

C F (PVT) LTD
versus
ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
KUDYA J
HARARE, 28 and 29 September 2015 and 26 February 2018

Income Tax Appeal

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

KUDYA J: This is an appeal against four amended income tax assessments number 20211442 for the year ending 31 December 2009, 20211443 for the year ending 31 December 2010, 202211446 for the year ending 31 December 2011 and 20211448 for the year ending 31 December 2012 that were issued against the appellant by the respondent on 27 June 2014¹.

On 25 July 2014, the appellant objected to the amended assessments in terms of s 62 of the Income Tax Act [*Chapter 23:06*]. On 22 October 2014 all the objections were disallowed save for a few relating to penalties. The appellant gave notice of its intention to appeal on 30 October 2014 and duly filed the present appeal on 18 December 2014.

The appellant called the evidence of two witnesses, an independent tax consultant, LM, who worked for the respondent for the 16 years to 2006 and its managing director. In addition, it produced four voluminous documentary exhibits in excess of 500 pages, exh 1 to 4. The respondent called its Chief Investigations Officer OM, who has held that office since 2011 but with a total of 14 years' experience, produced a 9 paged documentary exhibit, exh 5 and relied on the mandatory r 11 documents.

Background

The appellant was incorporated on 29 September 1995 and underwent two name changes on 24 April 1996 and 9 October 2014². The second name change was precipitated by

¹ Pp1-4 of r 11 documents and pp 73-76 in exh 4

² Pp42 and 43 of exh 2

the acquisition of the South African registered sister company by the appellant's holding company on 1 June 2005. Sometime in 2010³ the respondent commenced the tax compliance investigation on the appellant that resulted in the amended tax assessments that gave rise to this appeal. The appellant's main business activities in the four years in question were in the importation, distribution and marketing of motor vehicles and spare parts of a specified brand.⁴ *The 1996 Distributor-Assembler Agreement*⁵

Initially, on 24 June 1997 the appellant entered into a detailed 53 article distributor-assembler three year agreement, the original agreement, with NML a Japanese conglomerate engaged in the development, manufacture and assembly and worldwide distribution and sale of an international brand of various models of motor vehicles and spare parts, retroactively from 1 April 1996⁶. The appellant had access to the conglomerate's trademarks, trade names and engineering technology and was authorised to purchase, manufacture, assemble, market, distribute and sell certain models of the brand, knocked down components and spare parts through a network of dealers appointed by the appellant and approved by the conglomerate in Zimbabwe. The ordering, production, shipment prices and payment of the vehicles and components in an amount sufficient to cover the price was regulated by articles 5 to 7 of exh 3⁷. The appellant met the full cost and expenses of the shipment and demurrage, and storage costs of the vehicles and spare parts. The risk for loss or damage passed to the appellant once the goods crossed the ship's rail at the port of shipment. But ownership and title of the goods was retained by the conglomerate until the payment obligation had been discharged. It was discharged by payment into an L/C bank account opened in the name of the conglomerate by a bank acceptable to the conglomerate by irrevocable letters of credit at sight in favour of the conglomerate at which point the appellant simultaneously received the shipping documents for the relevant goods through that opening bank. Because the timelines for ordering and the confirmation of the orders and payment preceded the production of the vehicles, ownership passed to the appellant on delivery of the vehicle FOB past the ship's rail at the port of shipment. The appellant was solely responsible for securing government licences and permits

³ P26 of Commissioner's case and p15 of exh 4 conclusion to letter of 30 May 2012

⁴ P13, 35, 52, 58, 82 and 89 in the 2009 to 2012 financial statements in exh 1

⁵ Pp3-56 of 3xh 3

⁶ Article 41-1 p 45 of exh 3

⁷ Pp11-14 of exh 3

required to complete payments for and importation of the ordered goods⁸. The terms and conditions contemplated a cash before delivery sale.

The conglomerate could export and deliver to and sell in Zimbabwe brand vehicles in its own name through the agency of the appellant and pay the appellant for the services rendered. The conglomerate played an active advisory role in the establishment of the appellant's business and was entitled to receive prescribed mandatory reports at specified periods and to inspect the appellant's operations. The appellant undertook to maintain sufficient working capital and investment capital to enhance its business activities. Each party was in terms of article 39-2 responsible for any and all expenditure incurred and assumed in the performance of its duties, obligations and responsibilities. Article 44 provided that:

“This agreement does not constitute either party as the agent or legal representative of the other party for any purpose whatsoever. Neither party is granted any expressed or implied right or authority to assume or to create any obligation or responsibility on behalf or in the name of the other party or to bind the same in any manner whatsoever.”

The appellant was also required to purchase a specified minimum number of vehicles, gain market share and in the event of a decline due to circumstances beyond its control, implement agreed counter measures to arrest the decline or risk termination of the agreement.

It appears to me that these were standard terms and conditions found in international contracts for the facilitation of international trade as demonstrated by their striking similarity with the conditions found in *Lendlease Finance (Pty) Ltd v Corporacion de Mercadeo Agricola & Ors* 1976 (4) SA 464 (A) especially in regards to the payment arrangements and the passing of both risk and ownership.

*The 1 August 2007 Memorandum of Understanding*⁹

The appellant and the related party¹⁰, whom I shall refer in this judgment as the intermediary signed, a memorial of the procedures for importation of vehicles into Zimbabwe in the memorandum of understanding dated 1 August 2007. The intermediary was required to place monthly production orders with the brand suppliers. The importation value of the consignment was reflected in a manual invoice issued by the intermediary to the appellant. The vehicles were imported into Zimbabwe and held in the appellant's bonded warehouse as consignment stock with the intermediary retaining ownership of the vehicles until payment was made. Once payment was made, the invoice was stamped by customs officials and duty and

⁸ P 16 Article 10 and 11 of exh 3

⁹ P57-58 of exh 3

¹⁰ Para 10 on p 2 of the appellant's case

other imposts paid for the consignment by a clearing agent before ownership was transferred to the appellant. The appellant in turn invoiced and transferred the vehicles to an authorised dealer for sale.

The Distribution Agreement of 25 April 2011

On 25 April 2011 the appellant and the conglomerate entered into a “Distribution Agreement”¹¹ consisting of 39 articles with retroactive effect¹² from 1 February 2007. It appeared to be a reproduction of an incomplete Distribution Agreement dated 31 January 2007 that was only signed and initialled by the appellant’s managing director¹³. The new agreement was amongst other things precipitated by changes in the appellant’s management and ownership as contemplated by article 40 of the original agreement and confirmed by article 20 of the new agreement. It substituted the original agreement. The preamble, structure and in most respects the contents mirrored word for word the original agreement. The noticeable change was the wholesale removal of the right to purchase knocked down kits for assembling from and the transfer of technological assistance and assembly by the conglomerate to the appellant. Articles 21, 22 and 23 mirrored word for word articles 5, 6 and 7 of the original agreement in respect of the ordering, production and shipment of the vehicles and spare parts. Article 24 like article 10 in the original agreement dealt with the supply of spare parts whose purchase prices were computed on a cost, insurance and freight, CIF or free on board, FOB basis derived from a price list provided by the conglomerate. The grounds for termination were generally similar to those in the original agreement.

*The Memorandum on Sales and Purchase of the conglomerate vehicles of 25 April 2011*¹⁴

The appellant and the conglomerate entered into a memorandum on Sales and Purchases of brand vehicles with the intermediary retroactive from 1 February 2007 soon after signing the Distribution Agreement. The appellant appointed and the conglomerate approved the appointment of the intermediary as the intermediary for the sale and purchase of the vehicles from the conglomerate under the Distribution Agreement. The three parties agreed that the intermediary would purchase the vehicles from the conglomerate and sell them to the appellant. The parties all incorporated the ordering, pricing and payment and supply of spare

¹¹ Pp64-92 of exh 3 replicated odd numbered pages only on pp 56-70 of exh 2

¹² P83 Of exh 3

¹³ P45-55 of exh 2, which has no even numbered pages

¹⁴ P59-60 of exh 3

parts provisions in articles 21, 23 and 24 of the Distribution Agreement. They further agreed that any violation or default of those provisions by the intermediary would be ascribed to the appellant.

*The Management Services Agreement between the Appellant and the Intermediary of 2 March 2009*¹⁵

On 2 March 2009 the appellant and the intermediary entered into a Management Services/Technical Services Agreement which was governed by the laws of Zimbabwe and took effect on 1 March 2009. They were motivated by the introduction of the multicurrency financial regime in Zimbabwe. It was to run for an indefinite period. The intermediary undertook to:

“provide administrative services, financial services and support and logistical services and support to help appellant achieve its goals in terms of gaining market share, growth and profitability..... ensure that new developments and systems will be properly communicated together with appropriate facilitation of technical support, system materials and training... (and) be available to provide help and guidance on any aspect of the business mentioned, at the request of appellant.”

In regards to the computation of the fees the parties agreed that:

“the intermediary will calculate the fees based on both the turnover reported by appellant and also the level of input that has been provided in terms of this agreement. The fees to be provided for shall be 2% of turnover however this will not necessarily be the amount finally invoiced. The amount finally invoiced shall not exceed 4% of turnover.”

And in respect of payment they agreed that:

“Payment of the management fees shall ordinarily be made in the year following that on which the fees have been based on receipt of an invoice from the intermediary. For cash flow purposes it will be permissible to make part payments but at least two half-yearly payments will be required.”

The implementation and operation of the agreements

The evidence of the appellant’s managing director was that the intermediary, a Mauritian registered short-term credit financier interposed between the conglomerate and the appellant in the purchase of the vehicles and spare parts destined to Zimbabwe. Customers in Zimbabwe would place an order on the brand model of their choice either to the appellant or an approved dealer appointed by the appellant. The appellant would group the orders and submit a bulky order of the required stock of vehicles 4 months in advance to the intermediary which in turn placed orders with the conglomerate. The conglomerate would build the ordered

¹⁵ P61-62 of exh 3 and p39-40 of exh 2

vehicles for the intermediary. The intermediary would purchase the vehicles in its own name from the conglomerate and consign them directly to the appellant's bonded warehouse in Zimbabwe. The intermediary retained ownership of the consignment in bond until it was paid. Ownership vested in the appellant upon payment of the purchase price equivalent to the value for duty purposes. Thereafter the appellant would where applicable pay customs duty, surtaxes and VAT based on the agreed value through a clearing agent before the consignment was released from the bonded warehouse and delivered to the approved dealer and end user. The appellant used to import stock from a South African related party and the conglomerate under value rulings 18 and 29 of 2001 before the advent of the French holding company. These were replaced by value ruling 15 of 2007 on 5 November 2007 following upon protracted negotiations between the appellant and the respondent that commenced on 26 March 2006.¹⁶

A sample of the documents used in the consignment of the vehicles from the intermediary to the appellant were captured on pp 14 to 38 of exh 2 and pp 1 to 9 of exh 5. These were commercial invoices, telegraphic transfers and Zimra certificates of origin, bills of entry and customs clearance certificates. These commercial invoices¹⁷ denoted the intermediary as the supplier and the appellant as the purchaser and consignee. The vehicles were fully described by model, chassis and engine number, colour and year of manufacture. The order number, dates of issue and delivery, method of shipment, origin and destination together with the terms of payment, the free on board purchase price, the cost of freight, insurance and total CIF price, denominated in United States dollars were also indicated. The certificates of origin¹⁸ certified that each vehicle was manufactured by the supplier in South Africa and bore the same information contained in the commercial invoice in regards to the supplier, consignee and description of the vehicle.

The bills of entry¹⁹ were completed by the clearing agent and identified the intermediary as the exporter or consignor. They identified the country of supply and destination, the description and total invoice value of each vehicle separately from the freight and insurance charges. The customs clearance certificates²⁰ for each vehicle were issued by Zimra. They contained the full description of the vehicle shown in the commercial invoice. The cost, freight

¹⁶ The documentary record of the discussions encompasses p 1 to 75 of exh 2

¹⁷ P16, 20, 24,29,33 and 36 of exh 2

¹⁸ P 17, 21, 25, 30 and 37 of exh 2

¹⁹ P18, 22, 26, 31 and 38 of exh 2

²⁰ Pp 19, 23, 27, and 32 of exh 2

and insurance price for each vehicle sold was captured in a combined invoice²¹ issued by the intermediary to the appellant, which the appellant submitted to its bankers with instructions to pay the intermediary by telegraphic transfer²². The sequence of dates on these documents showed that an advance payment by telegraphic transfer was made on 12 February 2007, the certificate of origin was presented on 15 April 2007 while the commercial invoice was issued on 24 April 2007 and the vehicle was cleared by a bill of entry at the port of entry on 9 May 2007. Thereafter a customs clearance certificate was issued on 19 June 2007.

