GC (PVT) LTD
versus
ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
KUDYA J
HARARE 19 January and 25 September 2015

Income Tax Appeal

AP de Bourbon, for the appellant
T Magwaliba, for the respondent

KUDYA J: This appeal was filed in the High Court and raises three issues. The first concerns the interpretation of the General Notice number 374/2010 issued by the respondent in the Government Gazette of 1 October 2010. The second deals with the treatment of employee expenses incurred by the appellant on its own behalf and other sister subsidiary companies. The last issue revolves on the suitability for imposing penalties in this matter.

Introduction

On 8 May 2013 the respondent issued three amended assessments for income tax numbered 1/014 for the year ended 31 December 2009, 1/015 for the year ending 31 December 2010 and 1/016 for the year ending 31 December 2011[p(p)17-19 of r11 documents and p(p) 23-25 of the respondent's case]. It disallowed capital allowances based on the 2009 market values of the properties rather than on their income tax values and imposed a penalty of 50% of the tax chargeable in each year of assessment. These were dispatched to the appellant on 24 May and received on 27 May 2013. The chartered accountants representing the appellant raised four grounds of objection on 24 June 2013 [p(p)27-33 of Commissioner's case, p(p) 8-14 of Commissioner's bundle]. The first objection concerned the adding back of US$600 000 paid in 2010 arising from sale of 3 stands in Zimbabwe dollars in 2008 into the appellant's income by the respondent. The second objection related to the disallowance of capital allowances of US$ 2 539 850 claimed in each of the three years as notional wear and tear for the immovable properties. The third was in

respect of foreign travel expenses that were added back to the appellant's income. The fourth objection was in respect of 'other expenses', 'local travel', 'repairs and maintenance', project expenses and apportionments of the expenses of the employees of the appellant's ultimate holding public company. In the ruling of 20 March 2014 [p(p) 34-36 of Commissioner's case] the respondent allowed the last objection and disallowed the other three.

On 8 April 2014 the appellant notified the respondent of its intention to appeal against the disallowances based on the grounds set out in the letter written by its tax advisers of 24 June 2013. The grounds of appeal were duly filed and captured in the appellant's case on 20 May 2014. In para 7 of its case and para a. of its prayer the appellant abandoned the objection in respect of the inclusion of the sum of US$ 600 000 in its taxable income in the 2010 tax year. It persisted in its appeal against capital allowances and foreign travel expenses allegedly incurred by some of its employees. In addition it sought to appeal against the penalties that it had not objected to.

The background facts

The facts in regards to the formula for calculating the capital allowances due to the appellant in the light of the General Notice Number 374/2010 were common cause. I have elicited the facts of this appeal from the 7 paged appellant's case, the 44 paged respondent's case, the 20 page r 11 documents, the 275 paged appellant's bundle of documents and the 52 paged respondent's bundle of documents. The dates of construction of six perhaps seven of the eight properties that form the subject of this appeal are set out on p 17 and replicated on p 27 of the respondent's bundle of documents. The properties in question were constructed between 1 March 1950 and 1 December 1998.

The appellant owns the eight immovable properties in question. It is in turn a 100% owned subsidiary of NP (Pvt) Ltd which is in turn owned 100% by a Zimbabwe Stock Exchange listed public company, the ultimate holding company [see p(p) 9-10 and 35 and 91 of the appellant's bundle]. The ultimate holding company was in terms of a restructuring and transfer agreement dated 8 August 2003 demerged from another ZSE listed company, the second owner of the properties in question [p(p) 5-16 of the appellant's bundle]. The eight properties were as at 30 March 2003 valued at ZW$ 21 760 000 000 [p(p) 9-10 of appellant's bundle]. In 1968 the second owner was a mere division of yet another ZSE listed company, the first owner of the properties [letter of objection of 24 June 2013 p 30 of the respondent's case, chairman's executive summary p 27 of the appellant's bundle and p 15 of the respondent's bundle]. The properties were allegedly constructed by the first owner. They

were classified as industrial buildings in terms of para 1 (1) (v) to the Fourth Schedule of the Income Tax Act [*Chapter 23:06]*. The first owner claimed annual capital allowances of the construction of the immovable properties in terms of para 6 (1) (b) (i) to the Fourth Schedule as read with s 15 (2) (c) to the Income Tax Act at the rate of 5% per annum. The claim would cease after a period of 20 years.

In 1987 the first owner transferred these properties to a wholly owned subsidiary, the second owner, at their market values for accounting purposes before exhausting its 20 year entitlement. However, the acquisition costs that the parties elected to utilize for tax purposes were the income tax values (ITVs) provided in para 8 (3) (b) of the Fourth Schedule to the Income Tax Act. The Commissioner accepted that the two were related companies, which were involved in a scheme of reconstruction. He allowed the second owner to claim capital allowances over a period of 20 years at 5% per annum of the acquisition costs of the properties based as they were on the closing balances of the transferor and not at the open market value or the fair market price of the properties at the date of acquisition. The closing balances of the first owner transferor comprised the value remaining after deducting all the notional wear and tear capital allowances claimed from the cost of construction of the properties to the date of transfer [letter of 7 March 2013 from appellant's tax advisors on p 8 and 9 of r 11 documents]. The second owner claimed wear and tear capital allowances on these ITVs for the period of 16 years from 1987 until 2003.

In 2003 the second owner entered into a scheme of reconstruction with the ultimate parent company of the appellant. It was approved by the respondent on 10 July 2003 and subsequently again on 25 July 2005 [see letter of request of 11 April 2003 on p 2-7 of respondent's bundle and p(p)16-20 of Commissioner's case and p(p) 1-4 of appellant's documents and the two letters of approval of 10 July 2003 on p 30 para 6.1.2 of the chairman's executive report dated 14 August 2003 in the appellant's bundle; p 15 of Commissioner's case and p 1 of respondent's bundle of documents and the latter letter on p 26 of respondent's bundle and 103 of the appellant's bundle]. It was common cause that the 8 properties were transferred to the appellant in 2003 at their fair value of ZW$ 21.76 billion [para 1.2 of agreement on p(p) 9-10 appellant's bundle]. It was common cause that between 2003 and 2008, the appellant claimed and the respondent accepted capital allowances at the rate of 5 % per annum based on the ITVs of the second owner. The position expressed in the appellant's letter of objection of 24 June 2013 that the 20 year period for claiming capital

allowances started afresh albeit on ITVs that were generally much lower than the market values of the assets at the time was therefore correct.

Prior to 31 December 2008, all construction costs, the ITVs and the acquisition costs of the first and second owners and the appellant were shown in their respective books of account and tax returns in Zimbabwe currency. The second owner was incorporated in 1990 [p 27 and 43 of the appellant's bundle and p 15 of the respondent's bundle]. The circular to shareholders dealing with the scheme of reconstruction covers p(p) 17 to 102 of the appellant's bundle of documents. At p 43 and 89 the independent reporting accountants who happen to be the tax advisors of the appellant highlighted two important accounting policies of the second owner. Assets and liabilities denominated in foreign currencies were converted to Zimbabwe dollars at rates of exchange ruling at the end of the financial year while transactions in foreign currencies were translated to Zimbabwe dollars at rates of exchange ruling at the time of the transactions. The second was that freehold properties were stated at the valuation established at the time of restructuring and floatation of the second owner in 1990 and subsequent additions were shown at cost.

In the pre-listing statement of the ultimate parent company of the appellant, clause 5.2.6 p 71 valuations of freehold properties were based on their discounted cash flow calculations. The statement extrapolated depreciated replacement value of ZW$23.032 billion and the open market value of ZW$ 21.76 billion from the independent property valuation report dated 17 June 2003 on p82-84 of the appellant's bundle of documents. The valuation was conducted professionally and in line with the requirements of the Royal Institute of Chartered Surveyors and the Real Institute of Zimbabwe Valuation Standards. A summary of the Gross Replacement Cost, Depreciated Replacement Cost, Existing Use Value of Land, Depreciated Replacement Value and Open Market value were set out as at 31 March 2003. The gross replacement cost of a building represents the estimated cost of erecting the building or a modern substitute with the same gross internal area and incorporates the ancillary site works and relevant professional fees and expenses of their construction. The depreciated replacement value of land and improvements denotes the cost of erecting the building inclusive of the ancillary site work, professional fees and other expenses of the construction depreciated according to age, obsolescence, use and condition to which is added the open market value of land. The market value on the other hand is the estimated amount of exchange on the date of valuation between a willing buyer and a willing seller in an arm's

length transaction after proper marketing where each party acts knowledgeably, prudently and without compulsion [p 83, p 230 and expounded p(p) 231-232 of the appellant's bundle].

