S T (PVT) LTD
versus
ZIMBABWE REVENUE AUTHORITY

FISCAL APPEAL COURT
KUDYA J
HARARE, 20 May 2015 and 10 November 2016

Value Added Tax Appeal

D Ochieng, for the appellant
T Magwaliba, for the respondent

KUDYA J: This appeal concerns the efficacy of the value added tax assessments issued by the respondent against the appellant on three different dates in 2010 in respect of each of the 2009 calendar months. The appeal seeks to determine two questions. The first is whether by registering the appellant for value added tax in 2010 the respondent elected in terms of s 23 (4) (b) of the Value Added Tax to claim such tax prospective to that year or retrospective from that year to the date on which liability for such registration arose. The second is whether the appellant was in any event not liable for VAT by virtue of the export processing zone status conferred upon it by the Zimbabwe Investment Authority Act [*Chapter 14:30]*.

The appeal proceeded in the normal way until the day of hearing when the parties filed an amended statement of agreed facts and dispensed with oral evidence as initial envisaged at the pre-trial hearing of 8 July 2014. At that pre-trial hearing the parties filed a purported statement of agreed facts that however contained a dispute of fact and recitals of the law. The dispute was whether or not the respondent refused to issue the appellant with a tax clearance certificate ITF 263 required in terms of s 34C of the Revenue Authority Act [*Chapter 23:11*] for the second half of 2010 until the applicant had begun to submit VAT returns using Form VAT 7 instead of Form VAT 10. This dispute of fact was not resolved in the amended statement of agreed facts. Rather the parties agreed to disagree on this dispute and in addition raised another dispute on whether officials of the respondent declined to

register the appellant as a value added tax operator soon after the repeal of the Export Processing Zones Act [*Chapter 14:07*]. The amended statement of agreed facts repeated the legal recitals of the initial statement and to that extend negated the true facts disclosed in the pleadings filed on appeal.

The amended statement of agreed facts

The amended statement of agreed facts constituted the statement of agreed facts that the parties urged upon me as the basis for determining the appeal.

1. The appellant carries on business as a manufacturer of cigarettes mainly for export. It does and has always done so from a location that in 2002 was declared to be an export processing zone in terms of the Export Processing Zones Act [*Chapter 14:07*].
2. Section 65 of the Customs and Excise Act [Chapter 23:02] provides as follows:

> "**65 Goods deemed to be exported and imported**
> For the purposes of this Act—
> (a) goods which are taken from the customs territory and brought into an export processing zone shall be deemed to be exported from Zimbabwe; and
> (b) goods which are brought out of an export processing zone and taken into the customs territory shall be deemed to be imported into Zimbabwe; and
> (c) goods which are brought from outside Zimbabwe directly into an export processing zone shall be deemed not to have entered Zimbabwe; and
> (d) goods which are manufactured or produced in an export processing zone shall be deemed to have been manufactured or produced outside Zimbabwe."

The Value Added Tax Act [Chapter 23:12] similarly recognises the status of export processing zones by prescribing the following definition of export country in s 2:

> "export country means any country other than Zimbabwe and includes any part of Zimbabwe declared in terms of subsection (1) of section 20 of the Export Processing Zones Act [*Chapter 14:07*], to be an export processing zone."

3. Accordingly, the respondent accepts that until 1 January 2007 products produced in an export processing zone are deemed to have been manufactured outside Zimbabwe. It is on that basis that the appellant was not liable to register as a registered operator and submit returns in accordance with the Value Added Tax Act [*Chapter 23:12*].
4. With effect from 1 January 2007, the Export Processing Zone Act was repealed by s 34 (1) of the Zimbabwe Investment Authority Act [*Chapter 14:30*]. Section 34 (2) of the Zimbabwe Investment Authority Act reads:

> " Notwithstanding subsection (1), but subject to section 37, any certificate or licence issued or anything done or commenced or any decision made in terms of the Zimbabwe Investment Centre Act[Chapter 24:16] or the Export Processing Zones Act [Chapter 14:07], which

immediately before the fixed date, had or was capable of acquiring effect shall continue to have or be capable of acquiring, as the case may be, effect as if it had been done , issued, commenced or made in terms of this Act."

