PIL (PVT) LTD
versus
ZIMBABWE REVENUE AUTHORITY
and
THE COMMISSIONER GENERAL
ZIMBABWE REVENUE AUTHORITY

FISCAL APPEAL COURT
KUDYA J
HARARE, 17 and 18 March and 13, 14 and 18 May 2015 and 30 March 2017

Value Added Tax Appeal

W Manase, with *W Pasipanodya* and *T Tanyanyiwa* for the appellant
T Magwaliba, for the 1st and 2nd respondents

KUDYA J: This is an appeal against the determination in respect of value added tax, VAT, by the second respondent dated 12 June 2014 to an objection raised by the appellant on 2 May 2014. The appeal seeks to determine whether or not the estimates assessed for VAT and penalties imposed by the first respondent for the period from 1 February 2010 to 31 December 2013 should stand.

At the commencement of hearing, the appellant sought to amend the notice of appeal by including in the grounds of appeal issues relating to Income Tax and PAYE. I dismissed the application with costs on the ground that all appeals relating to such matters, in terms of s 65 of the Income Tax Act [*Chapter 23:06],* fell to be decided by the Special Court for Income Tax Appeals or the High Court and not by the Fiscal Appeal Court.

The matter proceeded on the basis of the seven grounds of appeal filed on 13 June 2014. At the appeal hearing the appellant called two witnesses, its group chief executive officer and a chartered accountant and produced a bundle of documents exh 2[1] while the respondent called a single witness, its chief investigations officer and produced two bundles of documents, exh 1 and 3[2].

[1] 120 pages
[2] 313 and 53 pages, respectively

The background

The appellant is a fast foods small to medium sized enterprise.[3] On 20 May 2013[4], the Commissioner commenced a tax compliance investigation on the appellant. He was represented by two chief investigations officers at the initial interview held on 29 May 2013 at the appellant's head office in Hatfield, Harare. The appellant was represented by its group chief executive officer, a finance manager and public officer and an assistant accountant.

The initial interview provided the Commissioner with a general overview of the operations of the appellant. The sole witness called by the respondent completed and together with the appellant's public officer signed the 8 paged questionnaire of the initial interview[5]. The nine areas covered were preliminary and general information, identification, bank details, rent and properties, PAYE, consultancy and agents, imports and exports, Income Tax, VAT and accounting systems.

On 4 February 2014, the investigators conducted a physical walkthrough of the appellant's accounting systems at the appellant's head office. A requested demonstration of the electronic display of the previous day and month postings at the computer department failed. The investigators selected four files for examination at their offices. An accountant of the appellant surreptiously took one of those files and disappeared from the premises, switched off his cell phone and became unreachable. His conduct prompted the investigators to seize two servers, the public officer's laptop and a computer from the marketing department at head office and another computer from one of the Harare branches of the appellant.

A total of eleven letters were exchanged and six meetings held between the parties during the period from 5 March to 2 May 2014. On 5 March 2014 and at the Kurima House offices of the respondents, the public officer apologised for the conduct of his accountant and pleaded with the respondents to return his servers. The respondents urged the public officer to declare all sales by 7 March 2014 and provide the outstanding schedules of the suppliers of non-vatable products such as chicken, cooking oil, meat and potatoes in the prescribed format showing the product, names of supplier, contact person and contact details. It was further requested to submit monthly schedules of all suppliers indicating the date, name of supplier,

[3] Letter of appellant to respondent of 7 March 2014 p 10 of respondent's reply and 16 and 91 of exh1 and notes to financial statements for 2010, 2011, 2012 and 2013 pp 8, 25, 42 and 60 of exh 2(last 2 mention fast food company and exclude potato distributor)
[4] Annex D1 p 24-25 of respondent's reply an p 30-31 and 89-90 of exh 1
[5] P252-259 exh 1

product, amount and mode of payment, tax clearance status and any withholding tax due. To facilitate the speedy release of the seized computers he was invited to examine, print, sign and stamp the information on the computers[6].

In consequence of the meeting, and in both the spirit of cooperation and mitigation of any possible punishment the public officer wrote a letter to the Commissioner on 7 March 2014[7], voluntarily disclosing areas of non-compliance with tax legislation "as part of our efforts to co-operate with the ongoing tax compliance investigation by your office." He confessed that the appellant had not been religiously remitting all taxes due to internal cashflow and liquidity challenges. He disclosed the existence of close and intricate and improper financial transactions involving the director's other farming projects. The farm produced and traded in potatoes, lettuce, beef and other agricultural products. The director further sourced potatoes from other producers and supplied them to the appellant. There was no clear separation between the proceeds from the director's sales and those of the appellant as they were all deposited into the company account. In addition, the farm workers at the director's farm were on the company payroll. He indicated that the appellant had not made full disclosure of both its sales and VAT and promised that he was in the process of compiling comparative schedules of the declared and actual sales. It is clear from this letter that the supply of potatoes was a separate and distinct business operation of the CEO that did not form part of the trading activities of the appellant.

In the reply of 12 March 2014, the Chief Investigator requested the appellant, as a distinct legal person, to account for its transactions separately from those of the CEO. She prescribed the format of the various schedules that she requested. The schedules related to the sales of the CEO and other external parties to the appellant showing the date of supply, the product supplied, the value of supply and the mode and date of payment. In regards to the declaration of output tax and purchases she urged the appellant to provide schedules of the discrepancies indicating on a monthly basis per branch the declared and understated sales and a schedule of purchases with an aggregate value exceeding $250 per year. She also sought a written explanation of the verbal explanation rendered on 10 March 2014 concerning the compilation of the daily and monthly sales report of each business complex by 13 March 2014. She warned the appellant that failure to submit all the requested information by 17

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[6] Annex D2 p 26-29 and annex H p 56-58 of respondents' reply reproduced pp 32-35 and 95-98 of exh 1
[7] Annex A p10-13 of respondents' reply and p16-19 and 91-94 of exh 1

March 2014 would force the Commissioner to issue estimated assessments based on the information at her disposal.

By 17 March 2014 the appellant had appointed one MG, a tax consultant, to assist with the compilation and submission of the requested schedules. It failed to submit the requested information. In consequence, two events took place on 19 March 2014[8]. The respondents estimated the VAT liability and dispatched schedules to the appellant giving it two days to comment. The schedules prompted the parties to meet on that day. The result was that on 21 March 2014[9] the public officer submitted sales figures for 2013 and 2012. The 2013 sales did not include input taxes and exempt sales from the grocery shop. The new declaration for 2013 was in the sum US$11 983 195.45 against the old one of US$6 952 536.43. The variance was in the sum of US$5 030 659.02. He requested an extension of time to submit 2011 sales and offered to clear the arrears at the rate of US$5 000 per week and as a sign of goodwill deposited an equivalent amount on 20 March 2014 and promised to pay US$100 000 by 15 April 2014. The 2012 variance was US$257 578.36 from the old declaration of US$4 688 055.64 and new one of US$ 4 945 634. These amounts were altered following the meeting of 21 March 2014.

In the meeting of 21 March 2014, the appellant was *inter alia* represented by its group chief executive officer and public officer. The parties discussed the figures collated from the documents and computers seized from the appellant. The new declarations understated the 2013 sales by margins in excess of 100%. The group chief executive officer regretted the conduct of his accountant who disappeared with the file that had been selected by the investigators and conceded the under declaration of sales. He blamed poor controls, theft and stiff competition for the appellant's conduct. His offer to liquidate the arrears at the rate of US$5 000 per week was declined.

On 24 March 2014[10], the public officer declared its final position for 2013 sales. The sales were pitched at US$12 991 211.88. The variance to the initial self-assessments rose slightly from the first voluntary disclosure to US$6 038 675.45. It proposed to liquidate any resultant arrears at the rate US$2 000 per day commencing 21 March 2014 in addition to their prevailing statutory obligation to the respondents, creditors and employees and a possible once-off bulk payment of US$ 100 000 once the extent of the indebtedness was established.

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[8] Annex D3 p 30 commissioner's reply and p36, exh 1
[9] P 99-102 exh 1
[10] Annex E1 p 31-32, commissioner's reply and 37 -39 and 103-104, exh 1

A meeting was held on 1 April 2014[11]. The respondents rejected the 2013 final position and the offer to liquidate the arrears at US$2 000 a day. The latest voluntary disclosure for 2013 did not accord with the forensic decoded data. The respondents applied a factor of 171% to raise the self-assessed sales of five of the months and extended deadlines for the submission of 2012, 2011 and 2010 voluntary disclosures to between 1 and 11 April 2014. The appellant disputed the application of a factor of 171% in the face of low and peak sales months induced by public holidays and sales promotions. The respondents issued amended assessments for 2013 on 4 April 2014[12]. On the same day the appellant admitted an aggregate negative variance of US$ 276 509.86 arising from an initial declaration of US$4 688 055 against a new disclosure of US$4 964 565.50[13]. A final high powered robust meeting took place on 7 April 2014[14]. The respondents were represented by six officials amongst who was the director of loss control, who chaired the meeting. The appellant was represented by the CEO, the public officer, accountant and assistant accountant. The public officer and the accountant signed the minutes on behalf of the appellant. The respondents demanded payment of the estimated VAT liability in the shortest possible time. The appellant disputed the amount. The appellant was castigated for using the VAT due as working capital and for channelling the money towards the CEO's personal construction projects. The public officer was threatened with arrest and the company with a 200% penalty for evasion. The appellant was encouraged to sign and stamp the information retrieved by the respondents' forensic department from the seized computers.

