 2015. These were accompanied by an explanatory letter dated 18 September 2015. Thus the respondent also re-opened the "prescribed" periods of 2004 to 2009 in respect of APT when it issued the amended APT assessments on 8 May 2015.

[24] The respondent's original claim under the assessed loss case was initiated in 2010 covering the periods 2004 to 2007. Thus the periods 2007 and before remained open pending the determination of the assessed loss case, but only in respect of that specific matter.

[25] APT is not on self-assessment. There is thus no APT return that is submitted by the tax payer to the respondent. The tax payer submits information for APT computations and it is the respondent who then assesses the APT.

<u>(c) Penalty on Additional Profits Tax</u>

[26] After the Assessed Loss Case judgment referred to in para 15 above, this being the judgment on the correct treatment of assessed losses, on 8 May 2015, when the respondent issued assessments (for 2002 to 2007) and original assessments (for 2008 to 2014), the respondent imposed a 30 per cent penalty on additional APT.

## THE DECISION OF THE COURT *A QUO*

[27] The court *a quo* found that the assessments that had been undertaken in terms of the Zimbabwean currency were in contravention of the law and were accordingly a nullity. Accordingly, the respondent was entitled to issue fresh assessments denominated in USD at any time without regard to the provisions of s 47 of the Income Tax Act. It found that this was because the assessments did not derive their validity from the objection that was raised but from the provisions of the law.

[28] The court *a quo* further found that the provisions of s 62 (6) of the Act did not apply to the facts of this matter as the provision presupposes an objection noted against a valid assessment. The respondent, as a creature of statute, could not amend a nullity as that would be against its enabling statute. This was not a matter where a valid assessment was wrong in terms of minor details but a case where an assessment was issued contrary to the peremptory provisions of the law and was therefore null and void *ab initio*.

[29] In the result, the court *a quo* dismissed the appeal in its entirety and the 30 per cent penalties on additional profit taxes that were imposed by the respondent on 8 May 2015 were confirmed.

## THIS APPEAL

[30] Aggrieved by the decision of the court *a quo*, the appellant filed this appeal on the following grounds of appeal:

1. The court *a quo* erred in law by holding that the incorrect tax assessments for the 2003 to 2006 years of assessment carried out by the respondent on the

appellant's income tax liabilities for those years were 'invalid' and a legal 'nullity'.

2. The court *a quo* erred in law by holding that s 62 (6) of the Income Tax Act [*Chapter 23:06*] is not engaged in circumstances where a taxpayer's objection was against an incorrect tax assessment by the respondent.

3. The court *a quo* erred in law by holding that the respondent can adjust an 'original' Additional Profit Tax assessment pursuant to s 47 or any other provision of the Income Tax Act.

4. The court *a quo* erred in law by holding that the respondent was permitted to impose Additional Tax (penalty) on an Additional Profit liability.

5. The court *a quo* erred in law when, having correctly found that it was conducting a rehearing, it restricted its enquiry to considering whether the respondent 'misdirected' itself when imposing a penalty on the respondent.

6. The court *a quo* erred in law by holding that the parties were not bound by the previous determination of the same court as to the amount of penalty that the respondent may impose on the appellant.

7. The court *a quo* erred in law in upholding the penalty of 30 per cent on Additional Profit Tax given the mitigating factors.

**THE APPELLANT'S SUBMISSIONS BEFORE THIS COURT**

[31] Mr *Kachambwa*, for the appellant, submitted that the court *a quo* erred in finding that the failure to comply with the peremptory provisions of para 11 (2) (b) of the 22$^{nd}$ Schedule of the Income Tax Act automatically rendered the assessments for 2004 to 2006 a nullity. He maintained that an assessment that does not so comply is incorrect but not invalid. He also submitted that the respondent could not adjust additional

profit tax under s 47 as the section was only applicable to income tax. It was his further submission that no penalty could be made to additional profit tax.

**THE RESPONDENT'S SUBMISSIONS BEFORE THIS COURT**

[32] Mr *Magwaliba,* for the respondent, submitted that the court *a quo* did not err in finding that the assessments were a nullity as the statutory provision is peremptory. He submitted that where there is default in the payment of tax, a penalty is imposed regardless of it being in respect of additional profit tax. With regard to the penalty that was imposed, he submitted that the court *a quo* had an unfettered discretion to impose the penalty that it deemed fit.