5. Section 37 of the Zimbabwe Investment Authority Act in turn provides that holders of licences issued under the Export Processing Zones Act were to apply to the Zimbabwe Investment Authority for the issuances of licences in terms of the Zimbabwe Investment Authority Act within six months of the effective date.
6. The appellant timeously applied for the issuance of a licence in terms of the Zimbabwe Investment Authority Act. The investment licence issued expressly states that it is issued in replacement of the appellant's certificate under the Export Processing Zones Act. Accordingly, the recognition of the appellant's operation by the Export Processing Zones Authority and then the Zimbabwe Investment Authority was uninterrupted.
7. In 2008, the appellant informed the respondent of its registration with the Zimbabwe Investment Authority and enquired whether it would be required to register for value added tax in respect of local sales. The appellant maintains that it was advised not to do so, but the respondent's officers have no recollection of this engagement. The respondent continued to accept refund claims from the appellant in Form VAT 10 throughout 2007 and 2008.
8. During 2009 the appellant was constantly paying value added tax in respect of the raw materials that it used in manufacturing its products. It would therefore seek to recover the input tax thus paid by making appropriate returns to the respondent. The appellant routinely submitted its refunds claims to the respondent in Form VAT 10. The respondent accepted these and sent audit teams to verify the purchases and refunded the VAT found to have been paid on raw materials.
9. In 2010 the respondent unilaterally registered the appellant as a registered operator and allocated and communicated a registration number to it, but did not deliver a certificate. Having so registered the appellant, the respondent would no longer accept refund claims in Form VAT 10 and insisted on returns in Form VAT 7.
10. In mid-2010, the appellant approached the respondent for a tax clearance certificate in Form ITF 263 in terms of s 34 C of the Revenue Authority Act for the period July to December 2010. Without this certificate, payments to the respondent from its clients would be subject to a 10% withholding deduction. Although the respondent has no

record of having done so, the appellant maintains that the respondent refused to issue the ITF 263[1] unless and until the Appellant had rendered returns in Form VAT 7 for 2010. The appellant then rendered returns in Form VAT 7 for 2010 and subsequent years.

11. At some time in 2010, the respondent claimed VAT for 2009 from the appellant. The appellant contends that the claim is not sustainable because given that its operation is within an export processing zone, the appellant was not liable to pay VAT for the sales recorded in 2009 and was not a registered operator. The respondent maintains that the repeal of the Export Processing Zones Act two years earlier had the effect of terminating all incidents of the status of export processing zones, and that the claim is therefore proper.

12. The fundamental point in contention in the appeal is therefore whether or not the appellant is liable to pay VAT on sales during the year 2009.

The amended statement of agreed facts falls short of disclosing the facts as they appear in the pleadings filed on appeal. It is to those pleadings that I extract what I regard to be the facts in this matter.

The facts

These are derived from the notice of appeal, the Commissioner's reply, the documents discovered and filed by both parties and the amended statement of agreed facts.

The appellant is a tobacco processing and cigarette manufacturing company registered in terms of the laws of Zimbabwe. On 10 August 2002 its place of business was declared to be an export processing zone in terms of the Export Processing Zones Act [*Chapter 14:07*]. The Value Added Tax Act came into force on 1 January 2004. It encompassed an export processing zone registered in terms of s 20 (1) of the Export Processing Zones Act into the definition of export country. Together with Part VI and especially s 63 and 65 of the Customs and Excise Act it conferred certain tax benefits on an export processing zone. As an export processing zone company the appellant did not pay VAT in respect of any services or goods as these goods and services were regarded as such supplies from outside Zimbabwe. However, any goods manufactured in the export processing zone that were disposed of in

[1] Stated in e-mails of the compliance officer and head of supply of appellant of 22 June and 2 July 2010 pp13-14 of appellant's discovered documents and in letter of 26 January 2012 by appellant's legal practitioners

Zimbabwe were considered imports and liable to VAT on importation in terms of s 6 (1) (b) of the VAT Act.

The Export Processing Zones Act was repealed in its entirety and substituted by the Zimbabwe Investment Authority Act on 1 January 2007. On 17 May 2007[2] the appellant was granted an investment licence number 000130 by the Zimbabwe Investment Authority, which replaced the Export Processing Zones Authority investment licence number 000218 issued on 10 September 2002. The issue of the replacement licence was backdated to 10 September 2002 and was to expire on 9 September 2012[3]. Three special conditions were attached to the licence. The first was that the appellant would not be permitted to engage in any other activity other than tobacco processing and cigarette manufacturing without the written authority of the Zimbabwe Investment Authority. The second was that it would abide by the laws and regulations governing investments and the third was that it was accredited as an Export Processing Zone Company. This licence was replaced on 6 August 2012 by licence number 001526 for an indefinite duration on the same special conditions as in the preceding licenses[4] notwithstanding the mandatory provisions of s 16 of the new Act which prescribes that every licence shall be "valid for a definite period".

In regards to value added tax, correspondence between the parties show that all local sales were zero rated as they were treated as exports to Zimbabwe[5]. The position changed after the meeting of 12 September 2008[6] between the respondent and the Ministry of Finance on the legal implications of the repeal of the Export Processing Zones Act. In a memorandum of 30 September 2008 the Head Technical Services for the respondent disclosed the results of that meeting. All export processing zone companies became "former EPZ companies". The respondent withdrew all tax benefits enjoyed by these companies such as the s 63 of the Customs and Excise Act rebate of duty and imposed strict monitoring mechanisms employed on local manufacturers. The directives in the memorandum were implemented against the appellant by the Harare Port Manger of the respondent on 6 October 2008.