The 2011 and 2010 final positions were submitted on 10 April 2014[15]. The variance for 2011 was US$142 057.96 arising from an initial declaration of US$2 323 234.06 against a new declaration of US$2 465 292.02. The figures for 2010 were a variance of US$112 614.08 from an initial declaration of US$552 012.95 and new declaration of US$360 126.10. The Commissioner issued amended assessments for the period 2010 to 2012 on 14 April 2014 based on sales figures derived from documents recovered from two Harare branches and head office and the computer and forensic downloads.

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[11] Annex F, p49-51 of commissioner's reply and p109-111 , exh 1
[12] Pp 49-51 of commissioner's reply and 55-57 and 109-111 of exh 1
[13] Annex E2 p 34-36 of commissioner's reply and 40-42 and 106-108 of exh 1
[14] P 126-131 of exh 1
[15] Annex E3 p37-40 of commissioner's reply and 43-46 of exh 1

On 2 May 2014[16] the chartered accountant wrote the letter of objection seeking the reversal of each of the VAT assessments issued on 4 and 14 April 2014 covering the period from 1 January 2010 to 31 December 2013. Three grounds of objection were raised. The first was that the respondents had arbitrarily increased output tax by using estimated sales that were not derived from factual records and information and without showing how the figure had been computed. The second was that the appellant had not been given adequate time to submit full claims for input tax and revise the initial sales figures indicated in the original VAT 7 returns. The third was that the penalty imposed of 100% was excessive in that it ignored the verbal representations made to the investigators in the various meetings that were held and was not commensurate with the moral blameworthiness of the appellant.

On 12 June 2014 the second respondent disallowed all the three grounds of objection. The appellant filed the notice of appeal in the present matter on 13 June 2014 which the respondents contested on 24 July 2014.

The facts

It was common cause that there was a single branch, the flagship branch in operation in 2009 and 2010. It commenced operations in February 2009 and diversified into the food court industry in May 2010. In 2011 two branches were opened in Harare. The Grocery shop was opened in December 2012. In 2013 a further two branches were opened in May and December in Harare.

It was common ground that during the period in question the appellant timeously submitted monthly self-assessment VAT 7 returns. Samples of these detailed and informative "Return for Remittance of Value Added Tax" forms are on pages 50 to 53 of exh 3. The form was divided into 5 major parts. The first Part covered the particulars of the registered operator. The second provided for the declaration of output tax, the third covered claims of input tax, the fourth set out the calculation of VAT payable or refundable and the fifth dealt with export sales. The form was submitted in duplicate to the Commissioner by the public officer who printed his name and appended his or her signature and date after certifying that all the information in the return was true and correct. The form carried a warning of severe penalties for false declaration, failing to pay tax and submitting the returns after the due date.

[16] Annex C of appellant's affidavit referred to on p 44 of respondent's reply and p50 , exh 1 and uplifted by Court from HC 4847/2014 and in the determination annex G pp 52-55 of commissioner's reply and pp58-61 of exh 1.

The first four parts were applicable to the appellant. The appellant was required in Part II to provide the aggregate output tax by indicating in the appropriate spaces the "Value of Supply" and "Output Tax" the value of the goods and services sold at the standard rate of 15%, zero per centum or any other per centum and exempt sales. There was provision for making suitable adjustments before computing the aggregate output tax. The appellant was further required to indicate in Part III the "Value" and "Input Tax" in the appropriate rows of the domestic goods and services purchased to make the vatable sales, imported goods and capital goods and any necessary adjustments on four other goods or services before calculating the total input tax. The output tax payable to the Commissioner was calculated in Part IV by deducting the input tax paid by the taxpayer from the output tax received by the taxpayer. A positive balance connoted the amount due to the Commissioner while a negative balance represented the refund due to the taxpayer.

In each submission, the public officer filled in the value of the standard rated taxable sales and calculated the appropriate output tax. He did not indicate any zero rated or exempt sales. He also inserted the value of the domestic goods and services purchased to make the taxable supplies and the appropriate input tax paid for them. He then calculated the output tax payable or refundable by deducting the input tax from the output tax. It was further common cause that two days before the hearing the appellant resubmitted the amended VAT 7 returns on pages 2 to 48 of exh 3 that covered each of the months appealed against. These VAT 7 forms have been reconfigured but they carry essentially the same legends, columns and rows as the old ones.

In spite of the submissions of Mr *Manase* for the appellant and the testimony of the chartered accountant to the contrary, it was common ground that at the time of the investigations, one RM, the finance manager, was the public officer of the appellant. The chief executive officer of the appellant conceded this fact three times under cross examination. The chief investigation officer of the respondents established this before, during and after the initial interview. In the correspondence exchanged between the parties and at the several meetings held, RM identified himself as the public officer.

It was further common ground that the appellant applied for and obtained four bank loans[17] during the period between 24 November 2010 and 16 October 2013. The applications were based on its management accounts. Indeed, the appellant was required in the first loan

[17] Pp 208-251 of exh 1

agreement to submit quarterly management accounts within 21 days of each quarter end and a copy of each annual report and accounts within 90 days of the year end together with signed copies of its annual reports within six months of the year end in respect of the other loans. The last three loans were obtained on the strength of the management accounts for the period ended 30 April 2011 and for the year ended 31 December 2012[18]. The notes to these management accounts indicated that the revenue figures were not only net of VAT but also complied with International Financial Reporting Standards[19].

The minutes of the management meetings chaired by the group chief executive officer and attended by 14 senior managers of the appellant of 3 April, 12 November 2013 and 15 January 2014 were downloaded from the computers before forensic examination[20]. The relevant portions of the minutes related to the sales achieved and the target set for some of the branches. In the April minutes the actual sales for March for the flag ship [US$654 000], and MN [US$391 000], SM [US$385 000] and A [US$180 000] branches were indicated and the total turnover was US$ 1.6m.[21] In the November minutes the aggregate October turnover for the 4 branches was US$1 572 188.12[22]. The individual sales were not provided for four of the branches. The January minutes related to 5 branches; including the one that was opened on 27 November 2013. The December aggregate turnover was in the sum of US$ 2 477 393.98. The new branch had a turnover of US$383 193 while the other four had turnovers of US$ 887 000 [flag ship], US$380 147.75 [MN], US$ 457 982.75[SM] and US$368 499.50 [A].[23] The appellant disputed these minutes on the basis that they were not signed but declined to provide the "readily available" signed minutes to the investigators soon after the meeting of 2 April 2014 or at any time thereafter.

The oral evidence

The general thrust of the chief executive officer's testimony was to blame others but himself for the woes of his company. He blamed his finance team for poor workmanship and for submitting inaccurate self-assessments, which excluded zero rated sales. He also blamed the investigation team for coercing the public officer to sign the "inaccurate" forensic decoded data. He criticised the Commissioner for using the decoded data, unsigned top

[18] Pp192-207 of exh 1
[19] P199 and 202 of exh 1
[20] P 132-163 of exh 1
[21] P159 para 4.1of exh 1
[22] P 150 para 4.2 of exh 1
[23] P 134 para 4.1 of exh 1

management minutes and management accounts supplied to a bank for the procurement of loan funding and rejecting the voluntary disclosures in making the estimated assessments. He charged the Commissioner with the duty to compare the forensic data with the sales on the fiscalised machines and the Pastel data bank even though he was aware that the machines were adversely affected by power outages and break downs.

The chartered accountant was the star witness of the appellant. He was engaged on 8 April 2014. His mandate was "to assist the appellant in any way (he) thought possible". He found computerised sales journals in place in the mainframe computer. The purchases system was in shambles. The management accounts on Excel were "nonsensical". There were no Zimra compliant records. He had difficulties finding information as the initial accountant had been convicted of fraud and the newly qualified chartered accountant in post was inexperienced. A substantial amount of sales records were in respect of agricultural products such as fish, chicken, potatoes and lettuce, sold from supermarkets and the open market. He also extracted information from the Retalix Extreme StoreLine point of sale and summarised it into a single journal. The bank statements showed large cash withdrawals. He wrote up payments from the bank statements. He wrote up cash books from the sales journal. The appellant predominantly transacted in cash and issued invoices that he alleged were all documented in the four trunks and box he brought to Court for verification. He traced the source of banked funds through the cash book and established vatable and non-vatable sales.