**ISSUES FOR DETERMINATION**

1. Whether or not the court *a quo* erred in holding that the tax assessments carried out by the respondent were invalid.
2. Whether or not the respondent could not adjust additional profit tax under s 47 of the Act.

**APPLICATION OF THE LAW TO THE FACTS**

**1. Whether or not the court *a quo* erred in holding that the tax assessments carried out by the respondent were invalid.**

[33] The appellant's primary bone of contention before this court was that the court *a quo* erred in holding that the tax assessments carried out by the respondent were invalid in that the respondent computed the income tax in Zimbabwean dollars which is contrary

to the provisions of paragraph 11 of the 22nd Schedule of the Income Tax Act [C*hapter 23:06*] (The Act). Paragraph 11 of the 22nd schedule reads as follows:

"1) The holder of a special mining lease may, in the first year of assessment after the issue of his special mining lease, elect to maintain all books and records relating to his special mining lease operations in the currency of the United States of America, and any such election shall be final (the underlining is added).

2) Where the holder of a special mining lease has made an election referred to in subparagraph (1)—

a) any—

i) income accruing to the holder and attributable to his special mining lease operations; or

ii) expenditure incurred by the holder and constituting an allowable deduction; in a currency other than that of the United States of America shall be shown in all books and records relating to his special mining lease operations in that other currency and in the currency of the United States of America; and

b) the Commissioner shall determine the holder's taxable income or, as the case may be, his assessed loss, for any year of assessment in the currency of the United States of America; and

c) notice of assessment and of any tax payable shall be given to the holder in the currency of the United States of America; and

d) payment of tax shall be effected in the currency of the United States of America; and

e) the provisions of the special mining lease shall apply in relation to the conversion of any other currency into the currency of the United States of America for the purposes of this paragraph: Provided that, if there are no such provisions in the special mining lease, the conversion shall be made in accordance with such procedure as the Commissioner may direct either generally or in any particular case."

[34] The appellant elected, at the inception of its operations, to maintain its books of account in USD, in terms of para 11 (1) of the 22nd Schedule. In terms of the law, such an election is final. It is common cause that the appellant kept its books of account in USD. Paragraph 11 (2) (b) commands the Commissioner of the respondent to determine the taxable income or assessed loss pertaining to the appellant in USD currency. Contrary to this clear provision of the law, the appellant was issued with an assessment sounding in Zimbabwe dollars. Such assessment was clearly not issued in terms of the law. It follows therefore, that no legal validity could attach to it because no legal validity attaches to any act done contrary to the provisions of statute. As

correctly observed by counsel for the respondent, "the law does not allow the respondent to issue tax assessments to a taxpayer in the mould of the appellant in any currency other than that elected by the appellant for purposes of keeping books of account."

[35] Counsel for the respondent aptly cited *Schierhout v Minister of Justice* 1926 AD 99 where INNES CJ stated:

> "It is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no effect. … So that what is done contrary to the provision of the law is not only of no effect but must be regarded as never having been done and that whether the lawgiver has expressly so decreed or not: the mere prohibition operates to nullify the act… and the disregard of peremptory provisions in a statute is fatal to the validity of the proceeding affected."

See also *McFoy v United Africa Co Ltd* [1961] 3 ALL ER 1169 (BC).

Counsel also highlighted, correctly, in my view, the importance of appreciating the difference and distinction between, on the one hand, an invalid assessment, which is a nullity at law and cannot therefore be corrected or create any obligation to pay and, on the other, an incorrect assessment which is afflicted by, *inter alia*, a mathematical error or miscalculation and which can be corrected.

[36] The wording of the provisions in para 11 of the 22nd Schedule of the Act is clear and unambiguous. It does not require the court to read anything into the Act in order to derive the intention of the legislature. The respondent could not have validly issued assessments in Zimbabwe dollars where the wording of the statute is peremptory and requires that the assessments be computed in United States dollars. The following sentiments expressed by Gubbay CJ in *Commissioner of Taxes v CW (Pvt) Ltd* 1989 (3) ZLR 361 (S) at 372D-E are appropriate:

> "Generally speaking, where taxation is concerned, it has to be acknowledged that justice and equity have little significance. <u>If the language of the statute is plain the court must give effect to it</u>, even if the result to the taxpayer is harsh and unfair." (my emphasis).

