R INVESTMENTS (PVT) LTD ENTERPRISES
versus
THE ZIMBABWE REVENUE AUTHORITY

FISCAL COURT OF APPEAL
ZIYAMBI AJ
HARARE, 19, 20 September & 26 November 2019

Vat Appeal

D. Tivadar, for the appellant
S. Bhebhe, for the respondent

ZIYAMBI AJ:

[1] This is an appeal against the decision of the Commissioner General in terms of s 33 of the Value Added Tax Act [*Chapter 23:12*] ("The Act") communicated to the appellant on 30 October 2017.

[2] The respondent is an administrative body established in terms of the Revenue Act [*Chapter 33:11*]. It is tasked, *inter alia*, with the duty of collecting Value Added Tax in terms of the Act.

Background

[3] The appellant operates in the timber industry. On 1 July 2016, the appellant, represented by its finance manager, concluded an agreement for a loan facility with Chipote Capital Partners Limited, a South African company ("Chipote"). Chipote was represented by its CEO one Wellington Mutombwe Masekesa.

[4] The salient terms of the facility were the following. In terms of Clause 3, the facility was for a loan of USD500 000. Clause 4 provided that the facility represented a line of credit and not a legal commitment to lend, was to endure for 3 years and was to expire on 30 June 2019 unless previously cancelled or extended. Clause 5.1 stated the purpose of the loan-it was to be used for the purchase of raw materials. Clause 5.2 stated the location of "the mortgaged property" to be Stand 11428 Mutare Township of Umtali Township. Clause 6 stated, in a table, the loan "terms and conditions including the pricing". The "total instalment" was USD175 000 due on the 30-6-19 but was payable annually. Interest was at the rate of 5% per annum. The exact drawdown date was to be determined on disbursement of the facility. Clause 7 provided for fees and commissions including the valuation fee and the costs of perfecting the security.

Clause 9 set out the maximum principal amount secured as USD500 000 as well as a description of the security- this time stating the property proposed to be mortgaged to be "in the name of the Appellant". SPECIAL CONDITION 3 provided there were to be no verbal alterations of the contract. There was a glaring absence of dates or amounts or other details of draw down as well as banking or other details for repayment of the loan.

AC Ltd and Chipote

[5] On 4 December 2016, Chipote entered into another agreement. This time with another Zimbabwean company whom I shall call interchangeably AC Ltd or AC. This company is involved in the importation, supply and maintenance of motor vehicles in Zimbabwe. In terms of that agreement, Chipote was to pay AC's vendors based in South Africa (Clause 1) AC would repay Chipote by depositing funds into the appellant's bank account (Clause 2) The total value of the transaction was to be limited to an amount not more than USD500 000 (Clause 3). That was the entire agreement. There were no provisions as to the details of invoices showing the amounts paid to the 'SA vendors', the dates when the amounts invoiced would fall due for payment, nor was there any corresponding agreement by either Chipote or AC with the appellant.

[6] On 21 February 2017, the appellant received a bank transfer of USD94 975 from AC. In its VAT assessment for February 2017, the respondent levied VAT on this amount. The appellant asserts that this amount was a loan payment from Chipote effected *via* AC in accordance with the agreements set out above. It requested a review of the VAT assessment.

Commissioner's decision

[7] Prior to the assessment and on 11 May 17, the Commissioner General by letter of even date, had requested from AC the following:

> "-Information relating to $94 975 you transferred to R Investments (Pvt) Ltd on 21 February 2017;
>
> -Copy/copies of the purchase invoices relating to the abovementioned transaction; and
>
> -written explanation detailing the goods bought or services rendered if there is no explanation on the purchases".

[8] The response by AC is contained in a letter dated 16 May 2017 by the Finance Manager. Paragraphs 2 and 3 thereof are quoted below-

> "[AC] (Private) Limited went into arrangement with Chipote Investments a South African company to pay our foreign creditor (name given) in turn AC has to pay [R Investments (Pvt) Ltd] for a loan they got from Chipote Investments.

> With effect from 1 May 2017 AC will be buying timber for export from [R Investments (Pvt) Ltd] hence this will go through invoicing from [R Investments (Pvt) Ltd] to AC".

[9] On 1 June 2017, the respondent wrote to the appellant requesting, among other things, the following:

> "-Chipote's loan account (with narrations) in AC's records from the date of commencement of the agreement to current on AC's letterhead.
>
> -Chipote's detailed ledger account (with narrations) in AC's records on AC's letterhead from the date of commencement of the agreement; and
>
> -AC's South African vendor detailed statement of account from the date of commencement of the agreement on AC's letter head".