He emphatically stated in his evidence in chief and under cross examination that he did not audit the appellant's accounts but compiled all the missing books of accounts and records such as cash books, ledgers, trial balances, and the financial statements in exh 2 for the years ending 31 December 2010, 2011, 2012 and 2013 from the information placed at his disposal by the appellant. The financial statements were approved by the appellant's board of directors on 17 December 2014. He prepared the amended self-assessment VAT returns in exh 3 for the period in question, separating zero rated from standard rated sales and indicated input VAT in compliance with the 12 month prescription period from the date of invoice, which he submitted to the respondents on 13 March 2015. He did not use the forensic decoded data, the management accounts or the voluntary disclosures made by the appellant before his engagement in his compilations. He disparaged these documents and the finance team employed by the appellant before his engagement. His computations were different from both the appellant's self-assessments and voluntary disclosures and the respondents' estimates. He used the records at his disposal together with the information and explanations

he obtained from management to calculate VAT payable. He found the total VAT payable before penalties to be US$ 485 004.64 and of this amount US$350 000 was paid before the hearing started.

The chief investigation officer and head of the investigation team testified for the Commissioner. She is a woman of letters and an experienced specialist investigator of 14 years. The investigations commenced on 20 May 2013, the date she wrote a letter to the public officer. She conducted an initial interview on 29 May 2013 and received some of the information she had requested on 20 May from the appellant's public officer on 10 June 2013. The information consisted of financial statements, tax computations, and sales schedules, which tallied with the self-assessments the appellant, had submitted. The sales schedules did not distinguish taxable sales from non-taxable sales. In July 2013 she reminded the public officer to submit the outstanding separate schedules of zero rated sales and output and input tax. Her team conducted a document analysis of the appellant until 4 February 2014 when she conducted a walkthrough at the appellant's head office with the public officer and his team. She was parked in the waiting room while the public officer ostensibly searched for the server room clerk responsible for entering sales into the computer. When he was located, he failed to open the previous day and the previous month's entries. She selected four hardcopy files amongst which was a "gross profit stocktake 2011" file for the flagship branch. The gross sales in that file were higher than those in the self-assessment returns for that branch. This prompted her to conduct a coordinated search and seizure at the appellant's head office and two other branches in Harare. She seized two servers, the laptop of the public officer and the marketing department computer from head office and another computer from one of the branches. The seized computers were logged in and opened by the public officer and the assistant accountant and analysed in their presence. Relevant data was downloaded, printed and contemporaneously signed and date stamped by the public officer. Thereafter the assistant accountant's computer and the finance manager's laptop were digitally examined by the respondent's Information Systems department and a treasure trove of information was retrieved from the hard drives. This information was analysed by the public officer immediately after the meeting of 7 April 2014 before it was printed and then signed and stamped by him.

She based the estimated assessments on the information derived from the supporting incomplete sales documents and inaccurate voluntary disclosures made by the appellant, the downloads from the seized computers made in the presence of the public officer and the

forensic decoded data acknowledged by the public officer as belonging to the appellant. She did not use the bank statements as the public officer had indicated to her that the appellant did not bank all the cash it received. Some of it was used to pay suppliers before banking. She did not account for zero rated sales in her estimated assessments. She did not have recourse to the other records purportedly used by the chartered accountant. She eventually raised estimated assessments because the appellant failed to supply the requested information and to cooperate on the core aspects of the investigation.

Assessment of the credibility of the witnesses

The group chief executive officer of the appellant was an incredible and contradictory witness. He prevaricated on whether the appellant owed or was owed output value added tax. While he maintained that the flag ship commenced operations in May 2010, he could not satisfactorily explain the dates of 2009 in the notice of appeal and February and September 2013 in both sets of the voluntary disclosures. He maintained that he attended only one meeting on 7 April 2014, with the investigation team contrary to the documentary evidence at hand which showed that he also participated in the initial interview and in the meeting of 21 March 2014. He claimed that he only became aware of zero rated sales after the engagement of the chartered accountant yet these were first discussed in the initial interview. Again, he falsely claimed to have obtained his farm in 2014 when according to the offer letter, the farm was allocated to him on 7 June 2013.

I have no doubt that the chartered accountant is an experienced man of letters who conducted the compilation to the best of his ability. The disclaimer in the compilations demonstrate that he was vulnerable to manipulation by the appellant arising especially from its poor record keeping system. He based his compilation on both the written records and verbal information that was supplied to him by the appellant, some of which were demonstrably inaccurate. The appellant issued receipts to sellers and not to purchasers. Under cross examination he admitted that the only records in existence were sales journals. He then indicated that reconciling sheets showed that the suppliers did not acknowledge receipt of payment and he attributed differences between the bank statements and the reconciling sheets to transport costs. He further alleged that he used vouchers, bank statements and computer information to write up cash books. He was not supplied with the note books in which open market sales of potatoes at such places as Mbare, Chitungwiza, Highfield, Dzivarasekwa and other high density areas were recorded and which were used by the cashiers at head office to

punch the sales into the appellant's computers. It was accepted that these sales provided fertile ground for fraudulent activities by the drivers who sold these potatoes from open trucks or the cashiers who received the proceeds and entered them into the computers at head office.

His evidence that the appellant was a potato distributor was contradicted by the letter of 7 March 2014. The letter intimated that potato trading was one of the personal projects of the group chief executive officer. In that letter he is indicated as a major supplier of potatoes to the appellant. It seems to me that the public officer correctly disclosed the mingling of the proceeds from the group chief executive's farm produce with those of the appellant. In my view, if the sale of potatoes were the appellant's project under head office, the appellant would have treated head office as one of its branches specialising in the sale of that product and this would have been discussed in the management meetings, which form part of exh 1.

It was disingenuous of both the chartered accountant and the group chief executive officer to accuse the appellant's finance team of incompetence, especially when the amended self-assessments prepared by the chartered accountant mimic the initial assessments in respect of taxable sales and input VAT claimed. The only major difference relates to the accounting of zero rated sales derived from potato sales and an adjustment to the motor vehicle benefit that increased the output tax received. The initial finance team produced complex statistics on the rate of monthly growth, contributions to turnover and customer counts of each business unit and business line, which in my view demonstrate a remarkable aptitude for financial competence and intelligence.

In any event, the major weakness of the evidence of the chartered accountant lay in that he merely related his methodology and conclusions without demonstrating his workings. He did not produce the primary documents from which exh 2 is derived. He failed to establish the existence of the documents he alleged he used and were in the trunks and box. For all we know they could very well have been empty.

On the other hand, I found the chief investigation officer a credible witness. Her version was confirmed by the correspondence that she exchanged with the appellant's public officer. She clearly provided the basis for her estimated assessments. She was an investigator and not an auditor. It was not her duty to compile the appellant's books of account. Her duty was to request for the information needed to establish the correctness of the initial self-assessments. In the initial interview, the appellant intimated that it had the information she required to conduct the verification. She set out in great detail the content and format of the

requested information, which should have been easy for the appellant to supply. In the absence of the evidence from the public officer, I do not see how the appellant could possibly establish on a balance of probabilities that her team coerced the appellant into logging into the seized computers and certifying the content derived from these computers.

I am satisfied that she told the truth when she stated that "the shorthand signature" on the forensic decoded documents belonged to the public officer and the smaller rectangular stamp on the same and other documents belonged to the appellant. These appear on other undisputed letters and documents of the appellant. The shorthand signature was appended in appendix 2 to the final position voluntary disclosure of the letter of the appellant of 4 April 2014 and on the five pages of gross profit stock take 2011 for the flagship branch which she took from the appellant's head office on pp 120 to 125 of exh 1 and on all the unsigned minutes. The smaller date stamp was also used in the letter of 14 April 2014 received by the appellant's assistant accountant. In any event, the group chief executive officer admitted that the public officer did sign and stamp these documents albeit under duress. The contention that she manipulated the figures in the forensic decoded data was in my view farfetched and in any event was never put to her in cross examination.

The issues

The following four issues were referred for determination in this appeal at the pre-trial hearing held on 21 November 2014;

1. Whether or not the appellant is indebted to the first respondent at all and if so in what amount
2. Whether or not respondent arbitrarily increased the total output tax without showing the basis of how the amount was calculated
3. Whether or not the respondents gave the appellant an opportunity to submit full claims for input tax for the period January 2010 to December 2013
4. What would be the appropriate penalty for the undeclared Value Added Tax for the period in question

The issues are derived from the grounds of objection set out in the letter of 2 May 2014, the relevant part of which states that:

> "Zimra has arbitrary increased total output tax without showing the basis of how the figures have been arrived at. The assessments do not state that the amounts assessed are derived from estimated sales implying that these are factual and have been derived from records and information, a position that our client disputes. Our view is that because of failure to show the basis of how the figures assessed have been arrived at, the assessments must be revised on the basis that they are arbitrary. In addition, before the assessments were raised, our client was

not given adequate time within which to submit full claims for input tax and reconsider figures for sales that were made during the period referred to above.

A penalty of a 100% has been imposed on each of the assessments and this is also stated on the remarks section of the assessments. The level of penalty is excessive and no consideration appears to have been made to the verbal representations made by our client in the several meetings that were held between the client and the investigating team. Whilst Zimbabwe Revenue Authority is given authority and discretion to impose and vary the level of penalty that can be imposed under VATA, general principles of law require that the discretion be applied with consideration to the level of blameworthiness and our view is that this approach has not been taken. The penalties must be reversed or reduced to a level that is congruent to the level of blameworthiness (if any) of our client."