It was common ground that the intermediary's consignment was delivered to Zimbabwe and warehoused by the appellant in bond. It was common cause that the appellant did not suffer any exposure to foreign currency risk or credit risk since the end users were required to make payment before the relevant vehicles were dispatched from South Africa²³ in 2009 and 2010. However in 2011 and 2012 the appellant was exposed to foreign currency risk through the importation of inventory, the liability of which was settled in South Africa in a carrying amount of US\$264 729 and US\$294 956 respectively²⁴. It was common ground that the appellant received vehicle prepayments in the sum of US\$2 064 187.00²⁵ in 2010 that was subsequently revised to US\$ 4 693 512²⁶ in the 2011 financial statements, US\$ 3 086 165 in 2011²⁷ and US\$ 755 673²⁸ in 2012.

Summary of the tripartite arrangement

The nature and scope of the tripartite arrangement between the parties was concisely set out by Mr *Magwaliba* in para 5 of his written heads of argument. A customer placed an order to the appellant through an approved dealer appointed by the appellant. The appellant placed orders with the intermediary, which in turn procured the motor vehicles from the conglomerate. The appellant received the motor vehicles in Zimbabwe and kept them in a bonded warehouse. Ownership of the motor vehicles remained with the intermediary until duty had been paid by the appellant. The purchase of a motor vehicle by a customer resulted in the

²¹ P 15 and 35 of exh 2,

²² P 14, 28 and 34 of exh 2

²³ P23 of exh 1 replicated p 20 annex C of Commissioner's case note 17 to the notes of the Financial Statements for year ended 31 December 2009, p46 of exh1 replicated in annex B on p 19 of Commissioner's case note 20.1 of notes to Financial Statements for year ending 31 December 2010

²⁴ Pp 73 note 22.3 and 104 note 26.3 to Financial Statements for year ending 31 December 2011 and 2012 respectively, in exh 1

²⁵ p 4 exh1 and annexure A p 18 of Commissioner's case note 13

²⁶ [p71 note 17 of exh 1

²⁷ [p 71 and annexure D p 21 of Commissioner's case note 17 exh 1

²⁸ p 102 note 19 exh 1 and annexure E p 22 of Commissioner's case

payment of duty to the respondent by the appellant before the vehicle was released to the customer. The intermediary was paid the transaction value of the motor vehicle, which according to the letter of the appellant to the respondent of 8 August 2007 included a 5% administration charge and interest of the selling price on the price list²⁹, in which was incorporated its mark-up of between 7.5% and 10%. The appellant was responsible for rentals, marketing expenses and payment of duty. It sold the vehicles to the dealers at a mark-up of 7.5% and the dealers sold the vehicle to the end customer.

Concessions made at the commencement of the appeal hearing

At the commencement of hearing, the appellant confirmed the concession first made in the letter of 19 June 2014 that it was remiss in failing to charge the intermediary a mark-up of 7% for transit services rendered in the sum of US\$ 2 240 for 2009, US\$ 2 505.87 for 2010 US\$2 198.13 for 2011 and US\$3 273.40 for 2012 in respect of vehicles exported by the intermediary to Zambia, Malawi and Tanzania. Again, the appellant conceded that it paid management fees to the intermediary when such fees were not due in the sum of US\$130 000 in 2009, US\$ 140 000 in 2010, US\$ 256 629 in 2011 and US\$140 000 in 2012.

In the same vein, the respondent conceded that it wrongly raised notional interest at the rate of 24% in the sum of US\$ 97 279.92 in respect of the 2012 loan to GS and in the sum of US\$ 106 953.12 for 2010, US\$ 266 879.52 for 2011 and US\$124 666.80 for 2012 in respect of the loans availed to ADI.

Assessment of witnesses

The appellant acted in a devious manner in regards to management fees. Its conduct amounted to a deliberate act of transfer pricing which was done with intent to avoid tax. The production of backdated agreements gave the impression that these were created as a response to the tax investigation. This was apparent from the purported agreement of 31 January 2007 which had the appellant's signatures only that was rejected by the respondent and resulted in the production of duly signed agreement of 25 April 2011 backdated to 1 February 2007. The managing director misled the court that the appellant provided functional analysis input under duress, contrary to his letter of 12 July 2013 in which he requested two weeks within which to provide the requested information, thus affording the appellant in excess of a month from the date of the initial request. He disputed making prepayments to the intermediary yet the financial

²⁹ Pp10 and 71 of exh 2

statements in note 17 on p 71 of exh 1 show that US\$4 693 512 was paid in 2010 and US\$ 3 086 165 in 2011 before the vehicles were exported in bond. He falsely averred and thus copied the evidence adduced by the tax consultant in his presence that the audits for his company commenced in November of each year in contradistinction to the timelines indicated in the audit engagement letter. The tax consultant prevaricated on what the respondent's generally prevailing practice in regards to provisions was. The chief investigations officer failed to demonstrate how he arrived at the apportionment ratio he used in his functional analysis. He testified that the appellant misled the respondent by claiming ownership of the consignment stock at the time he applied for the value ruling, contrary to the contents in the letters written by the appellant at that time.

The issues referred for determination

At the pre-trial hearing of 2 June 2015 the following issues were referred for determination. In view of the concessions made by the respondent at the commencement of trial, it is no longer necessary to outline the in respect of the loans advanced by the appellant to GS and ADI.

Sharing of profits/transfer pricing:

1. Whether or not respondent is precluded from adopting its current stance on this issue on account of either:
 - 1.1 the value ruling issued by it , or
 - 1.2 the fact that duties and taxes were assessed and paid to it on a different basis
2. whether the respondent is entitled to invoke section 24 of the Act to deem income to have accrued to the appellant which was not actually received by it

Expenses relating to leave pay and audit fees

3. Whether it was proper of appellant and open to appellant to make provision for the costs in question
4. Whether respondent was precluded from issuing amended assessments by virtue of the provisions of s 47 of the Act

Penalties

5. What if any penalties are payable to respondent

I proceed to deal with each issue in turn.

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The respondent's current stance

The position adopted by the respondent during the investigation, objection, determination and espoused in correspondence with the appellant and in evidence and argument at the appeal hearing was to disregard the values of the motor vehicles received into the country by the appellant that were accepted by the Commissioner-General in the Value Ruling No 15 of 2007 of 5 November 2007 issued under ss 106 and 113 of the Customs and Excise Act [Chapter 23:02] in preference to the values derived from the functional analysis purportedly computed in terms of s 24 the Income Tax Act.

The value ruling³⁰

The value ruling no 15 of 2007 was issued on 5 November 2007. It replaced two other value rulings, numbers 18 and 29 of 2001³¹. The transaction value accepted by the respondent in the first value ruling was based on the “invoiced prices plus dutiable adjustments” and in the second value ruling it was based on the invoice price plus ¥12 500 on each complete CKD kit and automobile CBU plus dutiable adjustments value and an uplift on the spare parts of 5% of the invoice price plus dutiable adjustments. The transaction value of the consignment stock provided in s 113 (2) of the Customs and Excise Act also included all costs, charges and expenses incidental to the sale and handling and transport costs from the port of exportation to the port of importation in Zimbabwe. The application preceding value ruling 15 of 2007 was necessitated by the change of ownership in the appellant through the purchase of 75% of the appellant's capital by a French company which also wholly owned the share capital in the intermediary. The holding company instigated the substitution of the conglomerate and the South African company in the supply matrix by the intermediary with the result that the appellant was designated as the importer and the intermediary as the supplier in the value ruling number 15 of 2007.

The ruling stated that:

“MOTOR VEHICLES

Invoiced prices plus dutiable adjustments are acceptable

SPARE PARTS

³⁰ P4 of exh 2

³¹ P772 and 75 exh 2

Invoiced prices plus dutiable adjustments are acceptable

Transaction Value, TV, Method applicable

Subject also to the inclusion of all costs, charges and expenses not mentioned above which are incidental to the sale and to placing the goods on board the means of transport they are removed from country of exportation. Any subsequent costs, charges and expenses incurred in delivering the goods to the place of importation in Zimbabwe should also be included in terms of the Customs and Excise Act.”

The covering letter of the same date explained that³²:

“Based upon the information you have provided regarding your importations from the intermediary-RSA, the following value ruling number 15/2007 has been issued by the Commissioner General of the Zimbabwe Revenue Authority in terms of s 106 and 113 of the Customs and Excise Act [*Chapter 23:02*] as amended. The value for duty purposes will consist of the total price paid or payable (directly or indirectly) for the goods, plus any necessary dutiable adjustments referred to in s 113 of the Customs and Excise Act [*Chapter 23:02*]. Your necessary dutiable charges/adjustments include the cost (not already included in the invoice) of any packages, packing, loading, handling, transport and insurance associated with the transportation of the goods to the place of importation in Zimbabwe. Provided that the relative amounts can be distinguished from the price of the goods and the necessary documentary evidence is furnished with the customs entry, the cost of transport and insurance beyond the place of importation may not be included in the value for duty purposes. The Commissioner General has made the ruling in accordance with the principles of the WTO valuation code based upon the present terms and conditions of trading between yourselves and the supplier concerned, as made known to the Department. Any changes of these terms and conditions of trading must be notified to this office immediately”

In a further covering letter of the same day³³, the respondent confirmed that the appellant was the importer. However, this view was contrary to the insurance attestation on pp 73 and 74 of exh 2 covering the 2007 calendar year in which the French based insurance brokers certified that the intermediary’s vehicles sold to the appellant were validly insured against damage and that the insurance policy was subject to automatic renewal from year to year. The risks covered were identified in bold print as: “all risks from the warehouse of the seller to the warehouse of the consignee in Zimbabwe, on CIF value.” [Underlining my own for emphasis].

Sections 104 to 119 in Part X of the Custom and Excise Act [*Chapter 23:02*] deal in detail with the computation of the value for duty purposes. The value for duty purposes is derived from the transaction value of the goods or services imported or due to be imported into Zimbabwe. The formula is provided in s 105 (1) and in the opening words of s 106 (1) in these terms:

“105 Value for duty purposes

³² P2 of exh 2

³³ P 3 of exh 2

(1) For the purpose of assessing the amount of any duty payable on any imported goods and for the purpose of any declaration or oath which may be required by this Act or any other enactment in relation to any question of value or duty in connection with the importation of goods or goods which are likely to be imported, the value of such goods shall, subject to this Act, be the transaction value thereof as established or determined in terms of sections *one hundred and six to one hundred and twelve*.

106 Transaction value: primary method of valuation

(1) Subject to this Act, the value for duty purposes of any imported goods shall be the transaction value of the goods, that is to say, the price actually paid or payable for the goods when sold for export to Zimbabwe, adjusted in terms of section *one hundred and thirteen*, if” —[the underlining is mine for emphasis]

The price actually paid or payable on imported goods is defined in s 104 of the Customs and Excise Act as the aggregate of all payments made or to be made on these goods by the importer to the seller that is to the satisfaction of the Commissioner and the value determined by the Commissioner of any consideration or services rendered or to be rendered by the importer for the benefit of the seller. The concept of related parties is captured in s 104 (3) to include individuals who *inter alia* are officers or commissioners in each other’s businesses or corporate bodies in which any other person directly or indirectly owns, controls or holds at least 5% of the issued shares of both or both are so controlled by a third person or control a third person or are members of the same family. In terms of s 104 (4) any sole agent or distributor or concessionaire of the other who falls into any of the categories listed in subs (3) is deemed to be a related party under Part X of the Customs and Excise Act.

There are five other elaborate methods of computing the transaction value of goods for duty purposes set out from s 107 to s 112 of the Customs and Excise Act. These comprise of the first alternative method and second alternative method which are based on the values of identical and similar goods, respectively, exported to Zimbabwe at about the same commercial level and the same quantity at about the same time. The third alternative deductive method is based on comparative sales between unrelated parties of similar or identical goods less any commissions, mark-up, cost of sales, transport, loading and unloading, handling and insurance costs within Zimbabwe from the place of importation and any duty or tax payable locally on importation or sale of the goods. The fourth alternative method relies on the manufacturer’s production costs plus mark-up. The final alternative method is a fall back method, which incorporates the preceding four methods with necessary modifications. The respondent is precluded from resorting to fictitious or higher alternative values from the country of origin or to any prescribed minimum custom values.

The adjustments prescribed by s 113 of the Customs and Excise Act are additional to the price actually paid or payable by the importer to the seller to the extent that they were incurred by the buyer and were excluded in the price actually paid or payable. These includes packing, loading and unloading, handling, transport and insurance, royalties and licence fees for the use of intellectual property rights, transport and insurance from the place of manufacture to the place of export to place of importation into Zimbabwe but the costs incurred within Zimbabwe from the place of importation are excluded from the transaction value. It is clear from the provisions of s 114 of the Customs and Excise Act that the value of any imported goods in the bill of entry does not constitute the value determined and accepted by the Commissioner for duty purposes.