The second owner carried the eight properties at fair value represented by active market prices adjusted for differences in nature, location, and condition of each specific asset. The ultimate parent company of the appellant adopted these values in its pre-listing statement and passed them on to the appellant.

The appellant regarded the eight properties as investment property in its financial statements for the years ending 31 March 2004, 2005, 2006 2007, 2008 and 2009 set out a p(p) 104 to 207 of the appellant's bundle. The principal business of the appellant was described in these financial statements as investing in investment property. Valuations were professionally conducted yearly by the valuer notwithstanding that it became a subsidiary of the ultimate holding company during the course of 2008 [p185 of the appellant's bundle]. The fair values in each year were indicated in the notes to the financial statements p 105 and p112 for 2004, p119 and p125 for 2005, p132 and p140 for 2006, p148 and p161 in 2007, p170 and p180 in 2008 and p189 and p202 in 2009. These investment properties were not depreciated from 2004 to 2009 even after the onset of chronic hyperinflation [p(p) 108, 122, 135, p(p)153-4, 175 and 197]. The appellant and its auditors accepted that the historical cost convention expressed a true and fair view of the financial position of the appellant over these years [p(p) 117, 147, 166, 169 and 185]. The fair value estimates of 2008 however incorporated both United States dollars and local currency in the computation model.

On 29 January 2009, the Government of Zimbabwe introduced the multi-currency regime and the local currency ceased to be the functional currency of account. The government and the Reserve Bank of Zimbabwe did not, until 15 June 2015 in s 6 of the Reserve Bank of Zimbabwe (Demonetisation of Notes and Coins Notice SI 70 of 2015 when it set a conversion rate of ZW$35 quadrillion to 1US$, establish the rate of exchange between the Zimbabwe dollar and the new currencies of account to allow for the conversion of existing obligations and balances in Zimbabwe dollars into these currencies. However, Parliament introduced two amendments to the Finance Act [*Chapter 23:04*]. Section 3 of the Finance Act 2009 (Act 3 of 2009) inserted s 4A into the Finance Act [*Chapter 23:04*]. Subs 4A (3) and (4) were then repealed and replaced by s 19 of the Finance Act (No. 2) 2009 (Act 5 of 2009) and backdated to 1 January 2009. Section 4A (3) empowered the Commissioner to approve for taxation purposes the conversion rates of balances denominated in Zimbabwe dollars prior to 1 January 2009 but only after issuing a binding general ruling in terms of the

Fourth Schedule to the Revenue Authority Act [*Chapter 23:11*] indicating how he would exercise his discretion. In addition the approved final balances were to act as initial balances for financial statements prepared for the new financial year. It was therefore Parliament that directed the submission of all tax returns commencing on 1 January 2009 in United States dollars. At that time Parliament did not set an official rate of exchange to enable those closing balances to be converted from local currency into United States dollars.

The financial statement for 2009 showed the difficulty experienced by the appellant in converting 2008 balances into foreign currency in compliance with IAS 29. The investment property was revalued at US$67.1 million with the comparative 2008 value restated in the same amount [p 189]. The fair value of investment property in 2009 assumed a relative normal economy ignoring the volatile one in actual existence and ran both a ZW$ model and US$ model to arrive at a most suitable estimate.

The fair value of the appellant's 8 properties in question were as follows:

2003: ZW$ 21.76 billion

2004: add FV adjustment ZW$ 34.82 billion: total ZW$56.58 billion

2005: add FV adjustment ZW$153.02 billion: total ZW$ 209.6 billion

2006: add FV adjustment ZW$ 12 980 304 000: total 13 190 billion

2007: add FV adjustment ZW$ 817 566 341 000 total 830 850 m [includes additions of 91 659 000]

2008: add FV adjustment ZW$ 3 193 338b total 3 194 168 850 000 000;

2009: reflected the fair value to open market value for 2008 as US$67 100 000 which remained static at the same figure in 2009 as the fair value adjustment.

In the financial statements as at 31 March 2009, the valuations were conducted in a deteriorating operating environment affected by chronic levels of hyperinflation where publication of official inflation indices ceased from July 2008 and economists' guestimates ranged from trillions to quadrillions per cent, multiple distorted interest rates and exchange rates consisting of "cash" exchange rates that were less than 1% of the market "cheque" rates or the "United Nations" exchange rates, distorted pricing mechanisms between licenced and non-licenced foreign currency trading operators within the country created challenges in determining functional currency in the latter part of 2008 and a fast deteriorating local currency unit that underwent redenomination by first removing from all monetary values 10 zeroes on 1 August 2008 and a further 12 zeroes in SI 6 of 2009 on 1 February 2009 [p197 and p207 of the appellant's bundle].

While the appellant did not specifically show the ITVs in its financial statements it indicated on pages 208 to 223 of its bundle the capital allowances claimed and the ITVs for the 8 properties between 2004 and 2008. The wear and tear for buildings for the 9 months in 2004 was ZW$311 751 and the ITVs ZW$ 12 158 300. For the 12 months ending on 31 March in 2005, 2006, 2007 and 2008 the wear and tear was in the sum of ZW$ 623 503 for each year respectively. The ITVs for the buildings during the same periods were ZW$11 534 798 in 2005, ZW$10 911 295 in 2006, ZW$10 287 793 in 2007and ZW$ 9 664 290 in 2008. On 22 February 2012 the appellant submitted the amended tax computation for the year ended 31 December 2009 [p(p) 215 - 223 of the appellant's bundle].

The 8 properties were valued as at 31 March 2009 in the Valuation Report of Land, Buildings and Improvements on Freehold Properties Nationwide that was completed on 5 May 2009 at the replacement cost of US$67.1 million by the valuator, a related party [p(p) 224 - 249 of the appellant's bundle]. Notwithstanding the unstable macroeconomic environment that was characterised by unstable prices and the close affinity between the valuator and the appellant the valuation was conducted in a professional manner. The appellant deducted the value of the land of US$10.19 million and the value of plant and equipment of US$6.113 million from the replacement cost to arrive at the replacement value for the buildings of US$ 50 797 000. It notionally wrote down the 5% capital allowances from 2003 to 2008 for the buildings in the sum of US$2 539 850 per annum for the five tax years to 31 December 2008. The full mathematical calculations that give rise to this figure are set out on p(p) 216 and 218 of the appellant's bundle and p 25 of the respondent's bundle. It sought to claim the sum of US$2 539 850 as capital allowances in each of the three tax years in issue on the basis of the binding general ruling published by the Commissioner in General Notice Number 274 of 2010 in the Government Gazette of 1 October 2010.

The Commissioner issued the binding general ruling on the manner he would exercise his discretion as envisaged by the proviso to subs 4A (3) of the Finance Act under the auspices of s 34D as read with para 10 of the Fourth Schedule to the Revenue Authority Act [*Chapter 23:11*] in the Government Gazette of 1 October 2010. It was common cause that although the heading on the General Notice described it as a provisional ruling it was clearly a final and binding ruling on both the Commissioner and the taxpayer. The Commissioner bound himself to utilize the ruling in approving rates of exchange put forward by taxpayers in converting the 2008 balances expressed in local currency to United States dollars for taxation purposes. He limited the scope of the ruling to movable and immovable assets, trading stock

and assessed losses and excluded outstanding Zimbabwe dollar denominated balances in respect of bank balances, creditors, debtors and liabilities to the values agreed between the parties to such transactions. He indicated in para 5 (3) of the ruling that where taxable income accrued in foreign currency prior to 1 January 2009 but the statements were prepared in Zimbabwe dollars he would accept the use of the same rate used to convert the transaction or balances into Zimbabwe dollars back to United States dollars or any other rate that would give substantially similar results. That the Commissioner placed great importance to outcomes that would give substantially similar results is repeated in para 7 in respect of assessed losses expressed in Zimbabwe dollars as at 31 December 2008, where he would accept *inter alia* any other rate that would give a result which closely approximates the loss in foreign currency had the financial statement to which the losses relate been prepared in foreign currency.