The power of the Fiscal Appeal Court

The power of this Court to determine VAT appeals is stipulated in s 33 of the Value Added Tax Act. Subsection (3) (a) and (b) provide that:

"(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."(My underling for emphasis)

The appeal is circumscribed by the grounds of objection raised by the appellant on 2 May 2014 and my decision is limited to the decision the Commissioner was empowered to make on 12 June 2014 when he disallowed the objections raised by the appellant.

Mr *Magwaliba* submitted that the appellant was precluded from relying on information which became available subsequent to the decision appealed against. He relied on the provisions of s 33 (3) of the Act that I have underlined for emphasis and the sentiments of Innes JA in *Cole* v *Government of the Union of South Africa* 1910 AD 263 at 272-273 to the effect that:

"The duty of an appellate tribunal is to ascertain whether the Court below came to the correct conclusion on the case submitted to it. And the mere fact that a point of law brought to its notice was not taken at an earlier stage is not in itself a sufficient reason for refusing to give effect to it. If the point is covered by the pleadings, and if its consideration on appeal involves no unfairness to the party against whom it is directed, the Court is bound to deal with it. And

> no such unfairness can exist if the facts upon which the legal point depends are common cause, or if they are clear beyond doubt upon the record, and there is no ground for thinking that further or other evidence would have been produced had the point been raised at the outset. In presence of these conditions a refusal by a Court of Appeal to give effect to a point of law fatal to one or other of the contentions of the parties would amount to the confirmation by it of a decision clearly wrong………..But where a new law point involves the decision of questions of fact, the evidence with regard to which has not been exhausted, or where it is possible that if the point had been taken earlier it might have been met by the production of further evidence, then the Court of Appeal will not allow the point to prevail. Because it would be manifestly unfair to the other litigant to do so."

These sentiments were adopted with approval by Sandura JA in *Goto v Goto* 2001 (1) ZLR 519 (S) at 526F-G and by Korsah JA in *Ngani* v *Mbanje & Anor & Mbanje & Anor* v *Ngan*i 1987 (2) ZLR 111(S) at 114C-F. In regards to the raising of a new issue in an inheritance tax appeal Watermeyer CJ in *Commissioner for Inland Revenue* v *Estate Crewe & Anor* 1943 AD 656 at 682 observed that:

> "This contention, however, raised an entirely new case; it was not a contention put forward in the special case nor was it considered in the trial court, and it cannot now be considered, and I express no opinion on it. As to the contention relating to the "capitalised value" of the annuity, therefore, the plaintiff's contention must be upheld and the Commissioner's overruled."

See also *Commissioner for Inland Revenue* v *Lazarus Estate & Anor* 1958 (3) SA 311 at 320G.

The cases cited by Mr *Magwaliba* correctly state the position of our law in respect of the formal courts such as the High Court and Supreme Court and to a limited extent the Special Courts such as the Fiscal Appeal Court. In the latter court, the notice of objection constitutes the central pleading that circumscribes the new facts and new law point that the taxpayer may introduce on appeal for the first time. However, unlike the appeals in the formal courts which are appeals in the narrow sense, appeals to the Special Courts are rehearings. The architectural design and scope of the legislative provisions that create Special Courts permit the leading of evidence and the submissions of facts and arguments which were not placed before the Commissioner. In *Sommer Ranching (Pvt) Ltd* v *Commissioner of Taxes* 1999 (1) ZLR 438 (SC) at 443A-B, (1999) 61 SATC 472 (ZSC) at 477 that:

> "Presently, it is well settled that in an appeal against the decision where the Commissioner exercised discretion, the Special Court is called upon to exercise its own original discretion. Nor is it restricted to the evidence which the Commissioner had before him. The appeal to the Special Court is not only a rehearing but can also involve the leading of evidence and the submission of facts and arguments of which the Commissioner was unaware."

See also *BT (Pvt) Ltd* v *Zimbabwe Revenue Authority* 2014 (2) ZLR 640 (H) at 644G-645E and *Commissioner for the South African Revenue Services* v *Pretoria East Motors (Pty) Ltd* 2014 (5) SA 231 (SCA), [2014] 3 All SA 266 at para 2.

It seems to me that the appellant could only enjoy the benefits prescribed by these authorities if it pleaded the issues it seeks to raise for the first time on appeal in its grounds of objection failing which it would have had to seek the consent of the respondents or leave of the Court. It did not pursue any of these options in respect of the new arguments raised in oral argument. Mr *Manase* persisted in oral argument to seek a review of the Commissioner's decision. He clearly fell afoul of the principles set out in these authorities and the provisions of s 33 (3) (a) of the Value Added Tax Act.

The legal basis for estimating assessments emanates from s 31 (4) of the Value Added Tax Act, *supra,* which rather tersely provides that:

> "(4) In making such assessment the Commissioner may estimate the amount upon which the tax is payable."

This subsection does not stipulate the factors that the Commissioner takes into account in making such assessment. The preceding subsection may provide guidance on the circumstances in which an estimate may be made. That provision empowers the Commissioner to make an assessment of the output tax payable from any person, whether registered or not who fails to render any return or declaration or renders an unsatisfactory return or declaration sanctioned by s 28, 29 and 30 of the same Act or has become liable to pay any amount or though not registered has charged output tax for his goods or services or has charged output tax on exempt or zero rated goods. Ordinarily, in terms of s 15 as read with s 28 of the same Act, a registered operator submits a self-assessment return in the prescribed form that reflects such information as may be required in that form and compute the tax payable or the amount refundable. In the robust meeting between the parties of 7 April 2014, the Commissioner indicated that he conducted estimates in the last resort on a clear basis. The chartered accountant, MHN, called by the appellant, in his evidence indicated that the Commissioner would make estimated assessments in those circumstances where the registered operator did not have the required documents and records or was uncooperative.

In his oral submissions Mr *Manase* contended that the appellant had the requisite records required for the calculation of the output value added tax payable and was extremely cooperative thereby rendering the estimation superfluous. Mr *Magwaliba* for the respondents made contrary submissions.

A box and trunks that purportedly contained both the source documents used and the derivative secondary documents prepared by MHN were placed before the Court and referred to in the testimony of the appellant's witnesses but were not produced in evidence. The chartered accountant waxed lyrically about his professional collation of records and preparation of the various books of account that he used to calculate what he purported was the actual output tax payable and due from the appellant. He, however, did not provide any sample from the trunks and box of the sales journals and bank statements he found or the cash books and ledgers he prepared. All he did was produce the results of his eight months of labour, exh 2 and was fortunate enough to have the amended self-assessment returns he prepared and submitted to the respondents on 13 March 2015 produced on his behalf as exh 3 by the respondents. He did not demonstrate how he came up with the figures in exhibit 2. He did not produce a single document that he alleged pre-existed the estimated assessments the appellant demands be reversed. He wrongly assumed that his documents were superior to the records used by the Commissioner in making the estimated assessments. It seems to me that the records and documents he used were not primary but as much secondary documents as those employed by the Commissioner in making the disputed estimated assessments.

His evidence failed to establish that the primary records completed by the drivers who sold the zero rated goods and used by the data capturers who punched the information into the appellant's computers at head office were in existence at the time the Commissioner made his determination. The branches did not enter sales into manual cash receipt books. They did so on the Extreme StoreLine point of sale from which the sales journal, cash book and ledgers were derived. The bank statement is obviously a derivative of the deposit system utilised by the appellant. The compilations prepared by the chartered accountant formed the end product of these primary source documents and many other intermediate documents and records.

Both the group chief executive officer and the chartered account failed to shed light on the apparent failure of the appellant to produce the treasure trove in the trunk and boxes that was used to prepare secondary documents by the chartered accountant during the investigations. At no stage did the appellant intimate to the respondents during the numerous correspondence exchange and various meetings that it could avail these documents to the appellant in place of the requested schedules. Again, the appellant never suggested to the respondents that they should conduct an audit of their operations as was so ingeniously argued by Mr *Manase*. The suggestion could not be made for two reasons. The first was that

during the initial interview of 29 May 2014, attended by the chief executive officer and his public officer, RM and assistant accountant JK the appellant indicated that the VAT output and input accounts, books and records were available and head office received daily and monthly returns from each branch. The second was that the appellant accepted as would any reasonable corporate citizen that it was not the duty of the Commissioner to prepare an audit of its operations. Indeed the chartered accountant ruefully intimated that the Commissioner expected to find proper books of account on each registered operator such as he finds amongst what he termed the big league players. In the meeting of 21 March 2014 recorded in the Commissioner's letter of 14 April 2014, the group chief executive officer confessed that they did not have the requested records. He blamed the appellant's woes on his inexperienced finance team, poor accounting systems, an absence of internal auditors, defalcations by one of his accountants who was convicted of fraud at Mbare Magistrates' Court and stiff competition in the industry.