None of these documents were provided.

[10] By letter dated 28 June 2017, the respondent gave its decision. In the letter the respondent acknowledged receipt of:

-Loan agreement between the "parties"

-a list of vehicles imported pursuant to the agreement

-Bills of entry (imports) for vehicles using the facility

-ledger accounts for the appellant

The respondent pointed out that Chipote's loan account in the appellant's books showed a balance of $500 750.93 as at 7 March 2017, yet in the appellant's letter dated 26 May 2017 it anticipated further payments from Chipote during the tenure of the agreement despite the fact that the loan ceiling was $500 000. In addition, the invoice values of the command agriculture vehicles which were imported by AC allegedly using the facility, according to documents submitted by appellant, amount to $756 456. 57.

Further, the appellant's letter of 7 June 2017 stated that "AC and [appellant] have resuscitated their 2006-2007 arrangement starting May 2017" but on 8 December 2016, AC made a deposit of $157 500 in appellant's bank account with the narration "purchase of timber" and on 15 December 2016 another transaction of $52 500 with the narration "trade payment". On 7 July 2016, a further deposit by AC with the narration "timber trading"; and on 29 August 2016, yet another deposit into appellant's Standard Chartered bank account with the narration "cbz rtgs Bedra Enterprises".

The respondent pointed out, in addition, that although the agreement between Chipote and AC was signed on 4 December 2016, the loan account for Chipote submitted by the

appellant to respondent showed transactions which occurred before the 4 December 2016. The respondent explained that after consideration of the above, the transactions between the appellant and AC were considered as 'values considerations' for VAT purposes.

Notice of appeal

[11] Three grounds of appeal were raised by the appellant, namely: -

That the respondent failed to consider and properly evaluate the evidence it had been presented with;

That the respondent predetermined the matter in that it ignored the very essence of the appellant's objection which is that there was no supply and therefore s 37 of the VAT Act had no application; and

That it applied the wrong standard of proof (namely that the appellant failed to convince it beyond reasonable doubt that the payment was a loan payment.)

At the pre-trial hearing, the issue to be determined was agreed to be whether the sum of $94 975 was in payment of a loan.

[12] The appellant called as its only witness one of its directors and signatory to the agreement between the appellant and Chipote. He told the court the amount in question was paid by AC to the appellant in terms of a loan agreement between the appellant and Chipote. He took the court through the agreement and produced an application for electronic transfer by AC to the appellant of $94 975 on the 20 February 2017. The purpose of the transfer was described as LOAN PAYMENT. This sum was credited to the appellant's account on 21 February 2017 as shown on the appellant's bank statement covering that period. In cross examination, he told the court that no mortgage had been registered by the appellant in favour of Chipote as provided for in the agreement; that no repayment had been made to Chipote up to the date of filing of the notice of objection which was after the 30 June 2017; that there was no agreement between the appellant and AC or Chipote as to the disbursement of the loan to the appellant *via* AC; that he received no communication from AC as to when the payments on behalf of Chipote were to be made, and in what amount, although he would receive a 'whatsapp' or email from Chipote showing a scanned copy of the invoices paid on behalf of AC and he would then expect the amount stated in the invoices. However, he did not consider it necessary to produce these 'whatsapp' messages and emails to the respondent as he felt the respondent was given what he had asked for. Regarding the various payments made to the appellant by AC with the narrations: "purchase of timber", the appellant had not seen fit to query the narrations with AC until the

Commissioner's enquiry picked up the error. The appellant did not call the author of the narrations nor was there any affidavit by him.

[13] Mr *Tivadar*, in his closing submissions, took the point that the witness's evidence that the sum in question was a loan payment and not in payment of timber was not challenged. He submitted this should be the end of the matter and judgment should be entered in favour of the appellant. The respondent is of the contrary view.

[14] Mr *Bhebhe* submitted that the onus of proof, which is on the appellant to show that the Commissioner's decision was wrong, has not been discharged. He referred the court to *VFSL & 3ORS* v *ZIMBABWE REVENUE AUTHOTITY* HH23-19 where KUDYA J dealt with the onus of proof laid down in s 37 of the VAT Act; and to *COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICES* v *NWK LTD* (2) SA 67 at 80-81where the Supreme Court of South Africa queried the genuineness of the loan agreement provided by NWK.