Capital allowances

The legislative provisions

The legislative provisions relevant to the first issue are s 4A (3) of the Finance Act, *supra,* s 6 (1) (b) and (3) (a) and para 8(3) (b) of the Fourth Schedule to the Income Tax Act. S 4A (3) of the Finance Act provides that:

> "(3) For all accounting and taxation purposes, where--------
> (a)…………..
> (b) a company, trust, pension fund or other juristic person whose taxable income is earned, received or accrued in whole or in part in Zimbabwean currency;
> then---------
> (c) the final balances denominated in Zimbabwean currency determined in financial statements prepared in respect of the previous financial year of the individual, partnership, company, trust, pension fund or other juristic person may be expressed in United States dollars at such rate of exchange as the Commissioner may approve;
> Provided that the Commissioner-General shall, in terms of the Fourth Schedule to the Revenue Authority Act [*Chapter 23:11],* issue a binding general ruling on the manner in which he or she shall exercise his or her discretion for the purpose of this paragraph;
> (d) the final balances determined in accordance with paragraph (c) shall be regarded as initial balances for financial statements prepared in respect of the new financial year."

Acting in terms of the proviso to s 4A (3), the Commissioner-General published General Notice No. 274 of 2010. Paragraph 6 states:

Taxable income accrued in Zimbabwe dollars

6. The Commissioner-General will approve rates of exchange whose net effect will achieve the following----

a. **Assets acquired or constructed in foreign currency**

   Balances equal to the cost in foreign currency less notional wear and tear claimable to 31 December 2008.

b. **Assets acquired or constructed in Zimbabwe dollars ZW$s:**

   Balances in foreign currency that is approximately equivalent to replacement value less notional wear and tear claimable to 31 December 2008.

c. **Trading stock acquired in foreign currency and recorded in Zimbabwe dollars ZW$:**

   Where trading stock was initially acquired in foreign currency but recorded in Zimbabwe dollars the Commissioner-General will accept the use of the same rate as was used to convert the foreign currency transaction or balances into Zimbabwe dollars or such other rate as will give substantially similar results.

d. **Trading stock acquired in Zimbabwe dollars ZW$s:**

   Where trading stock was acquired and recorded in Zimbabwe dollars the Commissioner-General will accept the use of an exchange rate that results in a value in foreign currency approximately equivalent to the replacement value.

The calculation of wear and tear allowances for commercial buildings, farm improvements, industrial building, railway lines, staff housing and tobacco barns is provided in para 6 (1) (b) as follows:

> "6. (1) Subject to subparagraphs (2) and (3), the allowance in terms of para 3 in respect of wear and tear on commercial buildings, farm improvements, industrial buildings, railway lines, staff housing and tobacco barns which have been acquired or constructed by the taxpayer and used for the purposes of his trade shall be—
> (*a*) …………
> (*b*) in the case of any farm improvement, industrial building, railway line, staff housing or tobacco barn—
> (i) where no allowance has been made in terms of para 2 in respect of the farm improvement, industrial building, railway line, staff housing or tobacco barn concerned, five *per centum* of the cost to the taxpayer of the farm improvement, industrial building, railway line, staff housing or tobacco barn allowable in the first year of assessment in which the farm improvement, industrial building, railway line, staff housing or tobacco barn, as the case may be, is first used and thereafter in subsequent years a sum equal to five *per centum* of such cost;
> (ii) ……….
> (2………
> (3) The allowance referred to in subparagraph (1) shall be subject to the following provisions—
> (*a*) in the *case* of buildings, structures or works referred to in subparagraph (v) of paragraph (*a*) of the definition of "industrial building" in paragraph 1 acquired or

erected prior to the 1st April, 1964, the sum of the allowances to be made in terms of paragraph 3 shall not exceed an amount determined by applying the formula—

in which—

D-(E + F)

D represents the cost to the taxpayer of the buildings, structures or works and if, for any reason, such cost cannot be ascertained, such cost shall be deemed to be such sum as the Commissioner may determine;

E represents the sum of the allowances, similar to the allowance referred to in paragraph 3, which, in terms of the previous law, would have been made each year from the time the buildings, structures or works were acquired or erected by the taxpayer up to and including the year of assessment ended the 31st March, 1964, had the buildings, structures or works, at the time they were acquired or erected, qualified as industrial buildings under the previous law;

F represents the sum of the allowances, similar to the allowance referred to in paragraph 3, which were made to the taxpayer in terms of a previous law for the three years of assessment ended the 31st March, 1965, the 31st March, 1966, and the 31st March, 1967";

In my view, subparagraph (v) of para (a) of the definition of "industrial buildings" covers the 8 properties in question. The cost to the taxpayer referred to in para 6 (1) (b) (i) is the same cost that is found in subparagraphs (2) and (3) of para 6, above.

The last legislative provision relevant to the determination of the first issue is para 8 (3) (b) of the Fourth Schedule to the Income Tax Act. It states:

"8 (3) If the ownership of assets referred to in subparagraphs (1) and (2) is transferred—

(*b*) from a company, in the course of or in furtherance of a scheme of reconstruction of a group of companies or a merger or other business operation which, in the opinion of the Commissioner, is of a similar nature, to another company under the same control;

the transferor and the transferee may elect that the selling price of the assets, for all purposes of this Act and notwithstanding the terms of any agreement of sale or the provisions of subparagraphs (1) and (2), shall be deemed to be the value of the assets, established in the hands of the transferor as a result of the application of this Schedule, at the date of the transfer:"

Restatement of the first issue

In my view, the issue is whether or not the appellant's foreign currency asset final balances as at 31 December 2008 for claiming capital allowances in 2009, 2010 and 2011 are computed on the basis of the replacement value less wear and tear allowances claimed from the date of acquisition in 2003 only or on the foreign currency income tax values of the 8 properties in question. The basic question for determination revolves around the meaning of para 6 (b) of the General Notice.

The arguments

Mr de *Bourbon* for the appellant and Mr *Magwaliba* for the respondent submitted diametrically opposed views on the meaning of para 6 (b) of the general ruling. Mr *de*

Bourbon submitted that the rate of conversion approved by the Commissioner for the final balances, in this case the ITV, that were expressed in Zimbabwe currency as at 31 December 2008 was the United States dollar denominated replacement values of the 8 properties as at the date of acquisition in 2003 less the notional wear and tear claimed in the period between these two dates. He correctly contended that the appellant acquired the properties in the group reconstruction in Zimbabwe dollars and took transfer at the fair market value of ZW$21.76 billion. The evidence established that the replacement value in United States dollars at the date of acquisition in 2003 was calculated at US$ 50 797 000. Both the appellant and its immediate predecessor in title stated the values of the 8 properties as at the time of restructuring and floatation of the second owner in 1990 and merely showed subsequent additions at cost. He correctly argued that the Commissioner complied with the obligatory requirements of the proviso to s 4A (3) of the Finance Act in issuing a binding general ruling stating the methodology he would employ to approve the rates of exchange used by taxpayers. He contended that in para 6 (b) the Commissioner determined that the final balances for ITVs in respect of assets acquired or constructed in Zimbabwe dollars to be carried forward would be the replacement value. In paragraphs 17, 21 and 24 of his written heads Mr *de Bourbon* categorically contended that the Commissioner abandoned the use of the ITVs in the binding general ruling in favour of the replacement value. He further contended that the appellant correctly applied that replacement value from the date it took transfer of the properties less the capital allowances claimed between that date and 31 December 2008.