In correspondence and the determination to the objection as well as in pleadings, evidence and argument the respondent advanced two reasons for abandoning the value ruling in the present matter and electing to assess the appellant for income tax purposes on a different basis. The first was that the Value Ruling applied to the determination of the duty value of the imported motor vehicles, which constitute the subject matter of the income tax appeals. The second and alternative contention was that the respondent was not bound by the value ruling as from 1 March 2009 and throughout the tax years in which the appeals relate because the appellant reneged on one of the terms and conditions going to the root of the value ruling in that it failed to inform the Commissioner General of the Management Fess/Technical Fess agreement entered into with the intermediary on 2 March 2009.

Whether the Customs and Excise Value Ruling binds the Commissioner in an Income Tax matter?

Mr *de Bourbon*, for the appellant, contended that the Commissioner was bound by the value ruling in question in the present income tax appeals even though it was made to resolve a Customs and Excise question. Mr *Magwaliba*, for the respondent, made contrary submissions on the point. Mr *de Bourbon* contended that as a single entity, the Zimbabwe Revenue Authority was obliged by the fundamental provisions s 68 of the Constitution and s 3 (1) (a) of the Administrative Justice Act [*Chapter 10:28*] to act in a lawful, reasonable and fair manner in utilising its opinion formed under the Customs and Excise Act on the transaction value of the imported motor vehicles to the computation of the purchase price under the Income Tax Act. He contended that the Commissioner could not possibly justify the change of opinion reflective as it was of his state of mind in the finding that the relationship between the appellant and intermediary did not influence the transaction value. He further contended that the importer

had proved to the satisfaction of the Commissioner that the transaction value closely approximated the values referred to in s 106 (2) of the Customs and Excise Act. Counsel were however agreed that there was no specific section in the Scheduled Acts which require the Commissioner to act in the manner advocated by Mr *de Bourbon*.

The foundational provisions of the Revenue Authority Act [Chapter 23:11]

It is indisputable that the respondent is created by s 3 of the Revenue Authority Act [Chapter 23:11] as a single entity with the seamless functions outlined in s 4, amongst which is the assessment, collection and enforcement of the payment of all revenues under the administrative purview of a single Commissioner -General appointed in terms of s 19. However, in terms of s 20 and 21, the Board also appoints Commissioners in charge of such departments or divisions that the Board may establish but who serve under the control of the Commissioner-General and who administer the Scheduled Acts listed in the First Schedule amongst which are the Customs and Excise Act and the Income Tax Act. The Commissioner-General is empowered to exercise the functions conferred on each of these Commissioners and may delegate such authority to any member of staff. The delegated authority, unless set aside by him, is deemed to be his authority. In terms of s 34D, the Commissioner-General may personally or by proxy make an advance tax ruling on any provision of any of the Acts in the First Schedule of his own accord or on application by an interested person to a taxable transaction. Tax is defined in the Fourth Schedule as “any tax, duty, fee, levy, charge, penalty, fine or any money levied, imposed, collected or received in terms of any of the Acts specified in the First Schedule” while “relevant Act in relation to an advance tax ruling means any one the Acts specified in the First Schedule in respect of which the ruling is made or sought.”

The context and the 13 minimum contents of an advance tax ruling are provided in paragraph 2 (2) of the Fourth Schedule to the Revenue Authority Act. Subparagraphs (2) (c) to (f) require a complete description of the proposed transaction for which the ruling is sought and its impact on the tax liability of the applicant and a citation of the relevant statutory provisions or issues and reasons why the proposed ruling should be made. It is apparent to me, contrary to the contention propounded by Mr *de Bourbon* in para 12 (b) of his written heads of argument that the application for the value ruling set out in exh 2 does not meet these minimum requirements in respect of the Income Tax Act. In this regard, the submission made by Mr *de Bourbon* in para 10 of his written heads of argument to the effect that one ruling in respect of one Schedule Act fits all the other Scheduled Acts in regards to the same imported item is

devoid of any merit. The differentiation applied by the respondent was lawfully grounded in the minimum requirements for an advance tax ruling provided in para 2 (2) to the Fourth Schedule of the Revenue Authority Act. Again, the value ruling falls woefully short of the requirements of para 6 of the same Schedule failing as it does to apply to the relevant Income Tax Act. While the facts and circumstances may be the same as in the value ruling the four requirements in para 6 are conjunctive; so the failure to fulfil any one is fatal to the appellant's contention seeing it falls outside the time frame of the advance ruling and the requirement to update the Commissioner with any new information affecting the value ruling. The attempt to export the favourable interpretation in para 4 (1) of the Fourth Schedule to the Revenue Authority Act from the Customs and Excise Act to the Income Tax Act flounders on the phrase "apply the relevant Act" defined with reference to the specified Act in respect of which the ruling was made or sought. The value ruling was not sought and obtained in terms of the Income Tax Act but in terms of the Customs and Excise Act.

In the alternative Mr *de Bourbon* submitted that like should be treated alike otherwise it would be unconscionable for the respondent to alter its opinion merely for the sake of extracting as much income tax from the appellant as it did with respect to customs duty on the same facts and circumstances. He submitted that by making the value ruling the respondent in essence determined as contemplated by s 106 (2) of the Customs and Excise Act that the two related parties acted at arm's length, a consideration in convergence with the requirements of s 24 of the Income Tax Act. He argued that the juxtaposition of a different and contradictory opinion on the purchase price under the Income Tax Act to the transaction value under the Customs and Excise Act of the selfsame imported vehicles was both illogical and unlawful.

The judicial definition of an opinion

The word opinion is not defined in any of the Taxes Acts. It has been judicially defined in a number of cases. In *Judes v District Registrar of Mining Rights, Krugersdorp* 1907 TS 1046 at 1049 Innes CJ equated a decision, in the absence of a qualification with a final determination. Both *Herbert Porter & Co Ltd and Another v Johannesburg Stock Exchange* 1974 (4) SA 781 (W) at 794 and *Knop v Johannesburg City Council* 1995 (2) SA 1 (A) at 13B defined decision as "the final and definite result of examining a question" and "adjudication in the juristic sense, i.e. a final and definite result in consequence of examining a question", respectively. These definitions were adopted in *Media Workers Association of South Africa & Ors v Press Corporation of South Africa Ltd (Preskor)* 1992 (4) SA 791 (A) at 794B-C. This

was a labour matter in which the relevant statutory provision stipulated that “an assessor shall be a person who in the opinion of the Chairman of the Court has experience in the administration of justice or skill in any matter which may be considered by the Court”. By reference to *The Shorter Oxford Dictionary* it was held at 796E that an opinion was a matter of speculation which could not be proved by any available evidence to be right or wrong. In the local case of *R v Foster* 1962 (1) SA 280 (SR) at 285H-286A BEADLE CJ held that:

“Opinion means something different from “intention”..... If the long and complex definition of “opinion” in the *Shorter Oxford Dictionary* is examined it will be seen that the meaning of “opinion” includes only such things as “a judgment” or “a belief of something”. It does not include merely an intention.”

However, in *R v Sibanda & Ors* 1965 RLR 363 at 369 an opinion of a court was equated with a judgment derived from objective facts and not a belief.

In my view, the publication and contents of the Value Ruling No 15 of 2007 and the accompanying correspondence demonstrated that the Commissioner-General was alive to the powers vested in him generally by Part X and in particular by s 106 and 113 of the Customs and Excise Act. It seems to me that the provisions in Part X delineate almost all the possible ingredients that constitute a transaction value for the purposes of computing the duty value of an imported item under the Customs and Excise Act. In summary, the ruling was that the sum payable to the intermediary was the value for duty purposes and that amount was religiously treated by the appellant as the purchase price of the motor vehicles in all its tax returns from the time it took effect. And rightly so, for those ingredients in my view are similar to the considerations which must necessarily constitute the purchase price of such an imported item for Income Tax purposes. In ruling on the transaction value for duty purposes, the Commissioner-General made a final and definitive determination amounting to an “adjudication in the juristic sense, i.e. a final and definite result in consequence of examining a question” or a “judgment” as indicated in the *Knop* and *R v Foster*, cases, *supra*, respectively.

That final and definite determination was that the relationship between the appellant and the intermediary did not influence the price actually paid for the goods concerned. The opinion of the Commissioner was that the parties acted at arm’s length in setting the transaction value. The finding was based on the objective assessment of the information provided to the Commissioner, which information would more or less be used to determine the purchase price of the imported vehicles. The introduction of a different statute would not change the value of the motor vehicles nor the finding that the parties had an arm’s length relationship, especially

in view of the respondent's refusal to refund the duty, surtax and VAT paid on the higher transactional value. Clearly, the appellant cannot approbate and reprobate in respect of the same motor vehicles simply because the imposts are levied under two different statutes. Contrary to the submission by Mr *Magwaliba* in para 11.2 of his written heads of argument I am satisfied that the assessment and payment of import duties and taxes based on the transaction value of these vehicles which was objectively ascertained by the respondent is binding on the respondent. The appellant has shown that it knows of no other means and the respondent has not discharged the evidentiary onus that shifted to it of showing how the purchase price required for the computation of taxable income on these vehicles could have been arrived at other than in the same way that was used to ascertain the transaction value.

Was the respondent entitled to invoke s 24 of the Income Tax Act to compute notional income?

The respondent conducted a tax compliance investigation of the appellant in respect of the four years in question. It was dissatisfied with the transactions between the appellant and the intermediary, who were related parties. The basis of the disquiet was that import documents showed the appellant as the owner of the vehicles in the bonded warehouse when in fact ownership vested in the intermediary who insured them whilst in bond. The prepaid forex amount on the price list was the Carriage Insurance Paid CIP price equivalent to 40% of the total cost of the vehicle. In addition, the appellant was responsible for the payment of rentals for the bonded warehouse, advertising and promotion expenses, clearing charges and management fees, which expenses it claimed from its income. At the same time, the owner of the motor vehicles incurred comparatively less costs and enjoyed more of the profits in a foreign tax jurisdiction beyond the reach of the respondent. The respondent formed the opinion that the arrangement was intended to reduce the appellant's profits in Zimbabwe and transfer them to this other tax jurisdiction to the obvious detriment of the Zimbabwe fiscus. In the result the appellant invoked the provisions of s 24 of the Income Tax Act and in collaboration with the appellant conducted a functional analysis of the transactions in the supply chain from the purchase of the vehicles from the conglomerate by the intermediary to their disposal to the dealers by the appellant and concluded that the transactions between the two were not conducted at arm's length. On the basis of functional analysis it apportioned and adjusted the income, expenses and profits earned from this supply chain in the ratio of 61% to the appellant and 39% to the intermediary. Even though these expenses were paid by the appellant, the respondent disallowed the portion attributed to the intermediary.

Functional analysis

The Chief Investigations Officer testified that this was an international best practice adopted by revenue authorities to assess the true income earned by related parties from transactions carried out for mutual benefit that fail the arm's length test. In its simplest form a functional analysis determines what part of a transaction was undertaken by the various parties involved in that transaction. In the present case the parties were the manufacturer (conglomerate), the intermediary, the appellant and the parent company. The respondent categorised the functions under functions performed, the attendant risks and the assets used and apportioned percentages to the work performed by each player. The respondent raised the functional analysis method around April-May 2013 on realising that the appellant was paying both management fees and a mark-up of between 7.5% and 10% on the conglomerate bought out price to the intermediary. On 24 June 2013 it supplied the appellant with the "Appellant's Functional Analysis" document on p 18 to 20 of exh 4. The document was divided into six columns headed functions, and each of the names of the four parties involved in the taxable transaction was indicated. The last column was reserved for comments.

The functions covered firstly, management and administrative services and the associated tasks of communication with customers, the handling of payment from buyer and to suppliers, provision of accounting and management services and maintaining customer negotiations, accounting and financial records and inventories. The second function was in respect of marketing and customer liaison and the associated tasks for the development, preparation, approval, implementation and funding of marketing strategies and programs which incorporated negotiations with buyers, liaison with suppliers and dealers, and the preparation of pre-shipping exit customs documents and the payment of clearing, shipping, freight and importation expenses.