The appellant failed to establish on a balance of probabilities that it had the documents it purported were in the trunks and box at the time the Commissioner disallowed the objections of 2 May 2014.

The evidence of the appellant was contradictory in regards to cooperation. This was clear from the chief executive officer's testimony and the submission advanced on the appellant's behalf by Mr *Manase* in his opening remarks. He stated in one vein that the appellant cooperated with an open heart and then soon thereafter averred that the public officer was coerced to cooperate by threats to close the company. Mr *Manase* graphically contended that threats of closure elicited cooperation and opened access to all the information the investigators required and further that the team voluntarily received and forcibly took all the data they required. These sentiments indicate that the appellant had no choice but to work with the Commissioner. The results of the reluctance were apparent from the submission of the first under stated voluntary disclosure of 7 March 2014 which was later substituted by the final positions that were disallowed. The appellant failed to supply the information requested from the commencement of investigations. The tight deadlines were prompted by the false information that it had the requisite documents for an examination and verification of the original self-assessment returns. The failure to supply the requested documents demonstrated a clear absence of cooperation.

Mr *Manase* moved new legal grounds of objection in his oral submission, which were not in the letter of objection in violation of s 33 (3) (a) of the Value Added Tax Act. He did

not show good cause or seek the Commissioner's consent, or leave of the Court to amend the appellant's grounds of objection. I agree with the point taken by Mr *Magwaliba* that such legal arguments were improperly placed before the Court. I, however, consider them on the off chance that I might be wrong in declining to address them.

The s 68 of the Constitution and s 3 of the Administrative Justice Act argument

The thrust of his submission was that the Commissioner violated the appellant's constitutional protection stipulated in s 68 by disregarding cash books, journals, ledgers and bank statements in making the assessment. On the merits, I have already found that the existence of the enumerated documents was not established. In any event, the respondent had no legal duty to do the appellant's own homework. I, however, dismiss the submission on a procedural basis.

Section 68 provides that:

"68 **Right to administrative justice**

(1) Every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair.

(2) Any person whose right, freedom, interest or legitimate expectation has been adversely affected by administrative conduct has the right to be given promptly and in writing the reasons for the conduct.

(3) An Act of Parliament must give effect to these rights, and must—

(*a*) provide for the review of administrative conduct by a court or, where appropriate, by an independent and impartial tribunal;

(*b*) impose a duty on the State to give effect to the rights in subsections (1) and (2) and

(*c*) promote an efficient administration"

I agree with Mr *Magwaliba* that Mr *Manase* moved this point in the wrong Court. Para (a) of subs (3) of s 68 is couched in mandatory language. It directs that an Act of Parliament must give effect to these rights and must provide for the review of administrative conduct by a court or where appropriate by an independent and impartial tribunal. The Fiscal Appeal Court is not a superior court of inherent jurisdiction. It is a creature of Statute and operates within the confines of its founding legislation and decided cases. Both the Fiscal Appeals Court Act [*Chapter 23:05*] and the Value Added Tax Act do not confer review jurisdiction on the Court. It is a court of appeal. The provisions of s 68 (1) as read with (3) of the Constitution cannot be enjoyed in nor enforced by the Fiscal Appeal Court by way of review. It is clear in our law that the law contemplated by s 68 (3) (a) exists in the Administrative Justice Act [*Chapter 10:28*] which in s 4 (1) confers review jurisdiction on the High Court and other courts that are entitled by some other law to do so. The mere fact

that I happen to be a High Court judge who was appointed in terms of s 3 of the Fiscal Appeal Court Act to be a President of this Court does not confer on me the power to exercise the jurisdiction of the High Court in this Court. In any event, in our law, in the words of McNally JA in *Charumbira v Commissioner of Taxes* 1998 (1) ZLR 584 (S) at 585B-D the difference between an appeal and a review "is fundamental and well established……judicial review as Gubbay CJ said *in Muringi v Air Zimbabwe Corp & Anor* 1997 (2) ZLR 488 (S) at 440F is concerned not with the correctness of the decision, but with the decision making process".

Mr *Manase* sought to rely on the speech of Lord Templeman in *Preston v Inland Revenue Commissioners* [1985] 2 All ER 327, where the taxpayer who was assessed to an additional assessment to income tax by the respondents brought judicial review proceedings against the Commissioners' decision in the High Court seeking a declaration that all the steps taken by the commissioners to assess him were unlawful. His appeal to the Special Commissioners awaited the result of the application and appeals in the formal courts. At p 339f the learned Law Lord stated that:

> "The court can duly intervene by judicial review to direct the Commissioners to abstain from performing the statutory duties or from exercising their statutory powers if the court is satisfied that the "unfairness" of which the applicant complains renders the insistence of the commissioners on performing their duties or exercising their powers an abuse of power by the commissioners."

To the same effect was Lord Scarman who at p329g of the same case stated:

> "I must make clear my view that the principle of fairness has an important place in the law of judicial review, and that in an appropriate case it is a ground on which the court can intervene to quash a decision made by a public officer or authority in purported exercise of a power conferred by law. First, the Commissioners of Inland Revenue are not immune to from the process of judicial review."

These sentiments are correct as long as the remedy by way of judicial review is brought before the appropriate court. In relying on these sentiments Mr *Manase* obviously overlooked what both Law Lords stated concerning appeals in tax matters. At p 330 d-e Lord Scarman said:

> "My fourth proposition is that the remedy by way of judicial review is not to be made available where an alternative remedy exists. This is a proposition of great importance. Judicial review is a collateral challenge; it is not an appeal. Where Parliament has provided by statute appeal procedures, as in taxing statutes, it will only be very rarely that the courts will allow the collateral process of judicial review to be used to attack an appealable decision. In the first part of his speech my noble and learned friend Lord Templeman has set out in detail ample appeal procedures available to a taxpayer aggrieved by a decision of the Commissioners to exercise their powers and duties under Pt XVII of the Income and

> Corporation Taxes Act 1970 to counteract a tax advantage alleged to have been obtained by him."

At p 337 g-j Lord Templeman stated that:

> "Judicial review is available where a decision making authority exceeds its powers, commits an error f law, commits a breach of natural justice, reaches a decision which no reasonable tribunal could have reached or abuses its powers. Judicial review should not be granted where an alternative remedy is available. In most cases in which the commissioners are said to have fallen into error, the remedy of the taxpayer lies in the appeal procedures provided by the tax statutes to the General Commissioners or the Special Commissioners. This appeal structure provides an independent and informed tribunal which meets in private so that the taxpayer is not embarrassed in disclosing his affairs and the commissioners are not inhibited by their duty of confidentiality. The commissioners and the tribunal established to hear the appeals from the commissioners have wide knowledge and expertise in fiscal law and practice. Appeals from the General Commissioners or Special Commissioners lie, but only on questions of law, to the High Court by means of a stated case and the High Court can then correct all kinds of errors of law, including errors which might otherwise be the subject of judicial review proceedings. See *Edwards (Inspector of Taxes) v Bairstow* [1955] 3 All ER 48, [1956] AC 14. Judicial review process should not be allowed to supplant normal statutory appeal procedure. The present circumstances are exceptional in that the appeal procedure provided by s 462 cannot begin to operate if the conduct of the commissioners in initiating proceedings under s 460 was unlawful."

It seems to me that the Law Lords made at least two pertinent points in the above cited case. The first was that the judicial review process was incompatible with the statutory appeal procedure provided in tax legislation. The second was that such a review process could only be brought before the formal courts in exceptional circumstances and not before the special courts. The *Preston* case does not support the submission made by Mr *Manase* with respect to an appeal brought to this Court.

I, therefore, hold that the appellant's counsel misconstrued the provisions of s 68 of the Constitution and s 3 of the Administrative Justice Act. The submission fails.

The failure of the Commissioner to obtain full business information

Mr *Manase* further submitted that the Commissioner's failure to obtain full information, as required by s 57 (4) of the Value Added Tax Act, on the business conduct of the appellant such as cash books journals, ledgers and paid cheques undermined the efficacy of the estimated assessments. The provisions of s 57 require that a registered operator such as the appellant keeps and retains books of account that are in compliance with the demands that are set out in the Act such as printouts for computer generated books of account, all invoices, tax invoices, credit notes, debit notes, bank statements, deposit slips, stock lists and paid cheques and all records supplied by or to a registered operator and accounting manuals and systems. These are to be preserved and retained in their original form or in the form

authorised by the Commissioner for a period of six years from the date of the last entry. The evidence led by the appellant failed to establish the existence of these books of account, records and documents that the chartered accountant purportedly used.

Failure to produce the Commissioner's authority to investigate

Mr *Manase* also argued that the estimated assessments were void for want of the Commissioner's authority to the investigators to inspect, audit, examine or obtain information, documents or other items of the appellant in contemplation of s 58 (a) (b) and (h). He ignored the provisions of s 59 as read with s 60 (4) which authorise such officers as investigators to request any information they may require from the registered operator and only to produce the Commissioner's authority on demand. The appellant failed to establish, firstly that it demanded the authority and secondly that proof of such authority was thereafter not tendered.