[15] The question arose during submissions as to the nature of the appeal and the effect of the witness's evidence on the appeal to be determined. I requested written submissions from counsel on the matter and I express my gratitude to Messrs *Tivadar* and *Bhebhe* for their assistance in this regard.

This is an appeal in the wide sense in that it can take the form of a rehearing and the court may hear evidence. Rule 5 of the Rules of the Fiscal Court requires the Commissioner to file all documents served on him with the notice of appeal, his reply, and any material correspondence relating to the appeal. In the instant case the Rule 5 documents comprise all the correspondence between the parties as well as the documents produced by the appellant in support of its stance that VAT is not chargeable on the sum of $94 974.

[16] The relevant statutory provisions are set out below. They are:

Section 33 of the Value Added Tax Act [*Chapter 23:12*] ("the VAT Act"):

> " **33 Appeals to Fiscal Appeal Court**
>
> "(1) An appeal against any decision or assessment of the Commissioner, as notified in terms of subsection (4) of section *thirty-two*, shall lie to the Fiscal Appeal Court *in terms of the Fiscal Appeal Court Act* [*Chapter 23:05*].
>
> (2)..
>
> (3) At the hearing by the Fiscal Appeal Court of any appeal to that court—
> (*a*) the appellant shall be *limited to the grounds of objection stated in the notice of objection* referred to in subsection (2) of section *thirty-two* unless the Commissioner agrees to the amendment of such grounds or the appellant, on good cause shown prior to or at such hearing, is given leave by the court to amend such grounds of objection within a reasonable

period and on such terms as to any postponement of such hearing and costs which may result from such postponement as the court may order;
(*b*) the Fiscal Appeal Court may inquire into and consider the matter before it and may confirm, cancel or vary any decision of the Commissioner under appeal or *make any other decision which the Commissioner was empowered to make at the time the Commissioner made the decision under appeal* or, in the case of any assessment, order that assessment to be altered, reduced or confirmed or, if it thinks fit, refer such matter back to the Commissioner for further investigation and reconsideration in the light of principles laid down by the court".

Section 37 of the VAT Act:
"**37 Burden of proof**
The burden of proof that any supply or importation is exempt from or not liable to any tax chargeable under this Act or is subject to tax at the rate of zero *per centum* or that any value upon which tax is chargeable under this Act or any amount of tax chargeable under this Act is subject to any deduction or set-off or that any amount should be deducted as input tax, shall be upon the person claiming such exemption, non-liability, rate of zero *per centum*, deduction or set-off, *and upon the hearing of <u>any</u> appeal from <u>any</u> decision of the Commissioner, the decision shall not be reversed or altered unless it is shown by the appellant that the decision is wrong*."
(Emphasis provided).

Section 13 of the Fiscal Appeal Court Act [*Chapter 23:05*]:

"13 Appeals from decisions of Commissioner
Any person who is dissatisfied with a decision of a Commissioner given in terms of a tax Act may appeal to the Court against that decision."

A tax act is defined as: "the Value Added Tax Act [*Chapter 23:12*]; or
the Stamp Duties Act [*Chapter 23:09*]…"

Section 15 of the same Act provides:
15 Burden of proof
"In any appeal in terms of this Part the burden of proof that *<u>any</u> amount is exempt from or not liable to tax* or is subject to any refund, rebate, remission or deduction shall be upon the person claiming that fact."(Underlining is mine).

[17] The effect of the above provisions is that in terms of s 15 of the Fiscal Appeal Court Act the burden of proof is upon the appellant who claims that the amount in question is not liable to tax by virtue of its being payment of a loan from Chipote and not a payment for timber. Further, by virtue of s 37 of the VAT Act the decision of the Commissioner can only be reversed if the appellant discharges the onus of showing that the decision of the Commissioner is wrong.

This court is therefore required to enquire into the question of the correctness of the Commissioner's decision. For this reason, I agree with Mr *Bhebhe* that the appeal is not merely

a rehearing but an appeal which, while it involves the hearing of evidence, including new evidence, yet it retains the characteristics of an appeal in that this court must enquire into the correctness of the Commissioner's decision and is restricted, by the words italicised in s 33(3)(b) (*supra*), when making decisions other than those specified in that subsection, to those decisions which the Commissioner was empowered to make at the time that he made the decision appealed against. Accordingly, the entire record of proceedings in the lower forum as well as proceedings on appeal are relevant in determination of this appeal.