Insofar as VAT was concerned, on 25 August 2009 the respondent's Client Care Unit Manager rejected claims for value added refunds from the appellant on the ground that it ceased to be an export processing zone company on the repeal of the Export Processing Zone

[2] P 8 of discovered documents letter from CEO of ZIA to respondent of 19 April 2013
[3] P 1 of appellant's discovered documents
[4] P 2 of appellant discovered documents
[5] P3 of respondent's bundle: letter of 22 July 2010 from appellant to respondent and p 6 of appellant's discovery and para 3 of letter of objection,
[6] P 3-4 and 5 of appellant's discovery documents

Act. He directed the appellant to claim input tax in terms of s 44 of the Value Added Tax Act on form VAT 7. The intervention of the Zimbabwe Investment Authority in favour of the restoration of the tax benefits of 3 September 2009 and 19 April 2013[7] failed to yield any positive results. Again, the valiant attempts of 16 October 2009 by the principal officer of the appellant failed to persuade the Client Care Unit Manager to reverse his decision of 25 August 2009. That form VAT 10 refund claims were rejected in 2009 and not in 2010 as claimed in the statement of agreed facts is further confirmed by the appellant's letter to the respondent of 22 October 2010.[8]

On 8 April 2010 the respondent raised VAT assessments against the appellant for the months of December, March, April, and May 2009 and on 8 May 2010 for July, and September 2009 and on 26 July 2010 raised further notices of assessments for June, August, October and November 2009[9] under VAT number 10043466.

On 25 January 2011 the Head of Supply Chain for the appellant wrote to the respondent's Regional Manager Harare. He sought a tax clearance certificate for the period January to July 2011 and requested time to settle excise duty arrears for 2010 of US$ 2 457 204.00 and VAT arrears of US$407 360.00 to 4 February 2011. On the 2009 VAT liability he revealed his exasperation in dealing with the respondent in these words:

> "Your office did raise the issue of a supposed VAT obligation for 2009 and our humble position and legal opinion as submitted to your good office is that the amount arising from Zimra calculations will be contested on the grounds that we are still enjoying all benefits arising from our EPZ status and the provisions of the ZIA Act section 37 which clarifies the extent of our benefits. We wish to have this resolved in good faith. As a company we wish to have a cordial relationship with all state entities and trade authorities in so far as our corporate activities are concerned. The total VAT liability relating to the 2009 period which you are referring to amounts to $1 639 934 and we indicated to your good offices that we never levied or collected this amount on the basis of advice given by Zimra that EPZ companies and their successors were not allowed to register for VAT. We thus find it extremely paradoxical that on following the advice of Zimra authorities, we now find ourselves in this untenable position from the same authorities." [10]

In response, on 31 January, the Regional Manager maintained that the sales in Zimbabwe by former export processing zone companies were no longer zero rated and requested settlement of all outstanding value added taxes. The appellant was again urged to settle all arrears by letter of 28 November 2011.

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[7] P 8 of appellant's discovery
[8] P3-8 of respondent's bundle
[9] P 21-30 of respondent's bundle
[10] P 2 of respondent's bundle

On 15 December 2011 the respondent wrote a letter which was not made part of the proceedings by either party but was responded to by the appellant's legal practitioners of record on the following day. This letter of 16 December 2011 was adjudged by the appellant to be the letter of objection. The letter of objection[11] indicated that the respondent determined that the appellant was liable for VAT from 1 January 2007 as a result of the repeal of the Economic Processing Zones Act. In the letter, the appellant contended that in terms of s 34 (1) and (2) and 37 (1) of the Zimbabwe Investment Authority Act the legislature preserved all the rights and obligations including the tax benefits derived from the Value Added Tax Act of the companies operating in export processing zones once they were issued with a licence by the Zimbabwe Investment Authority. And in the alternative, that the respondent was bound by its decision to zero rate the appellant in 2009 as such decision was made before the fixed date contemplated by s 34 (2) of the Zimbabwe Investment Act of 1 January 2007. The appellant further suggested that the respondent was estopped by both word and conduct from claiming such VAT in 2009 as the appellant had relied on the words and conduct of the respondent in eschewing charging and collecting VAT from those local purchasers who bought its products.