Failure to obtain computer print outs from the appellant

Generally, in terms of s 61 of the Act, the Commissioner is authorised to seize documents including computer printouts for further examination, investigation, trial or enquiry. The section does not authorize seizure of computers or other information retrieval systems. It is however incorrect to suggest that the information derived from seized computers has no probative value. Such information is admissible in terms of subsection (2) and its weight assessed in terms subs (3) of s 68B of the Act.

Proof of delivery of correspondence

The submission in this respect was that the letters of 20 May 2013 and 12 March 2014 should be disregarded because the prescribed format and proof of delivery contemplated by s 75 of the Act was not followed by the Commissioner. Section 75 (2) provides that:

> "75 **Forms and authentication and service of documents**
> (2) Any form, notice, demand, document or other communication required or authorised under this Act to be issued, given or sent to or served upon any person by the Commissioner or any other officer in terms of this Act, except where otherwise provided in this Act, be deemed to have been effectively issued, given, sent or served—
> (*d*) in the case of a company—
> (i) if delivered to the public officer of the company contemplated in section 61 of the Taxes Act; or
> (ii) if left with some adult person apparently residing at or occupying or employed at the place appointed by the company as its registered office in Zimbabwe or,"

While I agree with Mr *Manase* that there must be proof that these letters were delivered by the appellant, the subsection does not stipulate the type of evidence that is required to do so. It seems to me that the determination of whether or not the letter was delivered is a question of fact. I am obliged to consider and weigh the testimony given on behalf of each party and make a factual finding bearing on the point.

The respondent's witness averred that the letter of 20 May 2013 was delivered to the registered office and left with a secretary at the reception. She was satisfied that it was received by the public officer because he provided some of the documents listed in the letter on 10 June 2013. There is no proof by way of a signature or date stamp on the face of the copy retained by the Commissioner that the letter was received by the appellant. The respondent's witness also failed to produce evidence of the type of documents she received on 10 June 2013 and whether such documents were indeed received as a result of that letter. Indeed that letter was not referred to in any correspondence exchanged between the parties. I would hold that the Commissioner failed to establish that the letter was delivered. She however, established that the letter of 12 March 2014 was delivered to the public officer whose shorthand signature and date of receipt were appended on the copy produced by the Commissioner.

In the result, I am satisfied that the appellant failed to cooperate fully with the Commissioner. Accordingly, the Commissioner was entitled in terms of s 33 (4) to make estimated assessments of the appellant's output VAT payable and due.

<u>The onus</u>

The essence of the objection and appeal was that the decision of the Commissioner was wrong. Both counsel agreed that in terms of s 15 of the Fiscal Appeal Court Act [*Chapter 23:05]* and s 37 of the Value Added Tax Act [*Chapter 23:12*] the burden of proof to discharge these issues on a balance of probabilities lies on the appellant. The two sections provide as follows:

> **"15 Burden of proof**
>
> In any appeal in terms of this Part the burden of proof that any 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.

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 any appeal from any decision of the Commissioner, the decision shall not be reversed or altered unless it is shown by the appellant that the decision is wrong."

I proceed determine each issue in turn.

Whether or not the appellant is indebted to the first respondent at all and if so in what amount

The appellant, in the second ground of appeal filed on 13 June 2014 and in para 6 of the founding affidavit of its group chief executive officer of 14 June 2014 in the urgent chamber application filed in the High Court, HC 4847/2014, averred that it was owed substantial amounts by the first respondent. In oral evidence in this Court the group chief executive in question and the tax consultant, one MHN, abandoned this position and conceded that the appellant owed arrear value added tax to the first respondent.

The real dispute centred on the amount owing. In the meeting of 7 April 2014, the respondents set the VAT indebtedness at US$ 1.8 million. The evidence of the appellant's two witnesses was that the respondent demanded payment of arrear tax for all tax heads, penalties and interest in progressively increasing sums of US$9 million, US$19 696 645.44 and US$26 million. In his summary of evidence, the tax consultant estimated the debt at US$1 551 864.99 for all tax heads excluding interest and penalties. In evidence, he reduced the all-inclusive debt to US$905 000 incorporating the principal VAT liability of US$485 003.88. As on the date of testimony, the appellant had paid US$339 065.45 at the rate of US$2 000 from 21 March 2014.

The appellant submitted four sets of figures of VAT liability to the respondents. The first were the amounts in the self-assessments. The second were the voluntary disclosures of 7 March 2014. The third were the final position voluntary disclosures. The fourth and last were the figures calculated by MHN that were submitted on 13 March 2015 and produced in this Court as the correct computations. These were based on information MHN alleged was in the trunks and box that he brought to court. In addition to these figures the respondents decoded a different set of figures from the hard drive of one of the seized computers and

other information from both the computers and box files seized from the appellant. The estimates raised by the respondents were based on three sources of information. The first was the invisible data on the hard drive of one of the seized computers, the forensic downloads. The second was from the visible files on these computers and box files seized from the appellant. The third was from the disclosures made by the appellant.

The computation of 2010 liability

The computation of the 2010 VAT liability by the respondent is summarised in the table on p 29, replicated on p 265 of exh 1. One of the documents decoded by forensic was the key performance report on p 23-25 of exh 1 for the period ended 31 December 2010. The document was a summary of the operations of the appellant's food division in the first 8 months of its existence. The gross sales for 2010 were in the sum of US$1 713 247 against the self-assessment figure of US$641 793.27. The management accounts submitted to the bank for the 11 months from 1 February to 31 December 2010 indicated gross sales of US$1 713 267.13. The figure was slightly higher, by US$ 20.13 than the amount in the decoded management report. The Commissioner preferred the higher amount but maintained the output and input figures submitted by the appellant in the self-assessments to arrive at the output tax payable in 2010 of US$182 039.24. She deducted the amount paid of US$21 318.28 to arrive at the outstanding amount of US$160 720.96. The total output VAT paid to the Commissioner in that year was slightly more than the amount reported in the performance report as paid by the Food Division of US$20 379. The under payment in the sum of US$ 1 071 473. 86 constituted a negative variance to the Commissioner of 166.95%. The gross turnover in these two documents were higher than the final position voluntary disclosure of US$ 360 126.10, which only covered the last four months of the year.

The appellant's star witness insisted that these 2010 figures were inaccurate. He urged the Court to accept his "realistic figures" derived from the undisclosed information in the trunks and box. His computations disclosed gross sales of US$1 890 841. These were higher than the respondents estimate by US$177 573.87 and the final position voluntary disclosure by US$1 249 048. The actual gross sales included zero rated sales of US$ 1 152 778. The actual taxable sales were in the sum of US$ 738 063. The aggregate output VAT was US$110 709.45. He deducted input tax and output tax paid and computed the outstanding VAT in the sum of US$645. My calculations from the amended self-assessment returns showed gross sales of US$ 1 794 572. The total output payable after deducting input tax was in the sum of

US$21 963.94 the appellant paid output tax of US$ 21 318.28 leaving a balance of US$645.66.

The computation for the 2011 liability

The computation for 2011 VAT liability was summarised by the Commissioner in the table on p 28 and 266 of exh 1. She relied on the forensic decoded data on p 22 of exh 1, which indicated gross sales of US$7 605 952.56. This was against the self-assessment figure of US$2 323 234.06. The discrepancy of US$5 282 718.50 constituted a negative variance of 221.53%. She compared the amounts of gross turnover for the flagship branch indicated in the gross profit stock calculations box file she retrieved from the appellant's head office on 4 February 2014 with the gross turnover in the forensic decoded data. The figures tallied. I compared the forensic decoded data for that branch on p 22 with the hardcopy gross profit calculation on page 120 to 125 and 179 to 188 of exh 1. There were negligible differences in the computation of gross profit in the decoded data and in the hardcopy file in some of the months, otherwise the figures tallied. Again, a comparison between the management accounts for the four months to 30 April 2011 indicated in note 5 of the financial statements at p 202 of exh 1 a gross turnover US$1 319 691.93 against the forensic decoded data turnover of US$1 318 866.77, a marginal difference of US$825.16. She maintained the output and input tax in the self-assessments and after deducting the VAT payment of US$57 952.96 the outstanding output tax was in the sum of at US$792 678.34. The amount in the final position voluntary declaration of US$2 465 292.02 was less than the gross turnover from the forensic decoded data. The appellant's witnesses prevaricated on the authenticity of forensic decoded data but accepted authorship and ownership of the management accounts**.** The managements accounts showed revenue of US$ 7 551 682.86 against US$ 7 605 429.13 in the gross profit calculations in the forensic data in 2011, a variance of US$ 53 746.25.

In the star witness's computations the gross sales inclusive of the zero rated sales of US$4 773 573 were US$7 608 636. The gross sales were higher than the estimates by US$ 2 683.74 and the voluntary disclosure by US$5 285 402. The aggregate output VAT on the taxable sales of US$2 465 272 was US$369 790.80 from which he deducted both input tax and output tax paid leaving a sum of US$21 423 outstanding. My computations on his returns showed gross sales of US$ 7 238 246. The VAT payable after deducting input tax received was US$80 233.59. The appellant paid output tax of US$57 952.96 leaving an outstanding balance of US$ 22 280.63.