The risks were in respect of credit, exchange and business risk and covered the insurance of vehicles and the loss of inventory and warehousing. The assets used covered warranties, skilled and technical employees, intellectual property rights, and vehicles and office accommodation. At the request of the respondent, on 12 July 2013 the appellant allocated 100% to those tasks that were wholly undertaken by each party and inserted comments in the column provided for that purpose. Again, on 14 August 2013³⁴ the appellant provided a more detailed percentage allocation against the other tasks. In respect of the management and administrative

³⁴ annexure H pp 27-29 replicated page 30-32 to the Commissioner's case

function the task of communicating the intention to buy was allocated 100% to the appellant. The other tasks were allocated as follows: payments from the buyer, appellant 95% and the intermediary 5%; payments to the conglomerate, the intermediary 100%; maintenance of accounting records, negotiation records with buyers and preparing financial reports, the appellant 100%; inventory control system, the appellant 50% and the intermediary 50%; management support, the French holding company 100% and the financial support for funding and liaison with suppliers, the intermediary 100%.

Under the marketing and customer liaison function the tasks were allocated as follows: developing marketing strategies, the appellant 100%; funding 96.5% to the appellant and the conglomerate 3.5%; implementation of marketing programmes, negotiation with buyers and liaison with the dealers, appellant 100%; payment of clearing charges and transport fees, appellant 85% and the intermediary 15%; price negotiations with the supplier/conglomerate, appellant 60%, the intermediary 10% and the French holding company 30% and pre-shipping, customs exit documents and freight to the place of importation in Zimbabwe, the intermediary 100%. In regards to the risks function, the tasks were allocated as follows: insurance risk from embarkation in the country of manufacture to sale in a bonded warehouse in Zimbabwe, intermediary 100%; credit and exchange rate risks, intermediary 100% and business risk, appellant 50% and intermediary 50%. And in regards to the use of assets function the tasks were allocated thus: warranties, appellant 10% and the conglomerate 90%; the use of intellectual property rights, the conglomerate 100%; the use of technical skills the appellant 25%, the intermediary 25%, the conglomerate 25% and the French holding company 25% and the use of operational vehicles and rentals, appellant 100%.

On 21 November 2013³⁵ the respondent concluded the functional analysis by averaging the percentages inserted by the appellant with its own and allocated 61% to the appellant and 39% to the intermediary.

The vehicles sales gross profit of US\$1 252 021 for 2009 US\$ 3 110 196.00 for 2010, US\$6 338 185.46 for 2011 and US\$ 4 918 389.78 for 2012 were based on total gross sales figure that did not include the intermediary's invoices. These gross profit figures were derived from the difference between the appellant's local sales and the landed costs comprised of the conglomerate's FOB costs and shipping costs, finance charges and handling and clearing charges. The Commissioner disregarded the gross profit recorded in the appellant's statement

³⁵ p 57-61 of exh 4 and pp5—9 of r 11 documents

of comprehensive income of US\$ 837 160 for 2009³⁶, US\$ 2 327 853 for 2010³⁷, US\$ 3 953 949 for 2011³⁸ and US\$ 3 615 881 for 2012³⁹.

Mr de Bourbon correctly criticised the functional analysis methodology as an arbitrary, unscientific and an opinion based on value judgment and not on a formula⁴⁰. He accurately observed that the imputed gross profit was out of step with the comparable prices of similar vehicles offered in Zimbabwe by other brand competitors. He correctly contented that the chief investigations officer did not explain how his tabulated figures and especially the vehicle sales gross profit figures were computed and more importantly how he arrived at the 61:39 split. In my view, even the more detailed functional analysis percentage apportionments provided by the appellant on 14 August 2013 in annexure H of the Commissioner's case failed to disclose how the 61:39 split was achieved. Apparently, it was invoked on the weak basis of a purported concession to profit sharing made by the appellant in a letter of 9 September 2011⁴¹, which letter did not form part of the pleadings or evidence in this case. The evidence at hand established that the appellant at all times disputed ever sharing any profits with the intermediary⁴². The real reason for ascribing profit sharing between them as eventually disclosed by the chief investigations officer was that they each added a mark-up of 7.5% to their respective purchase prices. The respondent thus formed the opinion that the parties shared profits equally and not the costs, which burden was borne by the appellant. The respondent found the position contrary to the arm's length principle.

Is it part of our law

Mr de Bourbon submitted that functional analysis was not part of our law notwithstanding that the respondent foisted it upon the appellant. He further submitted that it was illogical and irrational and did not form part of the South African or OECD transfer pricing system. In regards to transfer pricing, he argued that until the introduction of s 98A to the Income Tax Act by the Finance Act No. 1 of 2014 on 1 January 2014 there were no statutory provisions dealing with this subject in our law. The concept of transfer pricing as explained

³⁶ on p 12 of exh 1,

³⁷ on p 31 of exh 1

³⁸ on p 54 of exh 1

³⁹ on p 85 of exh 1

⁴⁰ Letter of appellant of 2 July 2013 with adjusted percentages of 100%.

⁴¹ referred by the Commissioner in his letter of 12 September 2013 p 21 of exh 4 and confirmed by appellant on 7 October 2013 annexure I page 33 of Commissioner's case and p 56 of annexure 4 and letter of 19 June 2014 p 14 of R11 documents and 66 of Exh 4

⁴² Letter of 19 June 2014 p 66 of exh 4

by Keith Huxman and Philip Haupt in *Notes on South African Income Tax* 24 ed (2005) involves the manipulation of prices, income and expenses by associated companies operating in different tax jurisdictions in order to reduce profits in a higher tax jurisdiction. It is invariably measured by the arm's length principle. It seems to me that transfer pricing could be dealt with under the general deduction formula in s 15 (2) (a) of the Income Tax Act as was the case in South Africa when *ITC 569* (1944) 13 SATC 447 was decided before the introduction of s 31 in Act 58 of 1962 and the subsequent publication of Note 7, which delineated transfer pricing transactions in that country. While our law did not have a specific transfer pricing provision until 1 January 2014, it seems to me that the issue could be dealt with under the general deduction formula, or either s 24 or s 98 of the Income Tax Act if the requirements in those sections were met.

It is clear that the functional analysis methodology is not specifically provided for in our law. Nor was transfer pricing specifically provided for in our law prior to 1 January 2014. The respondent relied on the provisions of s 24 of the Income Tax Act to invoke the functional analysis methodology. The correspondence between the parties both before and after the objection and especially in the summary of evidence filed by the appellant in preparation of the appeal hearing recognised the existence of the functional analysis concept. In the objection letter the appellant recognised functional analysis as an international practice. And in its summary of evidence, the appellant was ready to call evidence to show how functional analysis was prepared and the context in which it applied. Indeed in argument Mr *de Bourbon* referred to the pillars on which it stands as comprising the functions of the targeted parties in the chain of supply, the nature and type of assets or resources deployed used and the risks assumed by each party in the supply chain. These were applied by the respondent in the functional analysis it conducted in collaboration with the appellant. To the extent that it is a recognised method of assessing taxable income earned or deemed to have been earned by a taxpayer, I would on the sparse evidence before me hold that there is nothing in our law that would preclude the Commissioner from applying it in suitable cases.

Whether or not this was a suitable case to employ functional analysis in determining the appellant's taxable income depends on whether or not the provisions of s 24 applied to the circumstances pertaining to the appellant. I agree with Mr *Magwaliba* that the genesis of the provisions s 24 of the Income Tax Act can be traced back to English Company Law. Incorporated companies, whether related or independent had always been regarded as separate and distinct entities. In time, in order to answer the pressing questions raised by the conduct of

related parties and especially holding companies and their subsidiaries the English courts imported the concepts of assignment and agency into the relationship and this was quickly adopted by both the South African and Zimbabwean courts. Expressions such as an assignee of the holding companies⁴³, “an agent of the holding company.....conducting its business for it”⁴⁴ and “one economic entities”⁴⁵ were used to remove the separate and distinct nature of these corporate entities. While the facts of each case in which these expressions were used were different from the present case, the principles derived from these cases resulted in the legislative intervention crystallised in s 24 of the Income Tax Act that sought to treat the activities of subsidiaries that shared management, control and capital and that breached the arm’s length principle as “one economic entities”.

I do not think that the respondent’s legal right to invoke the provisions of s 24 in making the adjustments to the appellant’s tax liability arising from either the failure to declare all the income earned or claiming unjustified deductions can be gainsaid. The section stipulates that:

“24 Special provisions relating to determination of taxable income in accordance with double taxation agreements

The Commissioner may—

(a) if any person—

- (i) carrying on business in Zimbabwe participates directly or indirectly in the management, control or capital of a business carried on by some other person outside Zimbabwe; or
- (ii) carrying on business outside Zimbabwe participates directly or indirectly in the management, control or capital of a business carried on by some other person in Zimbabwe; or
- (iii) participates directly or indirectly in the management, control or capital both of a business carried on in Zimbabwe by some other person and of a business carried on outside Zimbabwe by some other person; and

(b) if conditions are made or imposed between any of the persons mentioned in paragraph (a) in their business or financial relations which, in the opinion of the Commissioner, differ from those which would be made between two persons dealing with each other at arm’s length; determine the taxable income of the person carrying on business in Zimbabwe as if such conditions had not been made or imposed but in accordance with the conditions which, in the opinion of the Commissioner, might be expected to have been made or imposed between two persons dealing with each other at arm’s length.”

The first point to note is the anomalous reference in the heading to double taxation agreements which is not embodied in the provisions of the section. I agree with the submission

⁴³ *Harold Holdsworth & Co (Wakefield) Ltd v Caddies* (1955) 1 All ER 725 (HL) at 730H, 734H-I and 738B and *DHN Food Distributors Ltd v London Borough of Tower Hamlets* (1976) 3 All ER 462 (CA).

⁴⁴ in *Ritz Hotel Ltd v Charles of the Ritz Ltd v Anor* 1988 (3) SA 290 (A) at 315A

⁴⁵ *Moodie v Industrial & Pipe Employees Trust (Pvt) Ltd and Industrial and Pipe Ltd* SC 165/1997 at p1 and *CC Sales Ltd v David Dyer & Dajen (Pvt) Ltd* HH 230/1998

by Mr *de Bourbon* that by virtue of s 7 (a) of the Interpretation Act [*Chapter 1:01*] the reference to double taxation agreements should be disregarded in construing the section.

The onus

Mr *de Bourbon* submitted on the authority of *Commissioner for Inland Revenue v Conhage (Pty) Ltd (formerly Tycon (Pty) Ltd* 1999 (4) SA 1149 (SCA) at 1159-60 paras [11] and [12]; 61 SATC 391 (SCA) at 397 that the onus was on the Commissioner to show on a balance of probabilities that the arrangements between the two related parties in question were not at arm's length. I declined to follow the South African position in *CRS (Pvt) Ltd v Zimbabwe Revenue Authority* HH 728/2017 at p13-14 of the cyclostyled judgment. For the reasons set out in that case I remain of the view that the onus provisions of s 63 govern the interpretation of s 24 and the aligned provisions of s 98 of the Income Tax Act to the extent that the taxpayer challenges the tax liability attributed to it by the Commissioner. In other words, I hold that the onus is on the taxpayer to show that the Commissioner was wrong in forming the opinion that the arrangements concluded between the taxpayer and a related party were not at arm's length rather than on the Commissioner to show that his opinion was correct. This finding accords with the general thrust of our common law principle that he who alleges must prove. In an appeal such as this one, it is the taxpayer who is challenging the correctness of the Commissioner's opinion by averring that it was wrong. It is not the Commissioner who has come to court for the confirmation of the correctness of his opinion. The duty to establish the error in the opinion must surely lie on the party that impugns the correctness of such an opinion. In the present matter the party driving the challenge is the appellant and the onus must squarely fall on it. That is the further reason why I hold that the onus is on the appellant to show that the opinion of the Commissioner that the arrangements between the appellant and the intermediary were not at arm's length. This approach appears to be consonant with the sentiments of MORTON ACJ in *Elite Wholesale (Rhodesia) (Pvt) Ltd v Commissioner of Taxes, Southern Rhodesia* (1955) 20 SATC 33 (SR) at 35; 1955 (1) SA 350 (SR) at 351C-D where he said:

“In my view the appellant has discharged the onus upon him, for in the evidence before us I find no feature connected with any of the transactions which would justify the exercise of the Commissioner's powers under s 28 (1).”⁴⁶

⁴⁶ Section 28(1) read: “whenever the Commissioner is satisfied that any transaction or operation has been entered into or carried out for the purpose of avoiding liability for the payment of any tax imposed by this Act

In any event what triggered the appeal in the present matter was that an amount was assessed to tax; which amount the appellant avers was not liable to tax because it was wrongly created. While it is correct that this Court rehears the matter; the case remains an appeal lodged by the taxpayer challenging the process undertaken by the Commissioner in adjusting his tax liability. The point missed in the *Conhage* case, *supra*, so it seems to me, is that s 63 is engaged once the challenge relates, *inter alia*, to any amount not liable to the tax". The onus therefore lies on the taxpayer to show that the Commissioner's opinion or satisfaction as the case may be that the appellant infringed s 24 or s 98 was wrong. In my view, the Commissioner does not bear the onus of establishing that his opinion was correct. All that is required of him is to set out in the determination to the letter of objection the basis for his opinion or satisfaction and as PONNAN JA indicated in *Commissioner for the South African Revenue Services v Pretoria East Motors (Pty) Ltd* [2014] 3 All SA 266 (SCA) at 270 para [6] this is derived from the averments made by the taxpayer during the investigation. The Commissioner does not create any evidence but bases his opinion or satisfaction on the information availed to him by the taxpayer.