[18] The appellant seeks an order reversing the decision of the Commissioner. To succeed, the appellant must, as shown above, establish that the Commissioner's decision is wrong. I turn to consider whether the appellant has done so.

The evidence of the appellant's witness added nothing to the substance of the papers before the Commissioner. If anything, it served to accentuate certain questions raised by the respondent in his letter of the 30 June 2017.

The appellant has always maintained that the $94 975 was a payment by Chipote to it in terms of the loan agreement. This agreement was discussed above. It made no mention of the arrangement to disburse the loan through payments by AC. While it is noted that the alleged agreement to pay through AC came 5 months later, it seems a strange manner of conducting business that there was no agreement between Chipote and the appellant confirming the manner of disbursement of the loan. Further, there was no agreement between the appellant and AC as to the implementation of the agreement between AC and Chipote in so far as it concerned the appellant.

No invoices corresponding to the amounts allegedly paid by AC to appellant on behalf of Chipote were produced. There were, for example, no supporting invoices from Chipote showing the amount of $94 975.00 to have been paid to AC's creditors and therefore requiring payment to appellant in terms of the agreements. The witness's evidence that the appellant was notified by 'whatsapp' messages containing the scanned invoices is not plausible. It would have been a simple matter to produce those 'whatsapp' images to the respondent. In any event both the appellant and AC are companies of substance and it seems unlikely that such a method of doing business, without more, would find favour with them.

[19] Apart from the above, there are the additional disturbing features besetting the loan agreement between the appellant and Chipote. Despite the security being mentioned in the agreement, it was never perfected. No reason was given by the witness as to why the mortgage

bond was never registered over the property mentioned in the agreement. The loan was not secured.

Further, it was the witness's evidence that prior to the payment to the appellant of the $94 975 by AC, two disbursements of the loan from Chipote were paid to the appellant by deposits into Masekesa's account and that Masekesa is a director of the appellant. The fact that the agreement with Chipote shows that the latter's CEO is a Mr Masekesa who signed the agreement on Chipote's behalf raises questions as to whether or not the two Masekesas are one and the same person.

The information requested in the Commissioner's letters dated 11 May and 1 June 2017, if provided, would have shed light on the transactions between the parties. The failure to provide them without any explanation for the default has not only left an irreparable gap in the evidence tendered by the appellant but has, when considered together with the unsatisfactory features mentioned above, cast doubt on the genuineness of both agreements.

[20] I take the view that the fact that the witness's evidence that the payment was made in respect of a loan in terms of the agreement between AC and Chipote was not specifically challenged in cross examination is in itself insufficient to discharge the heavy onus on the appellant to prove, in the face of the overwhelming evidence pointing to the contrary, that the Commissioner's decision was wrong. The respondent's entire case is based on the premise that the payment was for the purchase of timber. The documents requested (and not produced) as well as the questions put in cross-examination to the witness, were directed at ascertaining the authenticity of the two agreements.

Evidence from the author of the narrations referred to in para [12] *supra* would have shed light on his reasons for describing the purchases, in 2016, as timber purchases when no purchases of timber had, according to the appellant, been made from the appellant by AC since 2006-2007.

In addition, evidence from the Managing director of AC might have shed light firstly, on the reason why the agreement with Chipote, signed by him on 4 December 2016, was not tabled before the Board at the Board meeting held on 5 December 2016 at which he was present and at which the issue of remittance of foreign currency for the importation of vehicles and vehicle parts was deliberated on by the Board; secondly, why there was no resolution by the Board to proceed in terms of the Chipote agreement but rather advice by the Board relating instead to timber exports; and thirdly why, if AC was proceeding in terms of the Chipote

agreement, this was not clearly documented so that those responsible for the narrations would record accurately what the payments were for.

Since there were two signatories required for the electronic transfer, a fact agreed by the witness in cross examination and evident in the application for electronic transfer produced in evidence, evidence from the managing director would also clarify why the narrations made by the clerk as 'purchase of timber' some 9 years after the last timber transaction with the appellant would not be picked up by the signatories to the transfer.

[21] Without this evidence and without the documents called for by the Commissioner in paras [7] and [9] above it is difficult to find fault with the decision of the Commissioner.

[22] I conclude that the Commissioner's decision has not been shown by the appellant to be wrong. The appeal is, for the above reasons, dismissed.

Henning Lock, appellant's legal practitioners
Kantor & Immerman, respondent's legal practitioners