Mr *Magwaliba's* contrary submission was that the date from which replacement value applied was not the date the appellant acquired the properties but retrospectively to the respective dates on which each property was constructed less capital allowances claimed by each predecessor in title up to 31 December 2008. Thereafter the appellant must continue to claim its capital allowances until they are exhausted after 15 years from 31 December 2008. The submission by Mr *Magwaliba* precluded the Commissioner from providing the rate of conversion between the United States dollar and the Zimbabwe dollar which would have been a tall order given the redenomination of the Zimbabwe dollar between 2004 and 31 December 2008 but it certainly provided the formula for calculating the capital allowances for each year in United States dollars. Mr *Magwaliba* buttressed his submission by relying on what he termed a commercial sensible way of managing the tax transition from the Zimbabwe dollar to the United States dollar. That approach was underpinned by the desire of

the Commissioner to provide a formula for conversion that would give substantially similar results had there been no change in currency. Mr *Magwaliba* forcefully argued that the contention advanced by the appellant has the effect of giving unintended and therefore unreasonable benefits to the appellant resulting in an artificial loss in the financial statements of the appellant. He further contended that the narrow interpretation contended by the appellant to the phrase "less notional wear and tear claimable to 31 December 2008" negated the intention of the Commissioner to place the taxpayer in the same position it would have been in the absence of the change in currency. It was his view that restricting the claim to the date of acquisition in 2003 simply ignores the fact that the computation of the wear and tear allowances was based on the ITVs in the Zimbabwe dollar era and not on replacement cost. It further overlooks that para 6(b) does not give a commencement date and should be interpreted in the context of other tax provisions without supplanting existing legislation.

It seems to me that the meaning attributable to this paragraph rests in the context in which it was made. It was agreed by counsel that it sought to provide the basis upon which the Commissioner would approve conversion rates of Zimbabwe dollar closing balances to United States dollar closing balances put forward by taxpayers in their tax returns in the absence of an official exchange rate between the two currencies. The main borne of contention is on the meaning rendered to the phrase "assets acquired or constructed ….equivalent to replacement value less wear and tear claimable to 31 December 2008". Mr *Magwaliba* correctly observed that the retrospective date from which the wear and tear is claimable is not stated. Mr *de Bourbon* contended that it is claimable from 2003. Mr *Magwaliba* said it is claimable from a date beyond 2003. Mr *de Bourbon* refuted this contention. The thrust of his argument was that the date from which the capital allowances to 31 December 2008 were claimable was provided by the phrase "acquired or constructed". The appellant did not construct the properties but acquired them and could only claim capital allowances in terms of para 6(b) of the general ruling on the basis of the replacement value as at the date of acquisition and not construction. He, however, urged me to invoke the *contra fiscum* principle in the event a dispute of meaning was found to exist and determine such dispute in favour of the taxpayer.

Resolution of the first issue

The disputed paragraph is set in the context of the computation of the final balances of taxable income at rates of conversion that the commissioner would approve. The appellant claimed wear and tear allowances before the publication of the General Notice on the ITVs of

the properties. The basis for such claims is found in para 3(1) (a) as read with para 6 (1) (b) (i) and para 8(3) of the Fourth Schedule to the Income Tax Act. The basic legal position in respect of claims for wear and tear allowances under group reconstructions is that where the transferor and transferee elect to claim such allowances under the ITVs of the transferor, the transferee will continue to claim them on those ITVs for a maximum of 20 years. This legal position is captured in para 8(3) of the Fourth Schedule under consideration. It is a position the appellant correctly averred in para 14 of its case that could not be and was not amended by para(s) 4 and 6 of the binding general ruling. The logical outcome of this contention must clearly be that replacement value cannot legally be substituted for income tax value. The effect of Mr *de Bourbon's* submission that the Commissioner abandoned the income tax values in favour of the replacement values is that the Commissioner amended para 8 (3) of the Fourth Schedule to the Income Tax Act. Such an amendment by the Commissioner could not have been in the contemplation of the legislature when it enacted s 4A (3) of the Finance Act.

In my view it would be absurd to apply the narrow interpretation to the words "acquired or constructed" so as to limit the period from which replacement value commenced to run for the appellant to the date of acquisition. Rather it seems to me that the wider view propagated by Mr *Magwaliba* accords with both the law and logic.

S 4A (3) of the Finance Act merely empowered the Commissioner to approve United States dollar equivalents of final balances that were expressed in Zimbabwe dollar final balances that appeared in Zimbabwe dollars in financial statements for the calendar year ending 31 December 2008. The professional valuators employed by the predecessor in title of the appellant and the appellant defined gross replacement cost of the 8 buildings as synonymous with the estimated cost of erecting the building or a modern substitute with the same gross internal area inclusive of ancillary site works and relevant professional fees and expenses of their construction. The depreciated replacement cost entailed depreciating the cost of the new building or its modern substitute according to the age, obsolescence, use and condition of the old building.

It is clear from these definitions that replacement value denotes the estimated cost of erecting a building similar to the one under valuation. It is not synonymous with the cost of acquisition as suggested by the general thrust of Mr *de Bourbon's* argument. It would be absurd to narrowly construe the method published by the Commissioner in the manner suggested by Mr *de Bourbon*. Mr *Magwaliba* was therefore correct in submitting that the

phrase “acquired or constructed……equivalent replacement value less notional wear and tear claimable to 31 December” referred to wear and tear that could have been claimed from the date each property was constructed. I agree with Mr *Magwaliba's* submission that this interpretation accords with the intention expressed by the Commissioner in the binding general ruling of attempting to place the taxpayer in the position it would have been had there been no change in currency**.**

The calculation of the wear and tear claimed by the original owner from construction could be computed using the replacement value of each building. The dates of construction of each property were provided to the respondent by the appellant and appear p(p) 17 and 27 of the respondent's bundle. The wear and tear claimed by the original owner can easily be deducted from each replacement value to arrive at the ITVs from which the second owner's claims commenced. The 2003 ITVs, which form the basis of the appellant's 5% capital allowances in United States are thus easily ascertainable. The problems so ably articulated by Mr *de Bourbon* associated with the many currencies used in this country from the advent of Southern Rhodesia to the chronic hyperinflationary Zimbabwe era that birthed the multicurrency regime would be avoided. Again, there would be no need to establish the exact amounts claimed by the appellant's predecessors in title. However, in the event that there were properties erected before 1 April 1964, the Commissioner may apply the formula D-(E+F) provided in para 6 (3) of the Fourth Schedule to the Income Tax. The maximum wear and tear allowance claimable being the deduction of both the wear and tear allowances the taxpayer could have claimed in each year had the buildings qualified under a previous law from the time the buildings were erected by the taxpayer up to 31 March 1964 and any wear and tear allowances granted to a taxpayer under a previous law for the three years of assessment ended 31 March 1965, 1966 and 1967. The Commissioner did not provide an exchange rate, rather he provided a replacement value linked formula for translating into United States dollars the final balances of assets acquired or constructed in Zimbabwe currency for the period to 31 December 2008. It seems to me that the establishment of the replacement value made for the easy computation of the wear and tear allowances due to the appellant in 2009, 2010 and 2011.

I am not persuaded that the appellant was entitled to a capital allowance of 5% of the purchase price of the properties converted into United States dollars on the basis set out in the binding general ruling in the sum of US$2 539 850 per annum. Rather, it was entitled to

claim such allowances based on the ITV balances claimable from the date each property was constructed.

Employee costs

The second issue

The second issue referred to trial at the pre-trial appeal hearing was whether or not the employee expenses that were disallowed by the respondent were incurred fully for the business of the appellant or partly for the business of the ultimate holding public company and other fellow subsidiaries.

Oral evidence

The facts that give rise to this issue are as follows. In its tax returns for the tax year ending 2009 and 2010, the appellant claimed in terms of s 15 (2) (a) of the Income Tax Act deductions for employee expenses in the sum of US$9 778 and US$74 983 respectively. The appellant disallowed them on the basis that they were inclusive of expenses incurred for the purposes of trade or in the production of the income not of a capital nature of the ultimate holding company and other fellow subsidiary companies. In the ruling of 20 March 2014 the respondent agreed that the employee expenses were deductible as long as they were properly apportioned between the group entities on whose behalf they conducted business.