The essential elements of s 24

The essential requirements envisaged by s 24 are that:

1. any person
 - a. who carries on business in Zimbabwe takes part directly or indirectly in the management, control or capital of a business of another person outside Zimbabwe, or
 - b. who carries on business outside Zimbabwe takes part directly or indirectly in the management, control or capital of a business of another in Zimbabwe; or
 - c. Takes part directly or indirectly in the management, control or capital of both a business operating in Zimbabwe by another person and a business operating outside Zimbabwe by another person

and

2. the business or financial conditions governing their interactions are in the opinion of the Commissioner inimical to those of two persons dealing with each other at arm's length
3. then the Commissioner shall determine the taxable income of the person carrying on business in Zimbabwe by ignoring the conditions concluded by the parties and invoking the conditions which in his opinion would have been concluded by two parties acting at arm's length.

or reducing the amount of any such tax, any liability for any such tax and the amount thereof may be determined as if the transaction or operation had not been entered or carried out."

In accordance with the concluding words of s 24, these requirements are invoked against the person who carries on business in Zimbabwe. The section was designed to deal effectively with business transactions between a taxpayer and another person that fail the arm's length test. The transactions must fall within the ambit of the provisions of s 24 before the Commissioner can determine the income tax liability of the taxpayer by ignoring the terms and conditions agreed to by the parties that are not at arm's length and supplanting them with the conditions the Commissioner believes would reasonably have been imposed between persons transacting with each other at arm's length. In the language Morton ACJ in *Elite Wholesale (Rhodesia) (Pvt) Ltd v Commissioner of Taxes, Southern Rhodesia, supra* at 351 the Commissioner takes the "sale into the taxpayer's accounts".

Any person

It was common ground that the appellant was a person who carried on business in Zimbabwe in each of the four tax years in question. It was also agreed that the intermediary carried on business outside Zimbabwe but it was in dispute whether or not it carried on business in Zimbabwe. It was also agreed that the French holding company partook directly or indirectly in the management, control and capital of both the appellant and the intermediary. There was no evidence adduced to show that any of these three related parties participated directly or indirectly in the management, control or capital of the conglomerate which manufactured and supplied the vehicles to the intermediary for the account of the appellant. However the distribution agreement permitted the conglomerate to participate in the management of the appellant.

Partakes directly or indirectly in the management, control or capital of a business of another outside Zimbabwe

The meaning of the phrase "business of another outside Zimbabwe" was the subject considerable dispute between counsel. Mr *de Bourbon* contended that the words referred to a business that was located outside Zimbabwe. He argued that the intermediary's business was located outside Zimbabwe and the appellant who was located in Zimbabwe therefore did not take part in the management, control or capital of the intermediary. Mr *Magwaliba* contended that the words equally applied to a business person located outside Zimbabwe but whose business was located either in Zimbabwe or outside Zimbabwe. He contended that the intermediary operated a business in Zimbabwe that was managed by the appellant. He therefore

argued that the relationship between the appellant and the intermediary fell into the ambit of this requirement.

The pleadings, the documentary exhibits and the oral evidence of the appellant's managing director, which were not contradicted by any evidence led on behalf of the respondent established that the appellant was not involved in the management, control or capital of any business located in a foreign country. It was not a shareholder in such a company nor did it manage or control by itself or by proxy any such company. While it was a related company to the intermediary, it did not take part in the management, control and capital of the intermediary. The appellant did not participate in the management, control or capital of the French holding company or the conglomerate. The question of whether the appellant managed the bonded warehouse on behalf of the intermediary is determined by the answer to the question of who the importer of the consignment stock was. The appellant maintained that it managed the bonded warehouse as the importer of the consignment stock, for its own account.

There was argument between counsel on whether the appellant was the importer of the consignment stock or not. Mr *de Bourbon* relied on the bills of entry for the contention that the appellant was the importer while Mr *Magwaliba* argued that it was the consignee. The chief investigations officer testified on the existence of three types of bills of entry in our law. The first was the bill of entry into Zimbabwe, the second was the bill of entry into a bonded warehouse and the third was a bill of entry for removal from bond for consumption in or for export out of Zimbabwe. His testimony was confirmed by the definition of both bill of entry and entry in s 2 of the Customs and Excise Act. A bill of entry is defined "as a prescribed form on which an entry is made". Entry is defined thus:

" "entry" in relation to clearance of goods for importation, warehousing, removal from a warehouse or exportation, means the presentation in accordance with this Act of a correctly completed and signed declaration on a bill of entry in writing and, where direct trader input facilities exist, includes the recording of the required information on the Customs computer system, using procedures approved by the Commissioner, or using a computerised procedure approved by the Commissioner, together with such bills of lading, invoices, price lists and other documents showing the purchase value of the goods together with the freight, insurance and other charges on the goods required to be declared by any provision of this Act;"

In regards to import and importer, the Act states that:

"import" means to bring goods or cause goods to be brought into Zimbabwe;
"importer", in relation to goods, includes any owner of or other person possessed of or beneficially interested in any goods at any time before entry of the same has been made and the requirements of this Act fulfilled;"

In an almost analogous case of *AT International Ltd v Zimra* 2015 (2) ZLR 143 (H) at 154D-155A by reference to the definition of “import”, “importer” and “entry” of s 2 of the Customs and Excise Act I held that a foreign registered company was the importer of goods that had been purchased in South Africa and consigned to a local company in Zimbabwe. In the present case, the intermediary met the definition of importer. Whether the appellant was “any other person possessed of or beneficially interested in the goods at any time before their entry had been made and the requirements of the Act fulfilled” is a question of fact to be decided on the basis of the available evidence and the relevant provisions found in Part III of the Customs and Excise Act. The appellant did not possess but was in terms of the distribution agreement and the tripartite agreement beneficially interested in the goods before their entry into Zimbabwe. These vehicles were coming to Zimbabwe in terms of the distribution agreement at the instance of the appellant and for the business of the appellant. Accordingly, I agree with Mr *de Bourbon* that the appellant was the importer.

As the importer, the appellant carried the obligation to warehouse the vehicles. It was in the business of selling vehicles. The appellant was contractually bound by the distribution agreement not only to purchase and sell a prescribed minimum number of vehicles but also to grow the business and enhance its market share. These objectives could only be achieved among other ways by promoting and advertising the brand. Both our common law and statutory law recognise the reservation of ownership. In *Rennie Grinaker Holdings (Pvt) Ltd v Sociedade Intercontinental de Compressores Hermeticos Sicom Ltda* 1997 (1) ZLR 173 (SC) at 182-183 KORSAH JA approved and applied the *dictum* in *Lendlease Finance (Pty) Ltd v Corporacion de Mercadeo Agricola & Ors* 1976 (4) SA 464 (A) at 498-490 where CORBETT JA said:

“According to our law, unlike certain other legal systems ownership cannot pass by virtue of the contract of sale alone; there must in addition, be at least a proper delivery to the purchaser of the contract goods.....Whether delivery alone will suffice depends in general upon the intention of the parties.....; and in this connection important considerations are (a) whether the contract contains conditions affecting the passing of ownership...and (b) whether the sale is for cash or credit.”

Again, s 17 of the Income Tax Act reads:

“17 Special provisions relating to hire-purchase or other agreements providing for postponement of passing of ownership of property

If any taxpayer has entered into any agreement with any other person in respect of any property the effect of which is that, in the case of movable property, the ownership shall pass or, in the case of immovable property, transfer shall be effected from the taxpayer to that other person

upon or after receipt by the taxpayer of the whole or a certain portion of the amount payable to the taxpayer under the agreement, the whole of that amount shall, for the purposes of this Act, be deemed to have accrued to the taxpayer on the date on which the agreement was entered into.”

In any event as was clearly pronounced in *Conhage, supra* at 115F para [3] the passing of ownership is not an essential element to a sale. It does not seem to me that the reservation ownership is synonymous with the operation by the appellant in the management, control or capital of the business carried on by the intermediary outside Zimbabwe. I accordingly find that the appellant did not manage any business of the intermediary in Zimbabwe. However, in my view s 24 (a) (i) locates the business outside and not inside Zimbabwe. I therefore agree with Mr *de Bourbon* that the appellant did not participate directly or indirectly in the business of the intermediary outside Zimbabwe.

Operates a business outside Zimbabwe and partakes directly or indirectly in the management, control or capital of a business in Zimbabwe

In regards to this requirement, the person who operated a business outside Zimbabwe was the intermediary. The person who operated a business in Zimbabwe was the appellant. The financial statements of the appellant showed that it paid management fees to the intermediary in respect of administrative, stock control and management in the sum of US\$130 000 in 2009, US\$ 140 000 in 2010, US\$ 256 629 in 2011 US\$ 140 000 in 2012⁴⁷. The scope of such management fees was covered in the agreement of 2 March 2009. The appellant failed to establish the activities conducted on its behalf by the intermediary. It strenuously asserted in correspondence of 19 May 2013 and even in the objection of 25 July 2014 that it received bona fide management services from the intermediary. However on 14 November 2014 the appellant made a half-hearted concession that it had erroneously paid management fees to the intermediary. At the commencement of hearing Mr *de Bourbon* abandoned the appeal in respect of management fees. I do not find on the facts that the intermediary participated in the management or control or capital of the appellant. I find that when the intermediary received orders from the appellant and placed them with the conglomerate it was managing its own business under the directing mind of its board of directors. The appellant did not play any role in this process. Accordingly, the provisions of subpara (ii) of para (a) of s 24 was not met.

⁴⁷ Note 12 p22 in 2009, note 17 p45 in 2010, note 18 p71 in 2011 and note20 p 102 in 2012 financial statements all in exh 1

Partakes directly or indirectly in the management, control or capital in some other business operating both in and outside Zimbabwe

The French holding company and not the appellant or the intermediary participated directly or indirectly in the management, control or capital of the appellant who operated in Zimbabwe and the intermediary who operated outside Zimbabwe. Accordingly, I also find that the provisions of that sub-paragraph were not met.

It is not necessary for me to consider the requirements of para (b) of s 24 as these are conjunctive with either of the subparas in para (a) of s 24 of the Income Tax Act. I do it for the sake of completeness.

The business or financial conditions governing the relationship in the opinion of the Commissioner that differ to those of two people dealing at arm's length

The persons identified as “any of the persons” mentioned in para (a) to which para (b) applies were the appellant and the intermediary. In regards to the conditions that were made or imposed between the intermediary and the appellant, both Mr *Magwaliba* in para 10.4 and 10.5 and Mr *de Bourbon* in para 31 of their respective written heads agreed that the business or financial conditions related to the reservation of ownership and its consequential costs of advertising and promotion, rent, clearing charges and management fees. These were exclusively met by the appellant. Mr *Magwaliba* submitted that it was the duty of the intermediary as owner and importer to meet the warehouse, marketing, promotion and advertising costs on the one hand and the clearing costs, as required by the definition of importer in s 2 of the Customs and Excise Act, on the other. His submission collapses in the face of my finding that the same definition of importer also covered the appellant. It would appear to me that the legal duty to pay these charges and imposts fell on the appellant.

Mr *Magwaliba* further contended in para 10.1 of his written heads that there was no real need for interposing the intermediary in place of the parent company in the purchase of the motor vehicles. It does not seem to me that it was within the power of the Commissioner to dictate to taxpayers who their contracting parties should be. In any event the reasons stated by the appellant for interposing the intermediary spelt out in its letter of 26 October 2007 in support of the value ruling were not impeached. The intermediary had the foreign currency required to meet the minimum purchase orders required of the appellant in the Distribution Agreement with the conglomerate. In addition, our law does not discourage middleman from interposing for profit in any lawful commercial activity of their choice as did the intermediary. This the intermediary proceeded to do by imposing a mark-up for its services as the

intermediary and financier, which mark-up was incorporated in the transaction value, which in turn was equivalent to the purchase price paid by the appellant. I do not find that the intermediary imposed these conditions on the appellant. I also do not find that the appellant wrongly increased its deductible expenses and correspondingly transferred profits to the intermediary.