On 25 January 2012 the appellant sought the suspension of the payment of VAT pending determination of the legal issues raised in its letter of objection to the respondent and determination of the objection. The determination was made on 16 February 2012. The respondent maintained that the repeal of the Export Processing Zones Act deprived the appellant of zero rating and attracted VAT at the prescribed rate. It insisted that s 34 (1) repealed both the EPZ Act and the Zimbabwe Investment Centre Act and accorded the Zimbabwe Investment Authority powers of the former Export Processing Zones Authority on the licencing of investors. The repeal extinguished all privileges enjoyed by the former Export Processing Zones companies. It maintained that the Zimbabwe Investment Act did not provide for any special dispensation to those companies that fell under the purview of the new authority as s 37 merely governed the conditions of registration of the former Export Processing Zones companies and the six month prescription period allowed for the smooth transfer of companies from Export Processing Zones Authority to the Zimbabwe Investment Authority. It further determined that the savings provisions did not incorporate the Value Added Tax Act benefits formerly accorded to Export Processing Zone entities. In the result

[11] Appellant stated it was a letter of objection in its letter of 26 January on p 9 of discovered documents

the respondent treated the appellant as it would of any other value added tax locally registered operator.

It was common cause that the appellant paid VAT for the years 2010, 2011 and 2012. The appellant filed its notice of appeal on 14 March 2012 to the Administrative Court. It was directed to do so in this Court by the respondent by letter of 12 April 2012. The appellant filed the notice of appeal on 19 April 2012 well outside the 30 day period prescribed by s 33 (2) of the Value Added Tax Act. The late filing of the notice was condoned by the Commissioner and the matter proceed on appeal. At the pre-trial hearing of 8 July 2014, three issues were agreed and the parties were directed to file their summaries of evidence and to make discovery within a specified time frame. The parties filed a statement of agreed facts which however raised a specific dispute of fact and undertook to attempt to resolve that dispute before the appeal was heard. On the date of appeal they filed an amended statement of agreed facts. The parties dispensed with the calling of evidence and proceeded to make oral argument.

The issues

The three issues referred on appeal where:

1. Whether the respondent refused to issue appellant tax clearance certificates in terms of s 34C of the Revenue Act for the second half of 2010 until the appellant had begun to submit returns in form VAT 7;
2. Whether or not the appellant was liable to pay VAT on sales during April 2011;
3. Whether the respondent is estopped from recovering payment of assessed 2009 VAT;

Resolution of the issues

I must hasten to admit that the second issue was referred on appeal in error as it did not form part of the objection or notice of appeal. The appellant's submissions on appeal are in terms of s 33 (3) (a) of the Act circumscribed by the grounds of objection raised in its letter of objection unless the Commissioner consents to amendment or the Court grants the amendment on good cause shown prior to or at the hearing. The appellant did not seek the Commissioner's consent nor make application for any such amendment. Mr *Magwaliba* contended that the Mr *Ochieng* had abandoned the issues contained in the grounds of objection. I agree that he did abandon the first issue in its entirety and I think for good reason. In terms of s 34C (1) (e) as read with (2) the Commissioner has the power to make the

issuance of the tax clearance certificate conditional upon the submission of any return that the taxpayer is obliged to make by any of the Scheduled Acts and the Value Added Tax Act forms part of such Scheduled Acts that are listed in the First Schedule to the Revenue Authority Act. However, for the purposes of this appeal, the appellant failed to lead any evidence to establish that issue on a balance of probabilities.

In regards to the third issue I accept that it was absorbed into the issue submitted by consent as para 12 of the amended statement of agreed facts, that is, whether or not the appellant was liable to pay value added tax in 2009. The third issue was therefore addressed by Mr *Ochieng* when he submitted firstly, that the value tax added tax benefits provided in the Value Added Tax Act were preserved when the Export Processing Zones Act was repealed and secondly that the respondent was estopped by both word [the alleged verbal assurance that the appellant as an export processing zone entity was not obliged to register for VAT] and conduct [allowing use of form VAT10 to claim VAT refunds applicable to an Export Processing Zones company].

Mr *Ochieng* contended that the appellant was not liable to value added tax for two reasons. The first was that it was not registered as an operator in 2009 and the second was that it remained an Export Processing Zone Company in 2009 despite the repeal of the Export Processing Zones Act with effect from 1 January 2007. Mr *Magwaliba* contended that the appellant was liable to value added tax. He argued that the Commissioner merely registered the appellant in 2010 but did not do so from 2010. Rather he did so retrospectively from 2007 but did not assess VAT for 2007 and 2008 for the reason that such VAT was payable in Zimbabwe dollars, which were no longer functional in 2010. Otherwise had the date of registration been from 2010 the respondent would not have been able to claim 2009 VAT from the appellant.

I proceed to determine whether the appellant was exempted from paying value added tax in 2009 by non-registration. Mr *Ochieng* contended that the appellant would be liable for VAT on the basis of s 6 (1) (a) of the Value Added Tax which restricts payment to the supplies made by a registered operator. He argued that as the appellant was in terms of para 9 of the agreed facts unilaterally registered in 2010 it would not have been liable for VAT on the supplies made in 2009.