The computation of 2012 liability

The Commissioner calculated the VAT due from the three existing branches, as summarised on p 27 and 267 of exh 1. She based her calculations on the forensic decoded data on p 21 and 173 of exh 1. The gross turnover was in the sum of US$ 16 087 852.35. The self-assessment was in the sum of US$4 454 668.49. The discrepancy between the two figures was in the sum of US$ 11 633 183.86. She accounted for both the output VAT charged and the input VAT claimed and deducted the VAT payment of US$ 121 259 to reach an outstanding output VAT of US$ 1 744 977.58. The gross turnover in the forensic decoded data was higher than the gross turnover of US$ 4 964 565 voluntarily declared as the final position by the appellant on 4 April 2014. The gross turnover in the management accounts for 2012 was US$15 950 305.34 against forensic data gross profit calculation turnover of US$ 16 087 852.35, a variance of US$137 547.01.

The gross sales computed by the star witness were US$ 13 453 044. The zero rated sales included in this amount were in the sum of US$7 743 794. The gross sales were lower than the estimate by US$2 634 808.35 and higher than the voluntary disclosure by US$8 998 376. The taxable sales were US$ 4 338 172 from which the aggregate output VAT was US$ 650 725.80. The outstanding VAT was in the sum of US$138 564. My calculations of the figures indicated in exh 3 show gross sales for the year of US$ 12 081 965. The input tax in the initial and amended returns was the same for all the other months except September where the amended return does not disclose any taxable purchases. The VAT payable to the Commissioner was US$246 439.32 inclusive of the motor vehicle benefit less the amount paid of US$121 259 leaving an outstanding sum of US$125 180.32

The computation of the 2013 liability

A summary of the Commissioner's 2013 computations was deposed at pp 26 and 268 of exh 1. The Commissioner relied on the forensic decoded data on p 20 and 164 of exh 1. The amounts shown in the last four months of that year were similar to those in the appellant's final position voluntary disclosure submitted on 24 March 2014. It was common cause that the voluntary disclosure did not account for input tax and exempt sales for the supermarkets. The amounts for January and April to July were interpolated by a factor of 1.71, which represented the average monthly under declaration between the voluntary disclosure and the self-assessments for the last four months of that year. She ignored the voluntary disclosure figure for January of US$ 605 200 and the forensic decoded amount of US$1 382 096.96 in favour of US$ 1 300. 699.19. For April she computed US$1 445 374.71

against the voluntary disclosure of US$736 170.80 and decoded figure of US$1 736 137.80. For May she computed US$1 742 429.19 and disregarded the voluntary disclosure of US$699 845.32 and forensic decoded amount of US$1 601 828.54. In June and July she preferred the figure of US$1 613 204.08 and US$1 715 329.19 against voluntary disclosures of US$733 333.68 and US$640 436.01 and decoded amounts of US$1 636 345.23 and US$1 641744.69, respectively. The amounts for February, March and August in the sums of US$ 1 241 520.12, US$ 1 610 000 and US$ US$ 1 381 503.23 were derived from computer downloads that were carried out before forensic decoding. She did not resort to forensic decoded data because the figures of some of branches had not been uploaded.

The Commissioner computed sales of US$ 19 331 450.67 against the self-assessment amount of US$ 6 052 536.43 and the final position voluntary disclosure of US$ 12 991 211.88. She maintained both the output and input VAT in the self-assessment and deducted the VAT payments of US$304 939.59 to reach an outstanding payment of US$ 1 856 837.14. The gross turnover of US US$10 845 466.67 in the forensic data was less by US$45 713.32 from the one indicated in the management accounts.[24]

The gross sales computed by the star witness were in the sum of US$17 071 493. These were lower than the estimate by US$2 259 958.67 and higher than the voluntary declaration by US$4 072 282. Included in the gross sales were zero rated sales of US$ 7 283 600. The taxable sales were therefore in the sum of US$8 511 212 from which US$ 1 276 681.80 constituted the aggregate output from which the aggregate input tax was deductible to arrive at the output tax payable or refundable. He accounted for VAT paid of US$ 304 939.59 and indicated the additional tax due was in the sum of US$324 371. My own workings from the figures in exh 3 indicated gross sales of US$ 15 794 812. The input VAT claimed was again similar to the one in the original VAT 7 returns except for October where there were no taxed purchases in the amended return. The VAT due to the Commissioner was [US$598 654.63 less the amount paid of US$304 939.59] in the sum of US$293 715.04 and not US$324 371 adduced in evidence by the star witness.

The aggregate amount owing for the whole period

The computations of the chartered accountant indicated an outstanding principal output value added tax liability of US$ 485 003. The estimates showed an outstanding principal value added tax liability of US$4 860 153.61.

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[24] P 205-207 of exh 1

The appellant's strategy in this appeal was to attack the documentation used by the respondent's to estimate the principal liability due and the conduct of the respondents in discharging their mandate. The appellant found itself in the invidious position of having to attack its own documents. In the absence of the personnel who drew up the management accounts and the forensic data it was always an impossible task for the appellant to impugn these documents. They were obviously based on some accounts. The vatable sales and the input tax on purchases computed by the chartered accountant matched dollars and cents with the initial self-assessments. The Commissioner did not depart from the input tax claimed. His estimates based on the impugned documents were close to the "actual figures" computed by the chartered accountant.

It was common cause that the appellant failed to provide the schedules for zero rated goods that it sold. It does not appear from the evidence that the appellant sold any zero rated products on its own account. It is most likely that some zero rated goods were sold from the supermarkets, which only commenced operations in December 2012. It does not appear that it sold such goods from the other three business lines, whose intrinsic nature was to sell goods processed and beneficiated by the appellant. The appellant was solely to blame for failing to supply the Commissioner with the requested schedules. The appellant failed to prove on balance probabilities that it sold raw agricultural products including meat for its own account. The chartered accountant testified that the sale of potatoes constituted the bulk of the zero rated sales. In the absence of proof that the potatoes were sold for the account of the appellant, I am unable to find that the sales attributed to the appellant in the forensic decoded data, the management accounts and the minutes of the top management and the gross profit computations of the flagship branch for 2011 were in part from potato sales.

The appellant failed to establish the extent of its liability for output tax to the respondents. The figure provided by the chartered accountant cannot be correct. The appellant has provided four different amounts of liability. The input VAT on purchases remained constant in all the computations. It was in the sum of US$1 650 094.55 (made up of US$74 950.83 in 2010; US$290 261.58 in 2011, US$ 546 941.27 in 2012 and US$737 940.87). The aggregate amount in the initial assessments was in the sum of US$ 505 469.83. In the first aborted voluntary disclosure the appellant provided new figures for 2012 and 2013 and not for 2010 and 2011. The 2012 under declaration amounted to US$ 38 636.75 and inclusive of VAT paid of US$121 259 resulted in total payable of US$159 895.75. The under declaration for 2013 was US$ 754 598.85. The total payable inclusive of the amount paid of

US$304 939.59 was US$1 059 538.44. The total liability based on the first voluntary disclosure was in the absence of the 2010 and 2011 figures in excess of the total of the two years declared of US$ 1 219 434.19. The third aggregate amount based on the final position voluntary disclosures was US$ 1 490 948.43. The amount refundable would be US$159 146.12. The fourth provided by the chartered account was US$ 485 003. However, the amount that would arise from the aggregate of the separated zero rated and taxable sales figures he provided in evidence would be US$ 6 003 602.10. The total sales in the amended self-assessments of 13 March 2015 amount to US$36 910 194.63. The aggregate output VAT received would be in the sum of US$5 536 529.20. The output VAT payable would be US$3 886 434.65 against the respondents' estimate of US$4 860 153.61.

On the figures provided by the parties I am unable to make a finding on the actual amount of output VAT due from the appellant. In the result, the appellant has failed to show on a balance of probabilities that the estimated figures were wrong. I accordingly confirm them.

Whether or not respondent arbitrarily increased the total output tax without showing the basis of how the amount was calculated

The respondent indicated the basis of the computation of the VAT liability in letters of 4 and 14 April 2014 and in the determination appealed against. The appellant failed in the period from 29 May 2013 to 14 April 2014 to avail the actual figures it alleged were in the documents in the trunks and box. The evidence of the chartered accountant failed to establish the accuracy of his computations. In my view, the Commissioner properly used documentation and computer generated data derived from the appellant to estimate the output value added tax due from the appellant. The appellant failed to discharge the onus on it to show that the information in these documents was incorrect. It was not in dispute that these documents emanated from the appellant. The public officer confirmed the source of the documents by appending his signature and by stamping them. The suggestion that he acted under duress was not established.