[37] The respondent is a creature of statute and therefore cannot act contrary to the four corners of its enabling Act. Once it is established that the respondent had erroneously issued tax assessments in the wrong currency, it therefore follows that the respondent had to issue assessments that are in compliance with the law. In *Commissioner of Taxes v Astra Holdings (Pvt) Ltd* 2003 (1) ZLR 417 (S), MALABA JA (as he then was), stated as follows:

> "Every ordinarily sophisticated tax payer knows that Revenue is a tax collecting agency, not a tax-imposing authority. The tax payer's legitimate expectation is, *prima facie*, that he will be taxed according to statute not concession or a wrong view of the law."

[38] The appellant cannot thus seriously argue that the failure by the respondent to comply with the provisions of para 11 of the 22nd Schedule of the Act did not automatically render the assessments invalid. No validity attached to the purported assessments. The law imposes a duty on the respondent, in terms of the Act, to issue tax assessments to a taxpayer in the currency elected by the tax payer.

[39] Importantly, the court *a quo* stated:

> "The concession by the case manager in this matter cannot stand because it amounted to an attempt (innocently or otherwise) to abandon the tax collection responsibility by the respondent based on a mistaken view by its officers that the relevant period was covered by prescription when in fact such prescription is not applicable.
>
> Any agreement arising from the concession which the appellant may seek to hold the respondent to would be unlawful it being contrary to statute. Such agreements are unenforceable in terms of *ex turpi causa non oritur actio* principle. This principle is absolute and admits of no exception. In the premises, the bargain which the respondent is being held to by the appellant is one which it could not lawfully give.

The subsequent assessments which were issued on 9 October 2014 were the first validly issued assessments. Their validity cannot be impugned on the basis of initial notices of assessment which are a nullity at law. The fact that they are inscribed "Original" or "amended" assessment is irrelevant. The court looks at the substance of these assessments and not the form.

Section 62 (6) of the Act does not apply to these facts because this provision presupposes an objection noted against a valid assessment. … It does not create any waiver or estoppel or forbearance by the respondent in favour of a tax payer entitling the tax payer to hold respondent to an unlawful bargain. Whether or not the respondent purports to have 'effectively nullified' the Zimbabwean dollar assessment is not the point. What nullified the Zimbabwean dollar assessments are the provisions of para 11 to the 22nd Schedule of the Act. The respondent, as a creature of statute, could only recognise such nullification. It could not amend a nullity. The respondent cannot act outside its enabling statutes. This is not a case where a valid assessment was wrong in terms of minor details. It is a case where an 'assessment' was issued contrary to the peremptory provisions of the law and was therefore null and void *ab initio*, with this finding the issue of prescription does not arise. In light of this finding I deem it unnecessary to deal with the alternative argument submitted by the appellant on the engagement of s 47 of the Act. The issue of re-opening the assessment does not arise on account of the above finding."

[40] The court *a quo* thus correctly found that the assessments for the tax years 2003 to 2006 were invalid. The first ground of appeal thus has no merit.

[41] It also follows from the above that the appellant's second ground of appeal cannot stand either. The appellant's contention is that the court *a quo* erred in law in holding that s 62 (6) of the Income Tax Act is not engaged in circumstances where a taxpayer's objection was against an incorrect tax assessment by the respondent. The reasoning of the court *a quo* was that the section is not applicable to the facts of the matter because the provision presupposes an objection against a valid assessment and the assessments *in casu* were not merely incorrect but were nullities.

[42] Section 62 (6) reads:

"If an objection to an assessment or the determination of an objection of tax has been allowed, the assessment or reduction as reduced, increased or altered shall, subject to any adjustment made in terms of section forty-seven of the decision of a court on appeal determined in pursuance of this Part, be final and conclusive."