A registered operator is defined in s 2 of the Value Added Tax Act as:

"registered operator" means any person who is or is required to be registered under this Act:

> Provided that where the Commissioner has under section *twenty-three* or *fifty-three* determined the date from which a person is a registered operator that person shall be deemed to be a registered operator from that date."

The Value Added Act stipulates two methods of registering a supplier. The first is by voluntary application made by the supplier in terms of s 23 (2) or (3) and the second is by compulsory registration by the respondent in terms of s 23 (4) (b) of the Act. The appellant did not volunteer registration but was compulsorily registered by the respondent. Section 23 (4) (b) provides that:

> "Where any person has—
> (*a*) ……..not applicable; or
> (*b*) not applied for registration in terms of subsection (2) and the Commissioner is satisfied that person is liable to be registered in terms of this Act, that person shall be registered operator for the purposes of this Act with effect from the date on which that person first became liable to be registered in terms of this Act:
> Provided that the Commissioner may, having regard to the circumstances of the case, determine that person to be a registered operator from such later date as the Commissioner may consider equitable."

Both Mr *Ochieng* and Mr *Magwaliba* were agreed on the import of s 23 (4) (b) as read with the definition of registered operator in s 2 of the Value Added Tax Act. They correctly submitted the Commissioner can compulsorily register a recalcitrant operator retrospectively from the date on which such an operator became due for registration or prospectively to the date of compulsory registration provided that he is satisfied that there are equitable grounds for the prospective registration. Their point of departure was on whether the respondent registered the appellant with retrospective effect from or prospectively in 2010. Mr *Ochieng* contended that in the exercise of its s 23 (4) (b) powers the respondent registered the appellant with effect from 1 January 2010 and not from any prior date and was in accordance with the decisions of this court in *ITC 1674* (2000) 62 SATC 116 at 128 and *ITC 1692* (2000) 62 SATC 508 at 516-517 bound by that election. He relied on para 9 of the statement of agreed facts in which it was common cause that:

> "In 2010 the respondent unilaterally registered the applicant as a registered operator and allocated and communicated a registration number to it but did not deliver a certificate. Having so registered the appellant, the respondent would no longer accept refund claims from Form VAT 10 and insisted on returns in Form VAT 7."

The onus, obviously, lies on the appellant to positively establish on a balance of probabilities that the Commissioner imposed value added tax from 2010. Para 9 of the statement of agreed facts does not establish that the respondent registered the appellant from 2010. It merely establishes that the respondent unilaterally registered the appellant in 2010.

There is simply no evidence to show that the respondent invoked the proviso to s 32 (4) (b) of the Act either of its own accord or at the instance of the appellant. Mr *Ochieng* suggested that the respondent must have registered the appellant prospectively on the equitable ground that the appellant had not charged and collected any output tax from those local customers who purchased its products. In my view, there are no positive facts from which such a conjecture may be derived. In any event, such a contention runs contrary to s 69 (1) of the Act, which provides that:

> "**69 Prices deemed to include tax**
> (1) Any price charged by any registered operator in respect of any taxable supply of goods or services shall for the purposes of this Act be deemed to include any tax payable in terms of paragraph (*a*) of subsection (1) of section *six* in respect of such supply, whether or not the registered operator has included tax in such price."

In my view, the failure by a registered operator to include VAT in taxable supplies would not by operation of law constitute an equitable ground for the very reason that such VAT is subsumed in whatever price is charged by such an operator. I therefore agree with the submission advanced by Mr *Magwaliba* that s 23 does not disentitle the respondent from antedating the assessment of value added tax from the date of registration. In any event, a plethora of case law culminating in our very own Supreme Court case of *Commissioner of Taxes* v *Astra Holdings (Pvt) Ltd* 2003 (1) ZLR 417, which overruled *ITC 1674* and is binding on me, hold that the Commissioner does not have power to waive taxes which are due and if he does so he cannot be held to his word. Malaba JA, as he then was, stated at 428B-C:

> "In my view such an arrangement [by a revenue officer purporting to contract or represent to a taxpayer not to assess unpaid tax which is due to revenue] would be null and *void abinitio*. It is a bargain the Commissioner could not make at law because it would have the effect of being in breach of his statutory duty to collect tax which is due to revenue. It is one thing for revenue to enter into an arrangement with a taxpayer on how, in the exercise of its managerial powers, it will collect tax, but it is another for it to seek to decide that a particular tax imposed by Parliament is not due from a taxpayer when in fact it is and in so doing disclaim the right to the tax and abandon the statutory power to collect it."