The overall yearly gross turnover estimates computed by the Commissioner are not any different from the "actual figures" compiled by chartered accountant. The 2010 gross turnover estimated by the Commissioner was based on the performance report compiled by the appellant. The near accuracy of the amount was confirmed by the management accounts submitted to a bank to procure a loan. The 2011 and 2012 figures were derived from the forensic decoded data. The near accuracy of the 2011 gross sales were established by the

similarity of figures for the flagship branch in the forensic data and hardcopy gross profit calculations file for that branch that was handed over to the investigators by the appellant. The upliftment of figures by a factor of 1.71 for some of the 2013 months was scientific and objective.

I am satisfied that the Commissioner used the best documentation available at the time to estimate the output value added tax liability of the appellant for the period in question. The appellant has failed to show that the estimates were computed in an arbitrary manner.

Whether or not the respondents gave the appellant an opportunity to submit full claims for input tax for the period January 2010 to December 2013

The two samples of the initial self-assessments in exh 3 indicate that the appellant claimed input tax in each return. The chartered accountant confirmed the accuracy of those claims. The Commissioner adopted them as correct notwithstanding that the appellant failed to provide the requested schedules. It is unclear to me as to why the appellant failed to submit the schedules when it had claimed input tax monthly and on time. It was however incorrect to suggest that the appellant was not afforded an opportunity to submit input claims. This was done in the initial interview and in meetings of 5 March and 7 April 2014 and by letter of 12 and 19 March, 4 and 14 of April 2014. In any event the appellant was in terms of s 15 (2) (a) of the Value Added Tax Act required to claim input tax at the latest within 12 months of the invoiced date. In his testimony, the chartered accountant did not indicate what other input claims were excluded by the appellant.

Mr *Manase* argued that the claim for input tax prescribed after six years in terms of s 44 (1) (a) the Act. The provision states:

> “**44 Refunds**
>
> (1) Any amount of tax which is refundable to any registered operator in terms of subsection (4) of section *fifteen* in respect of any tax period shall, to the extent that such amount has not been set off against unpaid tax in terms of subsection (6) of this section, be refunded to the registered operator by the Commissioner:
>
> Provided that—
>
> *(a)* the Commissioner shall not make a refund under this subsection unless the claim for the refund is made within six years after the end of the said tax period; or

Section 15 (4) reads:

> “(4) For the purposes of subsection (3)
>
> (*a*) where any registered operator is entitled under subsection (3) to deduct any amount in respect of any tax period from the sum of the amounts of output

tax of the registered operator which are attributable to that period, the registered operator may deduct that amount from the amount of output tax attributable to any later tax period (but not later than the end of the longer period referred to in subsection (2)(*a*)) to the extent that it has not previously been deducted by the registered operator under that subsection;

(*b*) the amount of input tax which, in relation to any supply of goods or services is to a registered operator, the registered operator may deduct in respect of any payment referred to in subparagraph (ii) of paragraph (*a*) or subparagraph (i) of paragraph (*b*) of subsection (3), shall be an amount which bears to the full amount of the input tax relating to that supply the same ratio as the amount of the payment bears to the full value on which tax was payable in respect of the supply."

The refund that prescribes after six years is the one made in terms of s 15 (4) of the same Act. Subsection (4) provides two instances within which the deductions of input tax may be made in terms of the preceding subsection. The first relates to deductions of input tax either from the aggregate output tax or from import tax or excise duty tax rebates in respect of second hand clothes. The second relates to the proportional deduction of any insurance premiums paid in respect of a contract of insurance that is regarded as a taxable supply. The appellant did not establish in evidence that it purchased either second hand clothes or provided insurance services for which it was entitled to any input tax refunds contemplated by s 45 (1) of the Act. It seems to me that s 15 (4) of the Act does not cover the categories of input tax incurred by the appellant in the purchase of the taxable supplies sold in its supermarkets. The preceding subsection (3) is made subject to subsection (2) which prescribes the time frame within which input tax claims may be made to the Commissioner. Section 15 (2) states:

"(2) No deduction of input tax shall be made in terms of this Act in respect of a supply or the importation of any goods into Zimbabwe, unless—

(*a*) a tax invoice or debit note or credit note in relation to that supply has been provided in accordance with sections *twenty* or *twenty-one* within the period the registered operator is required to furnish a return in terms of sections *twenty-seven* and *twenty-eight* or twelve months, whichever is the longer period and is held by the registered operator making that deduction at the time that any return in respect of that supply is furnished; or"

The maximum period within which input tax could be claimed by the appellant was 12 months from the date of the invoice to which it relates. The time limits stipulated in s 45 (1) by reference to s 15 (4) which in turn provides for the type of refunds sanctioned under s 15(3) which in turn is subject to s 15 (2) are restricted in their application by the maximum time frame of 12 months provided in s 15 (2) (a) of the Act. The argument advanced by Mr *Manase* in this respect must fail.

The appropriate penalty for the undeclared Value Added Tax for the period in question

The respondent imposed a 100% penalty on the principal value added tax liability, which the appellant found disproportional to its moral blameworthiness and verbal representations made in the various meetings held between the parties. I reiterate that in all appeals before the Fiscal Appeal Court I exercise my own discretion. I am not fettered by what the Commissioner did.

My approach in determining the appropriate penalty borrows heavily from the criminal law. I prefer the approach first enunciated in *S* v *Zinn* 1969 (2) SA 537 (A) at 540G which considers the triad of the personal circumstances of the appellant, the infringement and the interests of society. See *PL Mines (Pvt) Ltd* v *Zimbabwe Revenue Authority* 2015 (1) ZLR 708 (H) at 730B-D.

In his submissions, Mr *Manase* emphasised the circumstances favourable to the appellant. It was religiously paying VAT during the period in question albeit in the incorrect amounts. It cooperated with the respondents during investigations and as a sign of goodwill has been liquidating its VAT liability at the rate of US$2 000 per month. It continues to meet current obligations and is adversely affected by the prevailing economic down turn. It had incompetent finance staff, one of whom was convicted of fraud at the Mbare Magistrates' Court. It employs about 500 permanent employees and an equal number of casuals. The appellant contributes to the national economy.

On the other hand, Mr *Magwaliba* emphasised the aggravating features of the appellant's conduct. His overall assessment was that the appellant was uncooperative. He listed the several incidents which impinged on cooperation. The infringement is a serious one. It undermines the economic health of the economy. Section 66 (1) of the Act imposes stiff penalties of up to 100% of the principal liability for evasion. In addition the Commissioner is entitled to impose interest on the principal liability. The penalties are designed to encourage compliance and provide personal and general deterrence.

In assessing the appropriate penalty I am guided by the submissions advanced by both counsel. I agree with Mr *Manase* that the appellant contributes in its own small way to the general economic wellbeing of this country. In an economy characterised by high formal unemployment it provides employment to about 1000 bread winners. Its business activities provide downstream linkages with other industries which benefit our ailing economy.

I, however, agree with Mr *Magwaliba* that the appellant did not fully cooperate with the investigators. Its finance officials stood up the investigators during the walkthrough exercise. An accountant, who was part of the exercise, deliberately removed a file that had been selected by the investigators disappeared and became unreachable. The probabilities confirm that the file was not a rates file as the CEO was wont to say in his evidence in chief. The investigators would hardly have selected a rates file. The accountant would not have disappeared with a rates file. The CEO and public officer would not have rendered profuse apologies for a rates file. In my view, the vehement averment by the CEO that it was a rates file indicated a lack of remorse over the accountant's deplorable, dishonest and obstructive conduct. The production of three sets of different but progressively higher sales figures prompted by information derived from the appellant's computers and the seizure of those computers demonstrated a further lack of cooperation.

The principal liability of US$4 860 153.61 is an estimate. The appellant failed to desegregate grocery sales and establish the zero rated sales attributed to its supermarkets, which in any event only cover the 13 months to 31 December 2013. The estimate is probably higher than the actual liability. In these circumstances it would be unfair to impose a penalty of 100%. In addition, the 2013 financial statements indicated that the appellant had assets of around US$6m. An excessive penalty would most likely lead to the liquidation of the appellant with the inevitable attendant economic damage to employees, suppliers and the general fortunes of our country.

In the absence of a deliberate intention to evade the payment of VAT and taking into account the extent of the principal VAT liability, it seems to me that a penalty of 10% of the estimated liability is most appropriate. According, I impose such a penalty on the appellant.

Costs

The appellant has failed in overturning the estimated assessment but has succeeded in persuading me to reduce the penalty. In the premises, the appropriate order for costs is one where each party bears its own costs.

Disposition

Accordingly it is ordered that:

1. The appeal against the estimated principal output value added tax liability estimated by the Commissioner is dismissed.
2. The principal value added tax liability estimated by the Commissioner for each month from February 2010 to December 2013 issued on 4 and 14 April 2014 is confirmed.

3. The appellant shall pay additional tax of 10% on the estimated output value added tax.
4. The estimated assessments referred to in para 2 above are set aside.
5. The Commissioner shall issue further output value added tax amended estimated assessments reflecting the additional tax charge of 10% on each assessment.
6. Each party shall bear its own costs

Manase and Manase, appellant's legal practitioners