[43] The court *a quo*'s reasoning is sound as it is borne out by a close look at s 62(6) (*supra*). *In casu*, the supposed determination did not reduce, increase or alter tax in favour of or against the appellant. Furthermore, there was nothing final and conclusive about the respondent accepting that it had not made an assessment in terms of the law. Finally, the letter "allowing" the objection did not contain any figures. It merely contained an undertaking to assess tax after an adjustment was made to the respondent's system. Such cannot be said to be final and exclusive in terms of s 62 (6) of the Act. The second ground of appeal is baseless and cannot stand.

**2. Whether or not the respondent could not adjust additional profit tax under s 47 of the Act.**

[44] The appellant argued that the court *a quo* erred in holding that the respondent could adjust additional profit tax assessments pursuant to s 47 or any other provisions of the Act. It maintains the view that once the tax payer has made a wrong return for purposes of income tax in terms of the 22nd schedule, that consequently affects additional profit tax hence there cannot be any penalty imposed on additional profit tax. In dealing with this ground of appeal, it is important, if not imperative, to take into account the definition of "tax" in the Income Tax Act. Section 2 of the Act defines "tax" as "any tax or levy leviable under the Act". It is not in dispute that additional profit tax is leviable under the Act in terms of section 33 which states:

"33 Additional profits tax in respect of special mining lease areas

(1) There shall be charged, levied and collected throughout Zimbabwe for the benefit of the Consolidated Revenue Fund an additional profits tax, determined in accordance with the Twenty-Third Schedule, in respect of the first accumulated

net cash position and the second accumulated net cash position, as so determined, in respect of any special mining lease area for any year of assessment."

Furthermore, where an "original" assessment is issued on the basis of incorrect information supplied by the tax payer and this is uncovered, the respondent is at large to adjust it to ensure that it reflects the actual tax due and owing to the fiscus.

[45] From the given definition of tax in the Act and the provisions of s 33, it is evident that additional profit tax is tax and therefore it is taxable under the Act. Once it has been established that additional profit tax is tax in terms of the Act, it therefore follows that the tax must be paid. In addition, s 46 (1) of the Act requires a tax payer to make payment in respect of additional tax. It provides as follows:

**"46 Additional tax in event of default or omission**
(1) A taxpayer shall be required to pay, in addition to the tax chargeable in respect of his taxable income—

(a) if he makes default in rendering a return in respect of any year of assessment—

(i) an amount of tax equal to the tax chargeable in respect of his taxable income for that year of assessment; or
(ii) an amount equal to the maximum fine prescribed in subsection (1) of section eighty-one for the offence of failing to submit a return; whichever is the greater"

[46] In para 31 of the respondent's counsel's heads of argument the following is aptly highlighted:

"The court correctly found that section 46 (1) of the Act which requires the tax payer to make a payment in respect of additional tax applied to the appellant. This is particularly so if regard is had to the fact that there had been a misrepresentation by the appellant which affected the determination of income tax due in terms of the 22nd Schedule, which consequently would have affected the assessment of additional profit tax in terms of the 23rd Schedule of the Act. It is important to mention that it is the taxpayer who submits information for after profit tax computations for purposes of assessments. Where such information is incorrect, the appellant cannot cry foul when the respondent uncovers same and computes the actual tax payable."

[47] Section 46 thus enjoins the appellant to pay such tax in addition to the tax chargeable in respect of its taxable income. The furnishing of wrong information in respect of income tax, which consequently affects after profit tax is the basis of the applicability of s 46 to the later tax. The third ground of appeal is thus devoid of any merit.

[48] The appellant furnished incorrect information to the respondent by misrepresenting its capital redemption allowances that had been claimed. Having misrepresented such, the provisions of s 46 (1) and s 47 of the Act were correctly invoked to compute the actual tax payable.