The appellant called the evidence of a single witness. She produced the employment contract of her former chief executive officer and her own [p(p)251-263 and 263-275, respectively of the appellant's bundle]. She also relied on the foreign travel schedules on p(p) 250 and 250A of the appellant's bundle of documents. The chief executive officer was employed by the public company on 1 June 2003 as a finance executive while she was employed by the same company on 1 August 2004 as a finance manager. Clause 1.2 in both their contracts of employment is material to the issue under consideration. It reads: "The Executive will be considered as an employee of [name of ultimate holding public company] although the Executive may fill a role in the company or a subsidiary or associate of the company if it is not the company itself. Where the name [ultimate holding public company] is used in this agreement, it shall mean "the company or any subsidiary or associate of the company". When she testified she was the Finance Executive and company secretary of the public company. In cross examination she disclosed that she was responsible for the company secretarial, financial and administrative functions of the ultimate holding public company. She was also the company secretary and human resources executive of the appellant and two other fellow subsidiaries.

It was common cause that appellant conducted business from which it earned income through the services rendered by the employees of the public company. It was also common cause that the employees did not work exclusively for the appellant [see Finance Executive and Finance manager contracts of employment clause 1.2 p(p) 252 and 265 respectively]. They carried out duties for appellant, 5 other group companies and the ultimate holding public company. The appellant incurred expenditure in respect of these employees for benefits, travelling expenses, motor vehicle expenses, local travel and staff training expenses. It was common cause that the appellant was entitled to claim only such expenditure as was incurred for the production of its income or for purposes of its trade. The dispute was that some of the expenses were incurred for the production of income or for the business activities of other group companies.

The witness testified on each line expense the appellant claimed as deductions in the 2009 and 2010 tax years. At the commencement of her testimony, she confirmed, the concession by counsel at the onset of the hearing that the amount of US$1 760 expensed by the former chief executive officer between 11 and 20 September 2009 when he travelled to and from London for a meeting with the independent valuator's franchisor for property management was not incurred for the business activities or in the production of the income of the appellant.

I will resolve each item following the line by line approach adopted by the witness.

The deductions sought in the 2009 tax year end at p(p) 222 and 250 of the appellant's bundle

a. *Attendance of the Young Presidents Organisation meeting in South Africa by the CEO on 6 February 2009*

The chief executive officer attended this meeting at a cost of US$1 228. The witness stated that the cost was met by the appellant. She characterised the Young Presidents Organisation meetings as brainstorming convocations of professionals where business activities and opportunities were discussed. The chief executive officer in question was engaged by the public company on 1 June 2003 as the Finance Executive [p252 of the appellant's bundle]. By 14 August 2003 when the pre-listing statement for the public company was issued he had been appointed the Chief Executive Officer. His duties entailed implementing the strategic objectives of the public company under the guidance of the board

of directors, identifying and developing suitable real estate opportunities for acquisition in Zimbabwe and elsewhere in accordance with the investment strategy and policies of the company. He would submit his recommendations to the Company Investment Committee consisting of a combination of executive and non-executive directors experienced in the industry for presentation to the Board.

The Finance Executive controlled directly all the income accruing and expenses incurred by the public company and was responsible for investing cash surpluses pending distribution, raising capital to fund additional projects and investments as well as implementing investment criterion. The ultimate holding public company envisaged appointing a projects manager and other appropriately skilled individuals as business activities expanded [p 76 of the appellant's bundle of documents]. The key function of the ultimate holding public company stated in the pre-listing statement on p 68 was to acquire, supervise, develop and lease industrial and commercial properties for investment and manage associated investments, trades and businesses in Zimbabwe and Africa. It was common cause that the public company acquired the eight properties in question through the appellant.

The financial statements of the appellant for the years 31 March 2004 to 31 March 2009 show that the chief executive officer in question of the public company was also one of the two directors of the appellant.

The sole witness did not link the Young Presidents Organisation meeting of 6 February 2009 to any business activity of the appellant. The objectives of the meeting appeared to me to be more attuned to the strategic objectives and focus of the public company. The schedule shows that he attended the meeting as the Chief Executive Officer and not as a director. He was CEO of the public company and a director of the appellant. The appellant failed to establish on a balance of probabilities that even though he was the CEO of the public company and not of the appellant, he attended the meeting at the instigation of and for the benefit of the appellant.

It seems to me that the US$1 228 was properly disallowed.

b. *Attendance at the Human Resources Summit in South Africa by the witness in her capacity as the Human Resources Executive on 9 March 2009*

The witness attended this meeting at a cost of US$ 1 818. She stated that the expenses were paid for by the appellant. She described herself as the company secretary and Human Resources Executive for the appellant. In another vein she described herself as the group Human Resources Executive. She, however, stated that she attended the meeting to share best

practice for managing and restructuring the human resources functions of the group. In my view the skills that were sharpened and the structures that were improved were those of the group. The benefit of the summit accrued to the public company which supervised all subsidiary companies and held an overarching interest in such companies as the appellant. In her evidence in chief she stated that all the 6 employs consisting of the group CEO, the witness, an accountant, a personal assistant shared between the CEO and herself, a messenger and a receptionist belonged to the public company. She categorically stated that the appellant did not have any employees. Her statement to this effect was in part confirmed by the notes to the financial statement of the appellant for the financial years ending 31 March 2008 and 2009. Pages 184 and 206 of the appellant's bundle show that the appellant did not pay any salaries and short term employee benefits in 2007, 2008 and 2009. In these circumstances, I am unable to discern how the summit would benefit the human resource structure of the appellant. Rather, it would benefit the management and human resource structure of the group with possible spin offs to the subsidiaries such as the appellant that utilised or were supervised by the same personnel. The financial statements for 2010 with 2009 comparative figures of a fellow subsidiary company to the appellant with 7 employees in both 2009 and 2010 indicated that all its operating costs were charged to the appellant [annexure G, p 38 of the respondent's bundle].

In the face of such evidence, the disallowance to the sum of US$1 818 cannot be faulted. The appellant failed to discharge the onus on it to show that the expenses in question were used in the business activities or in the production of the income of the appellant

c. *Attendance at the Corporate Governance Summit in South Africa by the CEO, the witness as company secretary and a managing director of fellow subsidiary-the independent property valuer on 31 March 2009*

The cost of attendance by each attendee was in the sum of US$2 244. The aggregate for all three was US$6 732. She regarded corporate governance as a key ingredient in managing the group businesses. All group companies benefited from these three meetings but the appellant and the independent property valuer benefited the most. She stated that corporate governance was for management and that the summit benefited the appellant and the fellow subsidiary involved in valuation of property. She testified that about 80% of the workload of both the CEO and herself was devoted towards the business activities of the appellant. In cross examination she put the percentage between the public company and the

appellant at 50% each but averred that the accountant and four other employees devoted their working time primarily for the appellant. She further glibly stated that the managing director of the fellow independent valuation subsidiary company attended the summit for the appellant's business activities. She dismally failed to link all their attendances with the business activities or the production of the income of the appellant. In my view, the summit was for the benefit of the public company and the other subsidiary companies would merely benefit by their close association with the group personnel. I would disallow the claim of US$ 6 732 for all three attendees.

In my view, the Commissioner correctly disallowed all the three claims with an aggregate total of US$ 9 778.

The deductions claimed in the 2010 tax year on p 250A of the appellant's bundle and Annexure F p 37 of the Commissioner's case.

Page 250A of the appellant's bundle of documents contains the same information in Annexure F of Commissioner's case headed Appellant's name (Pvt) Ltd: Taxation 31 December 2010 (Amended) schedule of employees' foreign travel for year ended 31 March 2010.

The sum total claimed between 24 April 2009 and 19 March 2010 was in the sum of US$74 933. The appellant conceded the disallowance of US$ 1 760 in respect of the chief executive officer's costs of travel to London. It challenges the remaining disallowances in the sum of US$73 173 for costs of foreign travel.

The foreign travel expenses claimed in the 2010 tax return in addition to those relating to the group CEO and the witness included those in respect of seven other persons. These were the group projects executive[SH], a consultant architect[M], the group financial executive[Mg], the group head of research and development[MH], an employee in the projects division of the independent property valuator[IT] and two employees of the City of Harare[K and Mw]. They went on 16 trips that were expensed on the appellant.