In *Namex (Pty) Ltd* v *Commissioner for Inland Revenue 1*992 (1) SA 761 (C) at 772; 54 (1992) SATC 307 at 318-319 Selikowitz J stated that:

> "It is a long and firmly established principle of our law that a public official entrusted with the duty of collecting taxes cannot forego taxes due to the State or ay part of them."

In *ITC No 1674, supra,* at 119 Smith J stated that:

> "Adv *de Bourbon* conceded that the official charged with gathering revenue by way of income tax or customs duties had no power to decide whether or not to gather the revenue in a

> particular case – see *Collector of Customs v Cape Central Railways Ltd* (1888) 6 SC 402. The law as expressed by De Villiers CJ in that case has been applied in many subsequent cases, examples being *Commissioner for Inland Revenue v The Master & Anor* (1957) 21 SATC 251 at 260 and *Foroma v Minister of Construction and National Housing and Anor* 1997 (1) ZLR 447 (HC)"

And he continued at p 121:

> "In *Acting Minister of Industry & Anor v Tanaka Power (Pvt) Ltd* 1990 (2) ZLR 208 (S) at 218 McNally JA said–
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> > 'promises, incompetently made and unfeelingly withdrawn, cannot bind the Treasury or the Government.'
>
> It seems clear from these authorities that the claim of estoppel cannot be sustained. The principle underlying the decision referred to above is that the Executive has no power to grant dispensations from or to suspend or waive the laws made by Parliament. It is a principle of public or constitutional law of the first importance not merely a rule of tax law and it is off course a principle we have inherited from and which we share with English law where it has been firmly established since the Bill of Rights of 1688."

It would be remiss of the Commissioner to abdicate his responsibility and seek to untax the appellant on the ground suggested by Mr *Ochieng* in oral argument. WESSELS CJ in *Commissioner for Inland Revenue* 1933 AD 242 at 248 put it thus:

> "It seems clear to me that the appellant has no choice in the matter. He must assess according to the provisions of the Act. The principle that an officer appointed to carry out the provisions of the Revenue Act cannot remit taxation or money due to the Crown is clear (*Collector of Customs v Central (Cape) Railways Ltd* 6 SC 402.) In *Undertone and Halstead v Birrel* (1932) 1 KB at 279 Rowlatt J said:
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> > 'In order to clear the ground I may point out at once that there is no question of the Crown having been bound by the first action of the inspector by mere contract. No officer has the power to do that.'"

The submission taken by Mr *Ochieng* runs contrary to clear legal precedent and is therefore devoid of merit. The respondent was empowered to accept and approve form VAT 10 claim refunds from export processing zone entities by the provisions s 19(1) (b) of the Value Added Tax (General Regulations) SI 273/2003 as read with s 44(9) of the Act. The respondent was enjoined to pay the claims for refund submitted within 12 months of the original invoice once the export processing zone operator produced a valid certificate of registration issued in terms of the Export Processing Zones Act together with the list of the panel of signatories approved by the respondent, a duly completed refund claim form VAT 10 and the relevant tax invoice, debit and credit notes and schedule of the relevant documents. It is clear to me on the authority of the *Commissioner of Taxes* v *Astra Holdings (Pvt) Ltd*, (*supra*), at 426A that such an acceptance constituted an error of law and was not, for that reason, binding on the respondent.

In any event notwithstanding the manner in which the appellant obtained the internal and private memorandum of the Head of Technical Services, this document laid the foundation of the respondent's thinking and actions after 12 September 2008. Rightly or wrongly, it took the view that all the tax benefits under all tax heads that derived from the Export Processing Zones Act had been extinguished with effect from 1 January 2007. The correspondence exchanged between the respondent and the appellant of 6 October 2008, 25 September 2009 and 16 October 2009 demonstrated that the respondent considered the repeal of the EPZ Act as the basis for treating the appellant under all tax heads as it would any other locally registered company. When the appellant failed to apply for registration after the exchange of correspondence, the respondent compulsorily registered it in 2010 and issued VAT assessments in April, May and July 2010 in respect of each of the 2009 calendar months. I am satisfied from the conduct of the respondent that it could not have registered the appellant for VAT with effect from 2010 but did so from the time the EPZ Act was repealed. It acted in terms of s 23 (4) (b). The appellant was therefore registered from 1 January 2007 and not from 1 January 2010. I find that the appellant was properly assessed to VAT for 2009 in 2010.

I also found on the documents filed of record that despite the concession that registration was made in 2010, the appellant had a VAT number that preceded 2010. These consist of the document attached to the Commissioner's amended summary of evidence that appeared to show that the appellant was registered on 1 August 2004, the bill of entry of 20 July 2006 which showed that the appellant paid value added tax on a consignment of cigarettes that it exported from its own export processing zone and imported into Zimbabwe; the refund claims that all bore VAT number 10013143 for the 2009[12] calendar year and 2010 calendar year[13].