Opinion that they were not at arm's length and normal conditions

The reservation of ownership is an arm's length condition recognised both in our common law and by statute. The *Rennie Grinaker Holdings* and *Lendlease Finance cases*, *supra* demonstrated that the reservation of ownership is a standard condition in contracts of sale governing international trade. The use of bonded warehouses was also a common and normal internationally accepted standard in the motor industry designed to promote the free and easy flow of global trade and accessibility of the vehicles in the importing country. It seemed to me that the cost structure of the intermediary incorporated all the ingredients that went into the landed price of the vehicles. The evidence of the appellant that the carriage insurance paid price comprised the free on board selling price of the manufacturer, the cost of freight to the bonded warehouse, insurance of the vehicles in transit to and in the bonded warehouse and the mark-up of the intermediary was not impugned. The respondent did not find the amounts charged to have been outside the normal open commercial terms charged in similar transactions by the appellant's competitors. It seems to me that the appellant discharged the onus on it to show that the opinion of the Commissioner was wrong.

Mr *de Bourbon* contended that the determination under s 24 was limited to the computation of taxable income, as defined in s 8 (1) of the Income Tax Act as "the amount remaining after deducting from the income of any person all the amounts allowed to be deducted from income under this Act". He argued that the respondent was not empowered to raise notional vehicles sales gross profit and thereafter derive taxable income from that figure. The submission lacks merit for the reason that taxable income is a derivative of gross income and income and not a standalone amount. Our Supreme Court in *Zimbabwe Revenue Authority v Murowa Diamonds (Pvt) Ltd* 2009 (2) ZLR 213 (SC) at 217G-218A requires courts to discard the literal textual construction in favour of the purposive contextual interpretation where the application of the former leads to an absurdity or repugnancy or inconsistency with the rest of the statute. It seems to me that to adopt the submission moved by Mr *de Bourbon* would lead to an absurdity and would be inconsistent with the rest of the statute. The computation of taxable income is not a standalone process but is preceded by the computation of gross income

from which all exemptions are deducted to arrive at the income from which further allowable deductions are removed before arriving at the taxable income. See also *Pretoria East Motors, supra*, para [3] and *Commissioner for Inland Revenue v Delfos* 1933 AD 241 at 252.

I am, however satisfied that the respondent wrongly invoked s 24 of the Income Tax in the present matter. Accordingly, there was no room for it to apply the functional analysis principle in this matter.

Expenses relating to leave pay and audit fees

Whether it was proper of appellant and open to appellant to make provision for the costs in question

In its income tax returns the appellant made provision for leave pay in its accounts in respect of its employees in the sum of US\$10 193 for the year 2009, US\$12 372 for 2010, US\$22 947 for 2011 and US\$24 207 for 2012. It was common cause that the respondent disallowed the 2009 and 2010 provisions in these amounts but disallowed US\$10 575 in the 2011 tax year and US\$ 1 260 in the 2012 tax year⁴⁸. The appellant contended that it was under a legal obligation to pay to its employees for the leave days accumulated at the end of each financial year and was therefore entitled to make provision for these leave days. On the other hand, the respondent contended that the obligation to pay only arose when an employee went on leave or encashed his or her leave days as it was at that stage that the leave pay would be incurred for the purpose of trade or in the production of taxable income, otherwise the provisions were rendered non-deductible expenses by virtue of s 16 (1) (e) of the Income Tax Act.

In the alternative the appellant contended that the provision in the original income tax return having been deemed issued by the Commissioner as his original assessment on the date of filing was accepted and made in accordance with the practice then prevailing in the respondent's office for which the respondent was precluded by the proviso (i) to s 47 (1) of the Income Tax act from issuing amended assessments. The respondent disputed firstly that the mere acceptance of the self-assessed return amounted to a concession as to its correctness otherwise the provision permitting the respondent to investigate and verify the correctness of the self-assessments as had been done on the appellant in the past would be superfluous. Secondly, it disputed the existence of such a practice as generally prevailing in its office at the time and characterised it as an arrangement which simply went unnoticed for years.

⁴⁸ Annexure O p 64 of Commissioner's case and p 8 of r 11 documents and p 60 of exh 4

Audit fees

It was common cause that the appellant was required by law and proper corporate governance to have its annual financial statements audited and would incur an audit fee in that regard. In each of the four years in question the appellant made provision in its respective financial statements for the audit fees in the sum of US\$10 000 in 2009, US\$15 000 in 2010, US\$12 000 in 2011 and US\$12 500 in 2012. It was common cause that provisions are made and are deductible for accounting purposes in accordance with the requirements of International Financial Reporting Standards. It paid the audit fees in the subsequent tax year but claimed them as a cost of undertaking business in the year of the assessment in which the audit pertained. The respondent disallowed the whole amount claimed in 2009 and US\$ 9 960 in 2010, US\$ 2 049 in 2011 and US\$491 in 2012⁴⁹.

The appellant contended that it incurred the obligation to pay the audit fees in the year in which the fees related even though they were eventually paid in the following year while the respondent contended that they were incurred in the year the audit was actually carried out and appellant billed for such services.

In the alternative, the appellant contended that the respondent was precluded from re-assessing the audit fees by proviso (i) to section 47 (1) of the Income Tax Act on the basis that the acceptance of the original self-assessments which are deemed by law to have been the assessments made by the Commissioner were made in accordance with the practice generally prevailing in the Commissioner's office at the time.

The two issues that arise in respect of these two provisions are whether or not these amounts are deductible under the general deduction formula, s 15 (2) (a) of the Income Tax Act notwithstanding that payment was only made in the following year. The second is whether the respondent is precluded from issuing amended assessments in each of these four years by virtue of a practice generally prevailing in its office at the time.

In regards to the first sub-issue, the law is clear. The general deduction formula caters for expenses incurred for the purposes of trade or in the production of income in the year of assessment. The provisions of the section are met when the taxpayer has incurred in the tax year to which the expenses relate an unconditional legal obligation to pay the amount due notwithstanding that the actual payment is made in the following tax year. See *G Bank Zim Ltd v Zimra* 2015 (1) ZLR 348 (H) at 354E- 355A and the cases cited therein, where the bank made

⁴⁹ Annexure O p 64 of Commissioner's case and p 8 of r 11 documents and p 60 of exh 4

commitment to pay certain amounts pertaining to voluntary retrenchments to employees in the 2009 tax year. Some employees had applied and the tax payer accepted the applications in that tax year while others only applied in the subsequent tax year in which the applications were accepted. The acceptance was conditional upon approval by the Minister of Labour and Social Services who granted such approvals for all employees in the subsequent year. I held that the unconditional obligation to pay arose in the subsequent tax year notwithstanding the commitment made by the bank and the acceptance of some applications in the 2009 tax year to which bank sought to deduct these expenses.

The cases of *Edgars Sores Ltd v Commissioner for Inland Revenue* 1988 (3) SA 876 (A) at 889A-C; 50 SATC 81 (A) at 90 and *ITC 1587* (1994) 57 SATC 97 (T) at 103-104 define the expression “expenditure actually incurred” as “an unconditional legal obligation arising in the year of assessment whether or not that liability has been discharged during that year”. In the latter case VAN DIJKHORST J stated thus:

“‘Incurred’ is not limited to defrayed, discharged or borne, but does not include a loss or expenditure which is no more than impending, threatened or expected. It is in the tax year in which the unconditional liability for the expenditure is incurred, and not in the tax year in which it is actually paid (if paid in the subsequent year) that expenditure is actually incurred for the purposes of s 11 (a). *Caltex Oil (SA) Ltd v Secretary for Inland Revenue* 1975 (1) SA 665 (A) at 674, *Nasionale Pers Bpk v KBI* 1986 (3) SA 549 (A) at 564, *Edgars Stores Ltd v CIR* 1988 (3) SA 876 (A) at 888-9, *CIR v Golden Dumps (Pty) Ltd* (1993) 55 SATC 198 (A) at 205-6. It is clear that expenditure may be deducted only in the year in which it is incurred. *Sub-Nigel Ltd v Secretary for Inland Revenue* 1984 (4) SA 580 (A) 589-591, *Caltex Oil (SA) Ltd v SIR (supra)* at 674. It is not necessary for expenditure to be regarded as ‘incurred’ that it must be due and payable at the end of the year of assessment. As long as there is an unconditional legal liability to pay at the end of the year, the expenditure is deductible even though actual payments may fall due only in a later year *Nasionale Pers Bpk v KBI (supra)* at 563-4, *Silke on South African Income Tax* 11ed Vol 1 para 7.5 at page 7-13.”

To the same effect was *ITC 1516* (1991) 54 SATC 101 (N) where GALGUT J said at 104:

“It is now settled for purposes of s 11 (a) that ‘expenditure actually incurred’ is not limited to expenditure actually paid. It includes all expenditure for which liability has been incurred during the year, whether such liability has been discharged during the year or not. *See Port Elizabeth Electric Tramway Co Ltd v CIR* 8 SATC 13 at 15; 1936 CPD 241 at 244 and *Caltex Oil (SA) Ltd v Secretary for Inland Revenue* 1975 (1) SA 665 (A) at 674D-E. A liability so incurred must however be absolute and unconditional before it will qualify as a deduction for the purposes of s 11 (a). It will not be deductible in the year concerned if for example the liability is subject to a contingency, if in other words it is dependent upon an uncertain future event. *So much is clear from Nasionale Pers Bpk v Kommissaris van Binnelandse Inkomste* 1986 (3) SA 549 (A) at 564A-D. The law in regard to the problem before us therefore offers no difficulty.”

In the local case of *Commissioner of Tax v "A" Company* 1979 (2) SA 411 (RAD) at 414A LEWIS JP cited with approval the definition of incurred that was set out in the Australian case of *Federal Commissioner of Taxation v James Flood (Pty) Ltd* (1953) 88 CLR 493 at 501 as equivalent to defrayed, discharged or borne of, encountered and run into or fall upon and not to impending, threatened or expected or due and payable.

Case law on provisions for leave pay and analogous provisions

In *ITC 674* (1949) 16 SATC 235 a provision for the payment of holiday allowances for a mandatory holiday that was due in the subsequent year was allowed on the basis that the appellants incurred mandatory and "absolute legal liability to pay" in the tax year in which the provision was made. In contradistinction holiday allowances in *Federal Commissioner of Taxation v James Flood (Pty) Ltd, supra*, were disallowed as a deduction on the ground that they did not constitute losses or outgoings incurred under s 51 (1), the section equivalent to our general deduction formula, s 15 (2) (a). The holiday was based on the accrual of 14 leave days for every 12 months of continuous service which leave days had to be taken within 6 months of due date provided the continuous service was not broken by death, a strike or absenteeism. In addition, it was mandatory to take such leave outside the year of assessment and the employee was paid his normal salary while on leave and prohibited from encashing such leave. It was held that the factors that could break continuous service constituted contingent liabilities that undermined a definite obligation on the part of the employer to make payment to those employees who had not completed 12 months service before the end of the taxpayer's financial year and as such had not incurred an outgoing proportional to the accrued leave days. I understood this case to mean that the obligation to take the holiday allowance was in terms of the award, which was the source of the liability, incurred when the employee qualified to take leave in the year subsequent to the year of assessment.

In the *Commissioner of Taxes v A Company, supra*, at 435A LEWIS JP referred to another Australian case of *Nevill & Co Ltd v Federal Commissioner of Taxation* for the proposition that the employer taxpayer had "at best an inchoate liability in process of accrual but subject to a variety of contingencies" which liability would be completely incurred in the following year in respect of those employees who had not yet qualified to take annual leave notwithstanding that the amount regarding the labour as a whole had become predictable with certainty,

In the *Edgars* case, *supra*, CORBETT JA distinguished between a conditional liability which arises in the year of assessment but is fulfilled in the following year and an unconditional liability which arises in the year of assessment but the amount of the liability is ascertained in the following year. The later was exemplified by the local case of *Commissioner of Tax v "A" Company* 1979 (2) SA 411 (RAD) where the unconditional loss on a loan advanced was incurred in the year the debtor was placed in liquidation and was held that the likelihood of a recoupment of a fraction of the amount in a subsequent year did not transform the unconditional liability into a contingent one. In contrast, in the *Edgars* case the obligation to pay rental was found to be contingent upon the determination of turnover at the end of the lease period in the subsequent year and was not an unconditional obligation the quantification of which took place at the end of the lease period. The condition to pay rental based on the turnover that was only quantifiable at the end of the lease period was contingent upon the computation exceeding the basic rental paid, a position that could only be ascertained in the subsequent tax year. The unconditional liability would thus be incurred only after the determination had been made that the turnover rental exceeded the basic rental. The concession by the Commissioner to apportion the turnover rental monthly was held to be contrary to principle.