I will group together by purpose of travel some of the 15 line items pertaining to these costs. They cover attendances by the CEO at the Youth Presidents Organisation meetings in Zambia and South Africa, corporate governance meetings, property development concept meetings, financial modelling and financiers meetings, town planner's conferences, fire business conference and the launch of the Zimvest business journal.

The Young Presidents Organisation meetings by the CEO

On 26 May 2009 the group CEO attended the YPO meeting in Zambia at a cost ofUS$1 150. On 27 July 2009 he attended another such meeting in South Africa at a cost of US$1 400. On 2 September 2009 he attended yet another YPO meeting where he met with some financiers at a cost of US$1 200. The last YPO meeting was held in Zambia on 11 January 2010 at a cost of US$4 450. The total amount expensed on these YPO meetings was in the sum of US$8 200.

I would for the reasons given for claims under the same heading in 2009 above, disallow the costs of attending all these YPO meetings in the sum of US$8 200.

Corporate Governance workshops

One workshop was attended by the group CEO, the witness and the managing director for the fellow subsidiary independent property valuation company at a cost of US$10 475 in South Africa on 19 March 2010. It was not clear from her testimony how the presence of the managing director of the fellow subsidiary property valuation company was to the benefit of the appellant in the light of her admission that the appellant did not have any employees. Again, for the reasons advanced under the same heading in the 2009 claims, I would disallow the claim for all three in its entirety.

Property development concept

The sole witness for the appellant conceded that the amount expended by the CEO on the round trip from Harare to London and back via Johannesburg between 11 and 20 September 2009 at a cost of US$ 1 760 to confer over a franchise was entirely at the behest and for the benefit of a fellow subsidiary, a company primarily concerned with valuations. The name of that fellow subsidiary company looms large in annexure F on the trip to Kenya by the CEO on 24 to 26 April 2009 at a cost of US$6 300. In the schedule on p 250A the CEO travelled to explore property development opportunities. The irresistible temptation for me was to treat all expenses attached to the fellow subsidiary as disallowable. The temptation was overcome by the testimony of the sole witness on the point. She stated that the appellant purchased 350 hectares of undeveloped residential land in Harare, which it sought to develop at an opportune time. Her testimony in this regard was confirmed by the contents on p 165 of the appellant’s bundle. The appellant actually acquired 370 hectares of undeveloped residential land on 9 June 2006. The agreed purchase price was satisfied by the issuance of shares of an equivalent value in the ultimate holding public company. It was common cause

that the appellant is a property investment company and is the biggest property holder within the group.

I am satisfied that her evidence in this regard established that the property development explorations in Kenya and Rwanda undertaken**,** by the chief executive officer on 12 May 2009 to Rwanda at a cost of US$1 480, by the second director of the appellant to Rwanda and Kenya between 17 May and 22 May 2009 at a cost of US$3 930 and to Kenya by the consultant architect on 15 June 2009 at a cost of US$2 425 constituted designed expenditure for the benefit of the appellant's business activities. The Rwanda trip was to scout for property investment and partners for project development in Rwanda at the time.

I would also have granted the claim in respect of the trip to Kenya from 24 to 26 April 2009 by the chief executive officer and a consultant engineer at the cost of US$ 6 300 were it not for the responses given by the witness in cross examination. She stated that the trip in question was made by the two gentlemen to Kenya to attend a board meeting of the Kenyan version of the independent property valuator to scout for business. She further averred that at the time the local outfit was related to the Kenyan one. In re-examination she recanted her response and stated that the two outfits were not interrelated companies but were mere franchisees where the two local visitors were just attending meetings as franchisees. It is clear to me that such a meeting on franchises fell into the same category as the London meeting of 11 to 20 September 2009. It was not for the business activities of the appellant. The correctness of this disallowance is confirmed by the admission made by the appellant's tax advisors in the 43 paragraphed letter of objection of 24 June 2013. In para 36 the appellant admitted that "certain group employees whose employment contracts were with the public company carried out activities for the appellant and in addition, also conducted business activities and travel for the other group companies such the independent property valuator all of which were expensed under the appellant". This point was reaffirmed by the sole witness in cross examination when she conceded that all expenditure for other group companies was expensed to the appellant contrary to the requirement for each company to account for its own income, and expenditure and file its own tax returns.

The US$6 300 cannot properly be deducted as an expense incurred in the business activities or for the production of the income for the appellant. I would disallow it in this appeal.

Meetings with financiers

Between 2 September and 6 September 2009 the group CEO met with some financiers in South Africa at a cost of US$821. This was part of his remit with the public company. It was not clear who the envisaged beneficiary of the finance was. The sole witness failed to establish that the appellant was the envisaged beneficiary of the funds.

Finance modelling workshop

The visit of 2 November 2009 by a group finance executive and a group head of research to South Africa at a cost of US$ 1 302 for a financial modelling workshop was again lacking in how it dovetailed with the appellant's business activities or the production of its income.

Attendance at the Town Planner's Conferences

Between 20 June and 2 July 2009 the CEO attended an African Town Planners Conference in Kenya and Rwanda at the cost of US$2 390. Again, on 4 December 2009 the CEO together with an employee of the independent property valuator and an employee of the City of Harare attended a World Town Planners Conference in China on 4 December 2009 at a cost of US$7 472. The sole witness stated that the meetings were for the sole benefit of the appellant and were geared towards financing and developing the 370 hectares of land to best advantage. The City of Harare was obviously a critical stakeholder in the residential development of the 370 hectares while the employee of the independent valuator may possibly have been required to garner the best methods of valuating the stands. The witness established that the two conferences were attended by all the parties for the benefit of the trading activities of the appellant. There is no sound reason to exclude the deduction of these costs from the appellant's income.

The Zimbabwe Investment Business Journal Launch

On 5 July 2009 the group project executive who was also indicated in the appellant's financial statements as at 31 March 2009 as the second director of the appellant attended the launch of the Zimbabwe Investment business journal in South Africa at the cost of US$1 071. The sole witness failed to link the launch of the business journal to the business activities of the appellant. I am unable to find that the expenditure was for the purposes of trade or production of income of the appellant. I would disallow this expenditure.

Prospecting for fire business

The scouting for a prospective fire business in Dubai was attended by the group CEO, the managing director of the independent property valuation company and the general manager of the City of Harare Fire Department on 8 January 2010 at a cost of US$27 232. The sole witness called by the appellant explained that it was a business research project in which the public company was investigating the possibility of starting a fire business in the country. It seems to me that her explanation clearly demonstrates that the trip to Dubai was for the benefit of the public company rather than the appellant. The claim is disallowed. Out of the US$73 173 that appellant sought to be deducted, I disallow foreign travel expenditure in the sum of US$55 401. The appellant wrongly sought to deduct US$57 161 out of a total claim US$74 933. It is however entitled to deduct US$17 772 from this amount as the proven expenses utilised for its business activities.

Penalties:

The last issue for determination was whether the respondent erred in failing *mero motu* to reduce or discharge in full the penalties imposed upon the appellant.

The three amended assessments were typeset on 8 May 2013 and actually issued on 24 May 2013. They were delivered to and received by the appellant on 27 May 2013 [para 2 of the letter of objection and certified copies of the assessments p(p) 17-19 of r 11 documents]. The respondent of his own accord and in the exercise of his discretion imposed a penalty of 50%. The appellant objected to the three amended assessments by letter dated 24 June 2013. The first para identifies the three amended assessments as the target and para(s) 3 to 43 specify the content of the objection. The whole letter neither raises an objection to the additional tax imposed nor to the full contents of the amended assessments. In his written heads of argument Mr *de Bourbon* submitted that the mere identification of an amended assessment by the appellant in its letter of objection was sufficient to obligate the Commissioner of his own accord to consider the whole amended assessment including such contents as were not specifically objected to. He relied on the provisions of s 46 (6) as read with para (m) of the Eleventh Schedule as read with s 62 (4) of the Income Tax Act.

S 46 (6) states:

> "(6) If the Commissioner considers that the default in rendering the return was not due to any intent either to defraud the revenue or to postpone the payment by the taxpayer of the tax as chargeable, or that any such omission, incorrect statement or failure to disclose facts was not due to any intent to evade tax on the part of the taxpayer, he may remit such part or all of the said additional amount for which provision is made under this section as he may think fit."