There is however a further basis upon which the appellant cannot escape VAT liability for 2009 even if it was found to have subsisted as an export processing zone company after the repeal of the EPZ Act. It was common cause that it imported into Zimbabwe the very goods it exported from the economic processing zone. This is confirmed by Part VI and especially s 63, s 65 and s 66 (1) of the Customs and Excise Act [*Chapter 23:05*], which regarded the appellant as a foreign entity. The goods purchased by the appellant from a foreign country into the export processing zone were not liable for excise

[12] P 15-38 of appellant's discovered documents
[13] P 39-62 of appellant's discovered documents

and custom duty. The goods bought in Zimbabwe for use in the export processing zone were deemed to have been exported out of Zimbabwe. The goods manufactured in the zone were considered to have been manufactured in a foreign country. In addition s 2 of the Value Added Tax Act treated the appellant in the same way by equating an export country to an export processing zone. The import of the definition was that all products manufactured by the appellant in the export processing zone were deemed to have been manufactured outside Zimbabwe and as such were not regarded as taxable supplies to which value added tax applied. These products would be exported to and imported into Zimbabwe by the appellant. This is confirmed by the bills of entry in the respondent's bundle[14] of 3 November 2009 and 20 July 2006. However, in terms of s 6 (1) (b) as read with s 6 (2) (b) of the Value Added Tax Act the appellant as the importer was liable for value added tax payments in respect of such importation. The products imported were not zero rated under s 10(1) (a) nor exempted under s11 and 12 (3) of the Value Added Tax Act. The bill of entry dated 20 July 2006 demonstrated that the appellant paid VAT at the rate of 15% for importing into Zimbabwe from its own export processing zone the consignment there described.

I now proceed to determine whether or not the appellant was liable to pay VAT on the 2009 local sales. The relevant statutory provisions in such a determination are the definition of export country in s 2 of the Value Added Tax Act and s 34 and 37 of the Zimbabwe Investment Authority Act [*Chapter 14:30*].

Section 2 of the VAT Act defines export country as:

> "Any country other than Zimbabwe and includes any part of Zimbabwe declared in terms of subsection (1) of section 20 of the Export Processing Zones Act [Chapter 14:07], to be an export processing zone."

Section 20 (1) of the Export Processing Zones Act provided that:

> "(1) The Authority may after consultation with the Minster and the Minister responsible for Finance, by notice in the *Gazette,* declare any area or premises to be an export processing zone, the area of which shall be defined in the notice."

Section 34 of the Zimbabwe Investment Authority Act reads:

> "**34 Repeal of Caps. 24:16 and 14:07 and savings**
> (1) Subject to subsection (2), the Zimbabwe Investment Centre Act [*Chapter 24:16*] and the Export Processing Zones Act [*Chapter 14:07*] are repealed.
> (2) Notwithstanding subsection (1), but subject to section 37, any certificate or licence issued or anything done or commenced or any decision made in terms of the Zimbabwe Investment Centre Act [*Chapter 24:16*] or the Export Processing Zones Act [*Chapter 14:07*] which, immediately before the fixed date, had or was capable of

[14] P14 and 17 of the respondent's bundle

acquiring effect shall continue to have or be capable of acquiring, as the case may be, effect as if it had been done, issued, commenced or made in terms of this Act.

And s 37 provides that:

"37 Persons licensed or certified under repealed Acts

(1) Every holder of a licence issued in terms of the Export Processing Zones Act [*Chapter 14:07*] and every holder of a certificate issued in terms of the Zimbabwe Investment Centre Act [*Chapter 24:16*] shall, no later than six months after the fixed date, apply to the Authority for an investment licence in terms of this Act.

(2) The Authority shall grant an investment licence to every applicant under subsection (1) on the same terms as those granted to the applicant under its previous licence or certificate, unless the Authority is satisfied that the applicant has not complied with the terms of its previous licence or certificate.

(3) Section 23 applies where any person is aggrieved by a decision of the Authority made under subsection (2)."

The Export Processing Zones [EPZ] Act [*Chapter 14:07*] came into force on 4 August 1995 and was administered by the Minister of Industry and Commerce. The declaration of the premises on which the appellant operated as an Export Processing Zone followed by the issuing of the 10 year licence to the appellant on 10 September 2002 were acts done by the Export Processing Zones Authority in terms of s 18 (a) and (b) as read with 20 (1) and s 27 of the EPZ Act. The type of investment and the value of the investment were decisions made by the appellant in terms of the Act. The goods imported into the EPZ, which were in transit, and the requisite exemptions from import and export permits for such goods, the operation of foreign currency accounts outside Zimbabwe, in the EPZ or in Zimbabwe would all constitute actions and decisions that had commenced or had been completed that could be made in terms of s 39, 41 and 44 of the EPZ Act. All these acts and decisions were saved by s 34 (2) as read with s 37 (1) and (2) of the Zimbabwe Investment Authority Act.