In *ITC 1495* (1991) 53 SATC 216 (T), where the employee was entitled to take mandatory leave after working for a fixed period failing which he would forfeit the accumulated leave and the employer did not have any obligation to pay cash in lieu of leave other than in respect of any accrued leave days on death or retirement, it was held that the provisions made for the accrued leave days on death or retirement could not be deducted in the tax year in which they were provided for because they were contingent on the happening of an uncertain event. In other words, it was held that the unconditional liability to pay for such days was only incurred on death or retirement.

The principles derived from case law

It seems to me that the principles that emerge from the above cases are that where by virtue of a statutory or contractual provision the employer is required to pay an employee cash in lieu of leave, which leave accrued in the year of assessment but is due in the subsequent year and the application for encashment is made and approved in the year of assessment, the liability to pay is incurred in that year of assessment. However, where application is made in the year of assessment and approved in the following year or where both the application and the

approval are made in the subsequent year, then the liability to pay is incurred in that subsequent year.

The facts on leave pay

The managing director stated that in 2007 and 2008 the appellant used the same method to claim provisions as it did in each of the four years and they were not disallowed. In the tax periods under review, the appellant had 20 employees⁵⁰ in the administrative, reception, managerial, sales, parts, finance and logistics and drivers divisions. A sample contract of a bookkeeper dated 3 May 2011 was produced on p 110 -112 of exh 4. In regards to annual leave para 9.1 states:

“your annual leave will be calculated as follows:-annual leave 22 working days, you may accumulate leave up to a maximum of twice your annual leave entitlement. The company may require you to take your leave during the annual December shutdown period. if you do not at that stage have any leave accruing to you or have insufficient leave accruing to you, then you will be required to choose between taking unpaid leave or accepting paid leave which will be off-set against leave that will accrue to you in the future (such leave will be termed advance paid leave). if you should resign or your employment with the company be otherwise terminated before your advanced paid leave has been set-off, then you acknowledge and consent to the deduction or off-set against any moneys which may be owed to you by the company, of an amount equal to the salary paid on the days when the advance paid leave was taken for those days which have not been off-set against accrued leave.”

The managing director stated both in his evidence in chief and under cross examination that cash in lieu of leave was payable based on request from the employee who had a right to such payment and 95% of the employees took up that right. However, until the request was made and approved the appellant would not know whether the employee would seek encashment or the number of days sought to be encashed and the amount. Any leave days over the maximum would be forfeited. He could not say whether it was paid in the year the leave accumulated or in the subsequent year but was content to aver that it was paid based on accumulation of the days up to the two year maximum. The chief investigations officer stated that while it was well and proper to make a provision for prospective leave under the International Financial Reporting Standards for accounting purposes, such a provision could not be claimed for income tax purposes before it was actually incurred for the purposes of trade or in the production of income. The obligation to pay the employee arose when the employee’s application for the full or partially encashment of his leave entitlement was approved.

⁵⁰ There were 20 in 2009, p21; 19 in 2010 p 43, 19 in 2011 p 68 and 21 in 2012 p 98 in notes to the financial statements of each year in exh 1,

Mr de *Bourbon* argued that the appellant's employees had an absolute legal right to convert the leave days which accrued in the course of the year of assessment. He further argued that the appellant accordingly incurred an absolute liability to pay for these leave days each time the days accrued even though actual payment was made in the following tax year. In other words, Mr de *Bourbon* contended that the employee had an absolute legal right to encash such days on accrual. The contention flounders on the proposition propounded in *Nevill & Co Ltd v Federal Commissioner of Taxation* and approved in *Commissioner of Taxes v A Company*, *supra*, that the employer taxpayer had at best an inchoate liability in the process of accrual but which was subject to a variety of contingencies and which liability would only be completely incurred in the following year in respect of those employees who had not yet qualified to take annual leave notwithstanding that the amount regarding the labour as a whole had become predictable with certainty. The evidence disclosed that employees could take voluntary leave or be forced to take leave during the annual December shutdown. In the forced leave category, were employees who had accumulated the required leave days and those who either had not accumulated any leave days or had accumulated insufficient leave days. The appellant and its managing director did not disclose either to the Commissioner or this Court whether the annual December shutdown took place and the exact dates when it did so in each of the years in question. They did not tender any evidence concerning the corporate diktat nor indicate when it was issued and what its contents were. We do not know whether it affected all or some of the employees. No evidence was led on the number who took full voluntary leave, unpaid leave, advance paid leave or those who took partial voluntary leave or even those who took forced leave combined with encashment. In respect of those who went on voluntary leave, he failed to disclose when they applied for such leave and whether they sought full or partial encashment of their accrued days and when and whether such leave was approved. There was simply no evidence on whether any leave was ever taken or encashed in each of these years.

All these administrative factors were relevant to determine when the unconditional legal obligation to pay arose. If the corporate diktat forced every employee to take leave during the annual December shutdown, then no provision for leave pay could be made for the duration of the shutdown because the employees would be paid from the ordinary funds allocated for their wages and salaries during that period, which would be deductible in the subsequent tax year. In regards to encashed days, the payment would be incurred on the date on which the approval was granted and not on the date of payment. The submission made by Mr de *Bourbon* that the absolute legal obligation to pay occurred when the leave accrued was therefore contrary to

authority. The unconditional legal obligation to pay arose when the administrative conditions dictated by the exigencies of the corporate diktat and contractual terms were fulfilled. These administrative factors were sorely missing in the testimony of the appellant. The appellant failed to establish on a balance of probabilities that the provisions for leave pay were incurred in each of the tax years in which it claimed the deductions.

The facts on audit

The managing director indicated that the appointment of auditors and the contract of audit were made prior to the end of the financial year. This was confirmed by the engagement letters dated 29 August 2011 and 27 September 2012 for the 2011 and 2012 audits⁵¹. The 2011 audit fees and expenses were by agreement based on the number of hours spent on the audit engagement while the 2012 fees were “billed as agreed from time to time and payable on presentation” at the standard rates in force when the service was delivered. The auditors estimated fees of US\$12 008 from 277 hours for the 2011⁵² audit and US\$ 15 825 for 250 hours in 2012⁵³. The 2012 audit was projected to commence in December 2012 and end in February 2013 (wrongly stated as 2012 p 29 but corrected on diagram on p 40 of exh 4 dated 18 October 2012). The audit time table on p40 of exh 4 was at variance with the evidence of the two witnesses called by the appellant that the substantive audit covering the first 11 months took place in 2012 and only mop up audits were done in 2013. The auditors projected that meetings with management would be held in December 2012 and January 2013 while planning and risk assessment and the compilation of the financial statements and the tax review would be done in February and the presentation of management reports and the distribution of the final audit reports would take place in March 2013.

The chief investigations officer testified that provisions denoted an impending service that was accounted in the year of assessment under the accounting prudence concept. He however, indicated that such provisions were treated as reserve funds which were not deductible in the year of assessment but in the following year being the year on which they were incurred. The testimony of the chief investigations officer that the real audit encompassed the compilation of the statement of financial position, statement of comprehensive income, statement of changes in equity and cash flows and thereafter the invoicing for the work done

⁵¹ P5-7 and 22-25 of exh 4.

⁵² p 8 of exh 4

⁵³ p44 of exh 4

was confirmed by the auditors engagement letters and projections. The essence of his testimony was that by agreement of the parties the liability to pay was incurred on the dates on which each stage of the contract was performed and not on the date on which the contract of engagement was entered into. My reading of the contracts of engagement is that the appellant incurred inchoate liability to pay at each stage of performance and an absolute liability to do so on the date on which performance was completed and the amount actually expended quantified and brought into account. The onus to show when the audit commenced and when it was completed lay on the taxpayer.

The principle of law that Lewis JP appears to have approved in *Commissioner of Tax v A*, *supra*, at 415G-G-H by reference to the two Australian cases of *Federal Commissioner of Taxation v James Flood (Pty) Ltd* (1953) 88 CLR 493 and *Nevill & Co Ltd v Federal Commissioner of Taxation* and the English case of *Edward Collins and Son Ltd v IRC* 12 TC 773 at 783 was that an expenditure or loss arising from the terms and conditions set out in a contract is incurred when the contracted work is performed. This view is supported by the underlined words by WATERMEYER AJP in *Port Elizabeth Electric Tramway Co Ltd v CIR* 8 SATC 13 (1936 CPD 241 who at p 15 that:

“But expenses “actually incurred” cannot mean actually paid”. So long as the liability to pay them actually has been incurred they may be deductible. For instance, a trader may at the end of the income tax year owe money for stock purchases in the course of the year or for services rendered to him. He has not paid such liabilities but they are deductible.”(My underlining for emphasis)

The clear principle arising from these cases is that the unconditional obligation to pay is incurred when the work is done or the services are rendered. In my view, the provisions made in respect of the audit fees constituted a contingent liability, the performance of which was “impending, threatened or expected” in the future. The appellant wrongly sought to deduct them in the years in which the provisions were made.

The practice generally prevailing

I must point out that this alternative ground was not raised by the appellant in the objection letter and cannot be considered unless leave, based on agreement or good cause has been granted in terms of s 65 (4) of the Income Tax Act. The appellant did not seek leave and none was granted. I decided to deal with the point simply because it raised an important issue regarding the use of the Assessors’ Handbook in determining the existence of a practice generally prevailing in the Commissioner’s office.

In ITC 1495 (1991) 53 SATC 216 (T) at 225 Melamet J relied on the *Shorter Oxford English Dictionary* in defining the phrase “practice generally prevailing” as a common habitual action authorised, approved and applied by the Commissioner. It was common cause that the onus lay on the taxpayer to prove the existence of such a practice. The appellant relied on the testimony of the tax consultant and an extract from the Commissioner’s Assessors’ Handbook, a private and confidential internal document issued by the respondent for the guidance of his employees in applying the provisions of the Income Tax Act.

The appellant’s first witness introduced para 145 (e) of the Assessor’s Handbook into evidence notwithstanding that the appellant had cited its contents in its letter of 19 June 2014. She worked for the respondent as an assessor between 1995 and 2005 and as an investigator for a few months before resigning in 2006. She runs her own tax consultancy. It was common cause that self-assessments were introduced by legislation on 1 January 2007. Her testimony was based on her personal experience as a tax consultant and the contents of para 145 (e) of the Assessors’ Handbook. An extract of the relevant paragraph, which was reluctantly produced by the respondent by order of Court at the hearing reads:

“[145] this subsection details the expenses which a client is not entitled to deduct from his income. The deductions not allowed are:

- (e) Income taken to a reserve fund or capitalised in any way. In practice this paragraph is not applied to specific reserves created in respect of leave pay, directors’ fees, bonuses and the like. Such reserves and provisions will be allowable deductions if-
 - (i) the amounts are voted on or before the date of the relative accounts or the annual general meeting at which they were considered; and
 - (ii) the income is taxable in the year of assessment following that in which it is allowed as a deduction.”

Similarly amounts due in terms of some industrial law or regulations are treated as allowable deductions having been properly incurred during the year of assessment. In no circumstances however are provisions for anticipated or contingent losses or expenditure allowed as deductions. Thus a car dealer cannot be allowed to deduct anticipated expenses to be incurred after his year end on free services still to be given on cars sold before the year end-but see s 15 (2) hh) (paragraph [148D]).

At the commencement of her testimony she stated that the respondent’s current practice was to disallow provisions for audit fees. She then changed her evidence and thereafter maintained in both her remaining evidence in chief and under cross examination that the respondent consistently allowed provisions for audit fees and leave pay in the tax year to which they related and added them back to income in the following tax year after they were approved

at the Annual General Meeting. She did not know how the appellant carried out its business and tax obligations but relied on her experience with other similarly placed corporates to postulate the general period auditors were engaged and the duration of such audits. She indicated that audits generally commenced in November and ended in the subsequent financial year.

In regards to the generally prevailing practice followed by the respondent, the chief investigations officer averred that both prior to and after 2007 provisions for leave pay and audit fees were not allowable deductions in the tax years in which they were made or at all despite the impression portrayed in the extract that they were allowable. The respondent regarded them as reserve funds that could not be deducted by virtue of the provisions of s 16 (1) (e) of the Income Tax Act. He stated that prior to the 2007 amendment, the respondent's assessors would examine each return but this practice disappeared with the advent of self-assessments. He further averred that one of the unintended consequences of self-assessments was that provisions such as the ones in issue could, until a corrective audit was undertaken within the statutory period of six years, escape notice and in the absence of an audit would remain undetected and become final and conclusive. The respondent regarded the Assessors' Handbook as a private and confidential and not a public or policy document or even a tax ruling, which could establish a practice. He maintained that the practice of the Commissioner was that all deductions for leave pay and audit fees provisions were not allowable.