Para (m) to the Eleventh Schedule reads:

> "The decisions of the Commissioner to which any person may object under paragraph (*b*) of subsection
> (1) of section *sixty-two* are those made in terms of—
> (*m*) subsection (6) and the proviso to subsection (7) of section *forty-six*;"

And s 62 (4) says:

> (4) On receipt of a notice of objection to an assessment, a decision or the determination of a reduction of tax the Commissioner—
> (*a*) may reduce or alter the assessment, alter the decision or, as the case may be, increase or alter the reduction or may disallow the objection; and
> (*b*…….
> In my view, the contention overlooks the provisions of s 62 (3) as read with (5) of the Income Tax Act. S 62(3) specifies that:
> "Every objection shall be in writing and shall specify in detail the grounds upon which it is made."

And subsection (5) states the consequences of failing to do so in these terms:

> "(5) If—
> (*a*) no objection to an assessment …………..subject to any adjustment made in terms of section *forty-seven* or the decision of a court on an appeal determined in pursuance of this Part, be final and conclusive."

The appellant is required by s 62(3) to set out in detail the grounds of its objection. The appellant did not do so in regard to penalties. It did so in respect of four other grounds. The result of the failure to even mention penalties in the objection is fatal. The penalties imposed in each amended assessment by the Commissioner were rendered final and conclusive by the appellant's failure to specify them in the letter of objection. The appellant can only appeal to that which it objected to in the letter of objection. It simply cannot be raised for the first time on appeal. I would dismiss the appeal in regards to penalties on this basis.

Mr *de Bourbon* further submitted that an appeal under the Income Tax Act is brought on a different legal footing with that in the Special Court for Income Tax Appeals. He contended that the High Court is vested with all express and inherent powers to right a wrong done by the Commissioner in imposing a penalty or failing to remit it in full. This submission bears all the hallmarks of a prayer for review. It does not seem to me that I can exercise review powers in an appeal. For that reason the alternative contention must suffer premature demise. He, however, contended that the High Court had conterminous powers as the Special Court to rehear the question of penalties afresh.

That the High Court is a court of concomitant jurisdiction with the Special Court in tax appeals is clear from a broad reading of s 65 of the Income Tax Act. S 65 (1) clothes both the High Court and Special Court with jurisdiction to entertain appeals against the Commissioner's decision by a taxpayer who is entitled to object and is dissatisfied with a decision or deemed decision made in terms of s 64 (4) of the Act. In *casu* while the appellant was entitled to object it did not do so with the result that the Commissioner did not make any decision or deemed decision on penalties. Both Courts are required by s 65 (4) to entertain argument at the appeal hearing limited to the grounds raised in the notice of objection. The proviso permits both courts to grant leave to the appellant to rely on other grounds not raised in the notice of objection on good cause or by agreement of the parties. The appellant did not seek such leave. It merely raised the ground in its grounds of appeal, averred it in its pleadings and raised it in argument. The inherent power to correct a perceived "obvious" wrong is circumscribed by the both s 62(3) and 65(4) of the Income Tax Act.

The sound and correct judicial pronouncements in *Commissioner for Inland Revenue* v *Da Costa* 1985 (3) SA 768 (A) at 774, 47 SATC 87 (A) at 95 and *Sommer Ranching (Pvt) Ltd* v *Commissioner of Taxes* 1991 (1) ZLR 438(SC) at 443, (1999) 61 SATC 472 (ZSC) at 477 clearly apply to both the High Court and Special Court in determining appeals properly brought in terms of s 65 of the Income Tax Act. The alternative ground raised by Mr *de Bourbon* does not find favour with me. I would again dismiss the appeal on penalties on the ground that it is improperly before me.

On the merits, Mr *de Bourbon* contended that the respondent erred in imposing a penalty in any amount in the absence of any infringement of any of the 6 particulars provided for in s 46 (1) of the Income Tax Act. He argued that the taxpayer did not fail to submit a return or omit an amount which he ought to have included or made an incorrect statement or failed to disclose facts he should have disclosed or made a statement seeking an undeserved credit, or failed to disclose the particulars specified in any notice calling on it to submit tax returns. In my view, the appellant conceded that it omitted to include US$600 000 from the sale of three stands which amount it ought to have included in the taxable income for the year ended 31 December 2010. That omission was sufficient to trigger the imposition of a penalty. More importantly, the submission overlooks the provisions of subs (4) of s 46 of the Act, which states that:

> "(4) Any taxpayer who, in determining his taxable income as disclosed by his return, deducts any amount the deduction of which is not permissible under the provisions of this Act, or

> shows as an expenditure or loss any amount which he has not in fact expended or lost, shall be deemed for the purposes of this section to have omitted such amount from his return."

The subsection equates the deduction of a higher amount than due or expenditure not actually incurred to an omission from the return which ought to have been made. The deduction of wrong capital allowances and of foreign travel expenditure incurred by other group companies fell into this category. The existence of such an omission obviously renders the statement incorrect. I am satisfied that in these circumstances the respondent was obliged by the provisions of s 46 (1) of the Act to impose additional tax.

Mr *de Bourbon* further argued that a genuine legal challenge to the interpretation rendered by the taxman to his general ruling, however wrong, not motivated by malice, negligence or moral turpitude should not be punished by the imposition of additional tax. I attempted to demonstrate in *PL Mines (Pvt) Ltd* v *Zimra* HH 466/2015, that that was not the only consideration that governed the determination of an appropriate penalty. The triad of the offender, the offence and the interest of society all enter the penalty matrix.

The appellant was a law abiding corporate citizen from its existence until it submitted culpable returns for the three tax years in question. The change of currency on 29 January 2009 and its failure to interpret the binding general ruling of 1 October 2010 resulted in the present infraction of s 46 (1) (b) and (c) of the Income Tax Act. It broke the law by rendering inaccurate amounts in its returns by failing to include US$600 000 in the tax year ending 31 December 2010 to its income and by deducting higher capital allowances in all the three tax years in issue and foreign travel expenditure than it was entitled to in the tax years ending 31 December 2009 and 2010. It was a first offender that fully cooperated with the respondent.

The legal challenge to the interpretation of the general binding ruling was honestly made. No moral turpitude attaches to the challenge or arises from my finding against the appellant. That, however, is not the only measure of its moral blameworthiness. The appellant sought to unduly benefit from higher deductions than prevailed before the introduction of the multicurrency regime. It knowingly claimed foreign travel expenses incurred for the business activities of group companies. It failed to include US$600 000 in its income in 2010. These two factors constitute greed and are aggravating features, which overshadow the honest legal challenge. In view of the admission of the sole witness in cross examination that the witness in her capacity as an "employee" of the appellant was aware of the requirement to submit separate returns for each group company capturing income earned, expenditure incurred and deductions made, the failure of the appellant raises its moral blameworthiness. That it acted

on professional advice does not lessen its blameworthiness. It is curious that the professional advisers would insist on a wrong interpretation of the general ruling even after conceding that the Commissioner had no powers to and in fact did not amend para 8 (3) of the Fourth Schedule to the Income Tax Act.

The interests of society demand that wrong doers be punished to inculcate both personal and general deterrence. The punishment expiates the tax sins of the errant taxpayer and serves to rehabilitate it into the ranks of honest and law abiding taxpayers. The potential prejudice to the fiscus occasioned by the appellant was high. In 2009 the appellant declared a loss after deducting the wrong capital allowances. In the other two years it sought to benefit from artificial assessed losses. I have applied the replacement values on p 218 column 5 under the rubric "ranking cost" in the appellant's documents and the dates of construction proffered by the appellant for six or seven of the eight properties on p(p) 17 and 27 of the respondent's documents to estimate the possible capital allowances that the appellant was entitled to claim yearly from 2003 in United States dollars. Below is the result of applying my reasoning on capital allowances to these figures.

The value of the property constructed on 30 November 1974 was set at US$3 127 000. The original owner claimed 5% capital allowances for 13 years to 1987 at the rate of US$156 350 amounting to US$ 2 032 550. The ITV for the second owner was used by the second owner was equivalent to US$1 094 450. The second owner claimed capital allowances (from 1987 to 2003) for 16 years at US$54 722.50 per year amounting to US$875 560. The ITV for the appellant in 2003 was US$ 218 890. The appellant's annual wear and tear allowance was US$10 944.50.