Section 47 of the Act states that:

**47 Additional assessments**

"(1) If the Commissioner, having made an assessment on any taxpayer, later considers that—

(a) an amount of taxable income which should have been charged to tax has not been charged to tax; or

(b) in the determination of an assessed loss—

(i) an amount of income which should have been taken into account has not been taken into account; or

(ii) an amount has been allowed as a deduction from income which should not have been allowed; or

(c) any sum granted by way of a credit should not have been granted; he shall adjust such assessment so as to charge to tax such amount of taxable income or to reduce such assessed loss or to withdraw or vary such credit, and if any tax is due either additionally, or alternatively, call upon the taxpayer to pay the correct amount of tax: Provided that—

(i) no such adjustments or call upon the taxpayer shall be made if the assessment was made in accordance with the practice generally prevailing at the time the assessment was made;

(ii) subject to proviso (i), no such adjustment or call upon the taxpayer shall be made after six years from the end of the relevant year of assessment, <u>unless the Commissioner is satisfied that the adjustment or call is necessary as a result of fraud, misrepresentation or wilful non-disclosure of facts, in which case the adjustment or call may be made at any time thereafter;</u>(my emphasis)

(iii) the powers conferred by this subsection shall not be construed so as to permit the Commissioner to vary any decision made by him in terms of subsection (4) of section sixty-two.

(2) Sections forty-five and forty-six shall apply to any assessments or additional assessments or to a call for the payment of any additional sum in respect of a credit made by the Commissioner under the powers conferred by subsection (1)"

[49] It is clear from the above provision that the Commissioner has a right to re-open audits after the lapse of the six-year period where the Commissioner is satisfied that the taxpayer's returns did not disclose the correct amount or amounts for income tax purposes. However, in terms of part (c) (ii) above, the Commissioner can only do that after he or she is satisfied that there is, on the part of the taxpayer, evidence of fraud, misrepresentation or wilful non-disclosure of facts. *In casu*, the Commissioner found that there was wilful non-disclosure by the appellant through the manner in which the capital redemption allowances had been claimed.

[50] The Commissioner was therefore entitled to re-open the assessments for the year 2001 to 2006 as well as for the period of 2014. Thus prescription only applies in circumstances where the Commissioner is satisfied that there was no material disclosure of all the relevant information by the tax payer. The Commissioner is otherwise not only automatically allowed, but obliged to disregard prescription where there is proof of material non-disclosure of information, as happened in this matter.

[51] In the circumstances the court *a quo* cannot be faulted for finding against the appellant as it did. The finding by the court *a quo* was therefore correct that if any return in relation to additional profit tax is made in terms of para 5 of the 23rd schedule, which does not disclose information which affects the quantum of the additional profit tax, a penalty, that is, additional tax, is chargeable. The court *a quo's*

finding cannot be faulted and grounds of appeal 3 and 4 cannot stand for lack of merit.

[52] Grounds of appeal 5, 6 and 7 need not detain this Court much. In this regard I can do no better that quote para 35 of the respondent's head of argument:

> "These three grounds relate to the penalty of 30% imposed on the appellant by the respondent. The court was correct in stating that it conducts a rehearing of the matter. That, however, does not mean that the court was obliged to alter the penalty which the respondent had imposed on the appellant. It was for the appellant to convince the court by way of evidence, that there was some justification for reducing the penalty from 30% to 5%. Apart from referring to a different matter between the same parties where a 5% penalty was imposed, nothing else was done by the appellant to justify the imposition by the court of a lesser penalty. It was common cause that the causes of action in the present case and the other case where 5% penalty was imposed were different."

Furthermore, at paragraph 36:

> "The adversarial system of legal proceedings obtains in our jurisdiction. The parties are responsible for presenting evidence in support of their respective cases. The court is enjoined, as a matter of principle, to place reliance on the evidence as presented by the parties in arriving at a decision. It is not empowered to play a part in the gathering of evidence or to call upon a party to supply more evidence which the court or tribunal then relies upon in making a determination."

[53] In my view, counsel ably and aptly disposed of the said three grounds. In addition to the above another significant factor that was also taken into consideration by the court *a quo* was the fact that the respondent had, in its discretion, reduced the penalty from 100 per cent to 30 per cent. It found no misdirection on the respondent's part in exercising its discretion. No fault, in my view, can be laid at the court *a quo*'s door in coming to the conclusion that it made.

[54] The appeal has no merit. The prayer for costs by the respondent is justified.

**DISPOSITION**

It is accordingly ordered as follows:

The appeal is dismissed with costs.

**MAKONI JA** I agree

**MATHONSI JA** I agree

*Dube, Manikai & Hwacha*, appellant's legal practitioners

Zimbabwe Revenue Authority, Legal & Corporate Services Division, respondent's representative