The Zimbabwe Investment Centre Act [*Chapter 24:16*] was administered by the Minister of Finance. The Act created an investment committee, which was tasked with the duty to approve and issue investment licences to eligible domestic and foreign investors. The licences were in terms of s 28 valid for two years and were eligible for extension for a period not exceeding three years. In terms of s 34 the Minister of Finance was empowered to publish guidelines for general, specific and other incentives to both domestic and foreign investors. The acts done or commenced or decisions made in respect of these provisions were also saved by s 34 (2) as read with s 37 (1) and (2) of the Zimbabwe Investment Authority Act.

It was common ground that while export country was a place and not a company, the tax benefits were, however, accorded to the company operating from such a place. The whole point in declaring an export processing zone was to exclude such a company from trading in Zimbabwe. The production of such a company was targeted at the export market. The purpose was, *inter alia,* to earn foreign currency. Such a company was permitted to receive foreign currency for goods and services rendered in Zimbabwe and to pay for goods and services it received from Zimbabwe in foreign currency.

The repeal of the two Acts by s 34 (1) of the Zimbabwe Investment Act rendered the two acts inoperative from the date on which the new Act took effect, the fixed date, which fell on 1 January 2007. It must be accepted that the operations of a functional business are organic and as such business acts and decisions are made; other acts that are undertaken remain pending. These acts and decisions together with valid licences and permits were preserved by s 34 (2) as long as the criteria stipulated in s 37 (1) were met. There were two such criteria. The first was that the licensee had to apply to the new Authority for a licence or certificate issued in terms of the Zimbabwe Investment Authority Act within a period of 6 months from 1 January 2007. The second was that the authority approved the application. The only consideration governing rejection or approval was the compliance of the licensee to the terms and conditions of the old licence. The appellant was found compliant and issued with a licence in terms of the new Act. The effect in my view was that it became registered under the new Act. It ceased to be governed by the Export Processing Zones Act for all time.

Mr *Ochieng* contended that s 34 repealed the Export Processing Zones Act [*Chapter 14:07*] and the Zimbabwe Investment Centre Act [*Chapter 24:16*] but preserved all the prevailing rights, privileges, responsibilities and obligations of all export processing zones as from the fixed date until such a time as the licence was cancelled or suspended by further Parliamentary intervention or breach. He submitted that the appellant retained its export processing zone status and as such remained an export country to which the VAT Act applied. Therein lies the weakness of his submission. An export country as defined in the VAT Act by reference to the EPZ Act died on the fixed date and was not resurrected in the new Act. Section 34 (2) and s 37 (1) which constitute the saving provisions of the two repealed Acts simply did not save s 20 (1) of the EPZ Act.

The provisions of the new Act closely mirrored the provisions of the repealed Zimbabwe Investment Centre Act. The provisions of these two substantially similar Acts do not incorporate the provisions of the VAT Act. The words “export processing zone” and

"export country" do not form part of the new Act. The functions of the new Authority are set out in detail in s 7 of the Act. It is mandated to issue investment licences to both domestic and foreign investors and assist the Minister of Industry and Commerce identify sectorial areas for investment by each category of investor. In terms of s 24 the Minister in consultation with the Minister responsible for finance is empowered to issue and implement guidelines on general, special or other incentives for both domestic and foreign investors. It was common cause that no such guidelines were ever issued. I agree with Mr *Magwaliba* that there is no basis to extend the saving provisions of the new Act to the VAT Act. After all the decision to extend value added tax benefits to the appellant were made in terms of the VAT Act and not in terms of either of the repealed Acts. It must also be borne in mind that VAT is a continuing obligation of any supplier or importer and applies every time such a supplier or importer falls within the provisions of s 6 of the Value Added Act. The appellant was therefore correctly assessed to VAT in respect of the 2009 tax year.

In oral submissions Mr *Ochieng* sought waiver of the penalties and interest that were purportedly imposed by the respondent. It does not appear from the pleadings and the documents filed by the parties including the notices of assessments in the respondent's bundle that the respondent ever imposed any penalty and interest on the appellant. I am therefore unable to determine an issue which is not apparent from the papers placed before me.

Costs

The appeal has no merit and is dismissed. In terms of s 10 of the Fiscal Appeal Court Act [*Chapter 23:05*] I am obliged to make no order of costs unless I find the decision appealed against grossly unreasonable or the grounds of appeal frivolous. I do not find the grounds of appeal frivolous.

Disposition

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

Atherstone and Cook, the appellant's legal practitioners