The second property was constructed on 1 March 1950. It was valued at US$2 220 000. It would appear to have exhausted its ITV by time the first owner transferred it in 1987 to the second owner as 37 years had elapsed unless the initial building was demolished and a new one constructed at some later period. There is need for this to be established.

The third property was constructed on 1 December 1998 by the second owner. Its replacement value was set at US$5 010 000. The wear and tear claimed per annum to 31 December 2003 was US$ 250 500 for 5 years totalled US$ 1 252 500. The ITV for appellant was US$3 757 500. Its yearly wear and tear was US$187 875.

The fourth property was built on 20 February 1993 by the second owner. Its replacement value was set at US$ 21 710 000. The capital allowances were claimed for 10 years in the yearly sum of US$1 085 500 in the total sum of US$10 855 000. The ITV for the

appellant was in that sum. Its yearly capital allowances from 2003 were in the sum of US$542 750.

The fifth and sixth property consists of two properties constructed in 1976 by the first owner. Both were valued at US$2 830 000. The first owner claimed yearly capital allowances at the rate of US$ 191 500 for 11 years in sum of US$2 106 500. The ITV value of the second owner was US$723 500. It claimed yearly wear and tear at the rate of US$ 36 175 for 16 years in sum of US$ 578 800. The ITV for the appellant was in the sum of US$144 700. The yearly capital allowances for the appellant were in the sum of US$7 235.

The seventh property constructed on 1 May 1972 by the first owner was valued at US$1 770 000. The wear and tear claimed yearly in the sum of US$88 500 for 14 years was US$1 239 000. The ITV for the second owner was US$531 100. The second owner claimed capital allowances for 16 years in yearly sum of US$26 550 in the aggregate sum of US$424 800. The ITV for the appellant was in the sum of US$106 300. The capital allowance claimed by the appellant was US$ 5 315 per year.

The date of construction of the eighth property was not provided. It was valued at US$13 130 000. Assuming it was constructed in 1968 when the second owner became a division of the first owner, the first owner would have claimed capital allowance at yearly rate of US$656 500 for 19 years in sum of US$12 473 500. The ITV for second owner was US$656 500. The second owner's yearly wear and tear would have been US$32 825 for 16 years amounting to US$525 200. The ITV for appellant was US$ 131 300. It claimed yearly capital allowance of US$6 565.

I estimate the total capital allowances for the appellant per year for its 20 year entitlement in the sum of US$760 684.50. The appellant sought to over claim by US$ US$ 1 778 855.50. The potential prejudice to the respondent was high. I would have weighed these aggravating features against the mitigating ones and imposed some penalty perhaps in the region of 5% to 10%. I would not have remitted the penalty in full notwithstanding my awareness of the existence of the Finance Act (Tax) Amnesty Regulations SI 163 of 2014 for the simple reason that the appellant is excluded from benefiting from the tax amnesty.

The Tax Amnesty

Mr *de Bourbon* also attacked the penalty as an infringement of s 56 (1) of the Constitution, which guarantees equality before the law and the right to equal protection and benefit of the law to all people. The section states that:

> "(1) all persons are equal before the law and have the right to equal protection and benefit of the law."

He contended that the appellant's rights to equal benefit of the law were infringed by the imposition of additional tax when other taxpayers with criminal intent make false declarations or evade the payment of tax or fail to render returns or pay tax on time or commit fraud or are negligent are absolved from penalties relating to that tax for the period 1 February 2009 to 31 October 2014 by the provisions of s 7 of the Finance Act (Tax Amnesty) Regulations 2014 SI 163 of 2014. The regulations were promulgated in terms of Part VII of the Finance Act (No 2) Act 2014 (Act 8 of 2014). Both the principal and subsidiary legislation do not extend these benefits to honest tax payers like the appellant. He decried the imposition of a penalty in any amount against an honest taxpayer such as the appellant for merely raising an arguable legal point on the interpretation of the general binding ruling while the dishonesty taxpayer is absolved from prosecution, does not pay interest and is not penalised. He urged me either to adopt the broad way of declaring the tax amnesty unconstitutional for discriminating against honesty taxpayers in favour of dishonesty ones or narrow way by taking into account the tax amnesty and discharging the penalties.

Mr *Magwaliba* was taken by surprise by the constitutional question and invoked the principle of constitutional avoidance. He further contended that the constitutional based relief was not sustained by the founding appeal papers. It was not part of the objections raised by the appellant on 20 June 2014. He further contended that the practice in this jurisdiction required intervention by and argument from the Attorney General before the Court determined the constitutional issue. He further argued that the Court was incapacitated from conclusively determining the constitutionality of the tax amnesty by the appellant's failure to lay the impugned legislation on the bench and by the lack of full debate by the parties of the issue. He requested me to invoke the principle of constitutional avoidance which both counsel assured me was part of our law. I am aware that it was set out in the United States case of *Ashwander* v *Tennessee Valley Authority* 297 U.S. 288, 347 (1936) in these terms: "The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of." In reply Mr *de Bourbon* abandoned the broad approach in favour of the narrow approach.

I believe that the constitutional question raised by Mr *de Bourbon* is a very important one with wide and far reaching consequences to all outstanding appeals on penalties that are yet to come before me. It would undermine the proper application of s 56 (1) of our

constitution if I were to bestow on it a broad and generalised meaning. It seems to me that there are various legal requirements that demarcate the issue of equality before the law and the right to protection and equal benefit of law that have been laid out in various common law jurisdictions such as the United States of America, Canada, South Africa and to a limited extent in this country which counsel did not articulate before me.

Again, the question was not raised in the objection to the Commissioner. The procedural requirement set out in s 62 (3) and (5) was not followed. The constitutional argument is therefore not properly before me. Regrettably, I must again state as I did in *PL Mines (Pvt) Ltd* v *Zimra* HH 466/2015 at p 25 that I leave the question for future argument by affected parties.

For the avoidance of doubt, I would dismiss the appeal against penalties on the ground that it was not properly raised before me.

Costs

The basis for an award of costs to either party is prescribed in s 65 (12) of the Income Tax Act. I do not find the claim of the Commissioner unreasonable nor the grounds of appeal frivolous. According each party will bear its own costs.

Disposition

Accordingly, it is ordered that:

1. The appeal against the imposition of 50% penalties is dismissed.
2. The amended assessment number 1/014 for the year ending 31 December 2009, the amended assessment number 1/015 for the tax year ending 31 December 2010 and the amended assessment number 1/016 for the tax year ending 31 December 2011 are hereby set aside.
3. The respondent shall issue further amended assessments to the appellant in conformity with this judgment which:
    a. grant the appellant 5% capital allowances based on the correct income tax values of each property;
    b. the respondent shall calculate the capital allowances due to the appellant in United States dollars in the following manner:
        i. utilize the replacement value of each property as stated in the fifth column under the heading ranking costs on p 218 of the appellant's bundle of documents as the cost of construction for each property and deduct the 5%

capital allowances claimable to determine the income tax value for each property on transfer from the first owner to the second owner;

ii. compute the income tax value of each property by deducting the 5% capital allowances claimable by the second owner on transfer from the second owner to the appellant.

iii. determine the final balances of each property as at 31 December 2008 after deducting the 5% capital allowances claimed by the appellant from the date it took transfer to 31 December 2008.

iv. deduct the correct capital allowances from the appropriate final balances that shall then be regarded as the initial balances for each of the three tax years ending 31 December 2009, 2010 and 2011.

c. the respondent shall add back to the taxable income of the appellant the sum of US$ 9 778 claimed by the appellant as foreign travelling expenses in the tax year ending 31 December 2009

d. the respondent shall add back to the taxable income of the appellant in the tax year ending 31 December 2010:

i. the sum of US$57 161 out of the total of US$74 933 claimed by the appellant as foreign travel expenses in that tax year;

ii. the sum of US$600 000 being the proceeds from the sale of three stands in Harare in that tax year.

4. Each party shall bear its own costs

Gill, Godlonton and Gerrans, the appellant's legal practitioners