The answer as to whether paragraph 145 (e) constitutes a practice generally prevailing in the Commissioner's office is provided by section 37A (11) to (13) of the Income Tax Act and para 4 (6), and 5 (3) to the Fourth Schedule of the Revenue Authority Act. Section 37A (11) to (13) of the Income Tax Act stipulate that:

- “(11) where a specified taxpayer has furnished a return in terms of subsection (1), the taxpayer's return of income is treated as an assessment served on the taxpayer by the Commissioner-General on the due date for the furnishing of the return or on the actual date of furnishing the return, whichever is the later.
- (12) Notwithstanding subsection (1), the Commissioner-General may make an assessment under section 46 and 47 on a specified taxpayer in any case in which the Commissioner-General considers necessary.
- (13) Where the Commissioner-General raises an assessment in terms of subsection (12), the Commissioner-General shall include with the assessment a statement of reasons as to why the Commissioner-General considered it necessary to make such an assessment. [Section inserted by Act 12 of 2006].”

It seems to me that subs (12) allows the Commissioner to reopen an assessment such as the self-assessments in question provided he is not precluded from doing so by either proviso

(i), (ii) or (iii) of s 47(1). The 6 year prescription prescribed in proviso (ii) and proviso (iii) do not apply to each of the provisions under consideration. The first proviso if proved on a balance of probabilities by the taxpayer would preclude such a reopening. The appellant maintained that para 145 (e) of the Assessors' Handbook established such a practice. Para 4 (6) to the Revenue Authority Act deals with binding rulings while para 5 (3) of the same Act deals with non-binding rulings. They stipulate that:

“(6) A publication or other written statement issued by the Commissioner- General does not have any binding effect unless it is an advance tax ruling.”

And 5 (3)

“(3) Any written statement issued by the Commissioner-General interpreting or applying the Income Tax Act [*Chapter 23:06*] prior to the 1st January, 2007, or any other relevant Act prior to the 1st January, 2009, is to be treated as and have the effect of a nonbinding private opinion, unless the Commissioner-General prescribes otherwise in writing.”

It was common cause that the extract from the Assessor's Handbook was neither an advance tax ruling nor a non-binding private opinion issued by the Commissioner to a taxpayer. Nor did it meet the prescribed requirements for a general binding ruling or a private binding ruling in paras 10 (3) and 11(5), respectively, to the Fourth Schedule in question. However, it could liberally be interpreted to fall into the category of “any written statement issued by the Commissioner interpreting or applying the Income Tax Act [*Chapter 23:07*] prior to 1 January 2007” contemplated by para 5 (3) above. The evidence of the first witness of the appellant attested to its existence during the time of her employment with the respondent, prior to 1 January 2007. It would therefore have the effect of a non-binding private opinion which in terms of para 5 (2) “may not be cited in any proceeding before the Commissioner-General or the courts other than a proceeding involving the person to whom the nonbinding private opinion was issued.” It was common cause that the extract in the Commissioner's handbook was never issued to any taxpayer let alone the appellant. It was therefore remiss of the appellant to seek to rely on it to establish a practice generally prevailing in the respondent's office. By operation of law, the appellant is precluded from relying on it to establish a generally prevailing practice. Although distinguishable on the facts and contentions of law, to the extent that *Commissioner of Taxes v Astra Holdings (Pvt) Ltd t/a Puzey and Payne* 2003 (1) ZLR 417 (SC) was decided on the principle of “the operation of law” the respondent was correct to rely on that case for the proposition that the Commissioner was bound to act in terms of the law of the land to collect all tax properly due to the fiscus and not untax the taxpayer on the basis of his own misinterpretation of the law.

The other evidence excluding the extract that was led by the appellant's witnesses in the face of the denials of the chief investigations officer as to its existence, failed to establish that such a practice had been operating since time immemorial. The undisputed evidence of the chief investigation officer that a practice generally prevailing was communicated in much the same way as a tax ruling and that the Commissioner-General was working with the Institute of Chartered Accountants to come up with such a practice clearly demonstrated that such a practice as alleged by the appellant did not exist. In any event the appellant should have led cogent and not vague evidence perhaps from other taxpayers on the existence of such a practice. See *D Bank Ltd v Zimbabwe Revenue Authority*, *supra* at p 191C. Such a failure satisfies me that the alleged practice does not exist. The alternative submission advanced by Mr *de Bourbon* was therefore devoid of merit. The respondent acted within the ambit of its statutory powers to reopen the self-assessment returns to readjust the provisions for both leave pay and audit fees. In my view, that these provisions were not treated as reserve funds in the financial statements was a mere accounting form that did not in substance affect their income tax reserve fund status. As correctly observed by the chief investigations officer, however the appellant treated it in its books of account, a provision was in substance a reserve fund, which could not be claimed in the year of assessment it was made by virtue of s 16 (1) (e).

Accordingly, I am satisfied that the respondent correctly disallowed the provisions in question in each of these years.

Penalties

It was common ground that penalties are imposed by virtue of s 46 of the Income Tax Act and in the present matter were derived from subs (1) (b) and (c), (4) and (6) of s 46 of the Income Tax Act. Initially the respondent imposed 100% penalties but on objection it reduced the penalty on the provisions to 50% and maintained the penalties in respect of the failure to deduct the correct amounts for marketing, promotion and advertising in the purported profit sharing arrangement, the omission to levy interest on subsidiaries and the deduction of management fees at 100%. The argument advanced by Mr *de Bourbon* that the obligation to pay tax only arose after the adjustments had been invoked under s 24 was incorrect. S 24 is invoked after the self-assessment, which is deemed to be the assessment by the Commissioner, has been filed. The purpose of s 24 is to determine whether the taxpayer paid the correct tax in the self-assessment. Any shortfall disclosed by the invocation of s 24 relates to the self-assessment and not to a new assessment. In my view, the obligation to pay the correct tax arose when the self-assessment return was made and not at the time of re-assessment when the

shortfall was discovered. Accordingly, the provisions of s 46 cover the infractions committed by the appellant.

The imposition of penalties at 100% is done only where the appellant is found to have fallen foul of the provisions of s 46 (6) of the Income Tax Act by omitting an amount which should have been included in the return or by rendering an incorrect statement or failing to disclose any relevant fact which results in the payment of less tax than would otherwise be due with intent to evade tax. Where such an intention is missing, then the Commissioner or the Court on appeal has a discretion on the quantum of penalty to impose.

Since this is an appeal in the wider sense I am at large on penalty. The appellant was generally a good corporate citizen which paid its fair measure of taxes. It cooperated with the respondent during the 4 year fatiguing and disruptive investigation which took its toll on management time and company resources. The objection letter and subsequent letters of 22 September 2014, 27 October 2014 and 14 November 2014 disclosed the financial stress the appellant experienced which contributed to the eventual loss of the franchise just before the objection was filed with the Commissioner. The appellant's position on its relationship with two local related parties was only conceded by the respondent's counsel in his opening remarks at the commencement of the appeal hearing.

I am obliged to look into the interest of the wider community. In *Commissioner of Taxes v F* 1976 (1) RLR 106 (AD) at 113D MACDONALD JP described tax avoidance in strong language as an evil. The imposition of penalties in fiscal infractions is predicated on both individual and general deterrence. Every taxpayer is required to shoulder its fair share of the tax burden for the common good. The level of moral turpitude of the taxpayer is measured against its good points to arrive at an appropriate penalty. In the *Elite Wholesale case* MORTON ACJ equated "an intention upon the part of the purchaser or seller to evade assessment or tax" with "something which shows a lack of good faith or the presence of "moral dishonesty in the taxpayer's mind".

Management fees

The appellant vehemently maintained and asserted throughout the investigations and in the letter of 14 March 2011⁵⁴ 30 May 2012, 19 June 2014⁵⁵ and the objection of 25 July 2014 against all odds and the available evidence that the intermediary had provided management

⁵⁴ para 6 p 2 of exh 4,

⁵⁵ p 67 ex 4

services in strategy setting, pooling funds and purchasing power from Mauritius in behalf of head office senior management. It only abandoned the claim on 14 November 2014⁵⁶. In that letter the managing director made three telling and disingenuous points. The first was that the intermediary was through a legal oversight substituted for the holding company in the management fees/technical fees agreement of 2 March 2009. The second was that the management fees were remitted to the holding company through the intermediary. The third, which was also reiterated during the cross examination of the chief investigations officer, was that the only management fees ever paid were in the sum of US\$130 000 reported in the 2010 financial statements while amounts reflected in the other years were provisions which were written back in subsequent years without any prejudice to the fiscus. The managing director failed to demonstrate by any hard evidence the management intervention that was undertaken by the holding company or to explain why the management fees remained a continuing obligation payable to the intermediary in the 2011 and 2012 financial statements. These prevarications eclipsed the good points exhibited by the appellant over the four years that it was under investigation. The concession however demonstrated that the appellant made an incorrect return in respect of claims for management fees in each of the affected tax years.

It seems to me that the unsupported persistent assertions maintained by the appellant even after the concession of 14 November 2014 were indicative of both corporate moral dishonesty and a lack of good faith. I therefore find that the appellant through the mind of its management evinced the intention to evade the payment of the correct amount of tax as contemplated by s 46 (6) of the Income Tax Act by claiming the deduction of management fees paid to the intermediary, who was not entitled to such fees. The Court or the Commissioner have no option but to impose a 100% penalty. The penalty imposed by the Commissioner is accordingly confirmed.

The wording of s 46 (1) (b) and (c) incorporates within its ambit the amounts adjusted under s 24 on rentals, marketing, advertising and promotion charges. These would not have affected the appellant's tax position for the reason that the intermediary would have incorporated them in the CIP price and passed them to the appellant who would have been entitled to deduct them from his income. There would not have been any moral turpitude attached to the appellant's deduction of the amounts representing 39% of the fair share of the

⁵⁶ p 107 of exh 4

intermediary's expenses. In these circumstances the imposition of any level of monetary penalty would be wholly unjustified. I would have waived it in full.

The leave and audit fee provisions

The tax consultant called by the appellant was aware that the respondent disallowed leave pay provisions and audit fees in the tax year that they were made. However, the evidence disclosed that the appellant accessed the Assessors Handbook and genuinely believed that the respondent allowed deductions of these provisions. It clearly lacked the intention to evade tax and was thus eligible for remission of penalty. The amounts involved in each of the 4 years were minimal. The moral turpitude of the appellant was minimal. It seems to me that a penalty of 10% in respect of each year for each head is appropriate.

The Tax amnesty

It was common cause that the tax amnesty was not raised in the letter of objection of 25 July 2014 for the reason that it had not yet come into existence at that time. The appellant raised it in para 72 of its case on 18 December 2014 and the respondent responded to it in para 43 of the Commissioner's case. It was promulgated under the authority of s 23 of the Finance Act (No. 2) of 2014 in the Finance Act (Tax Amnesty) Regulations 2014, SI 163 of 2014 on 21 November 2014. It exempted errant taxpayers whose applications were approved from paying any additional tax, penalty or interest on the amounts for which the amnesty was granted. It was common cause that both s 19 of the Finance Act and s 8 of the tax amnesty regulations specifically precluded from their ambit any taxpayers who had paid tax or rendered a return or declaration or had been assessed. It was again common cause that the appellant fell into the category of taxpayers who were excluded from the ambit of the tax amnesty and as a result did not apply for the amnesty.

At the tail end of his oral submissions Mr *de Bourbon* moved the Court in terms of the proviso to s 65 (4) to consider the introduction of the tax amnesty argument, which had not been raised in the notice of objection on two grounds. The first was that it was physically and legally impossible to raise it in the objection and the second was that such exclusion offended the appellant's constitutional right to equal treatment, protection and benefit of the law enshrined in s 56 (1 and (6)) of the Constitution. Mr *Magwaliba* opposed the application on the ground that the constitutional argument was constrained by the absence of evidence on the point.

In both his written and oral submissions Mr *de Bourbon* emphasized that the enactment of the tax amnesty under consideration was constitutional but that the denial of the tax amnesty benefit to certain categories of taxpayers was unconstitutional. In para 108 of his written heads counsel submitted that “if the tax amnesty is to be treated as being constitutional, and the concession is repeated that it is within the terms of the Constitution permissible to grant such an amnesty, it must apply to the appellant, who therefore cannot be obliged to pay penalties and interest on any unpaid taxes raised in an amended assessment as in the present case”. In the alternative, he urged this Court to exercise its sentencing discretion in favour of the appellant by extending the benefits embodied in the tax amnesty legislation to the appellant.

The submission is obviously raising the constitutionality of the tax amnesty. As I understand it, the submission is really that the tax amnesty is unconstitutional to the extent that it fails to cover all taxpayers. Looked at from another angle the submission is that any law that does not treat all people equally does not provide them equal benefit to the law and is therefore unconstitutional. The fallacy of the submission becomes self-evident when viewed in this wider context. It is simply that all laws that do not treat all citizens equally are unconstitutional. But that is not what the constitution contemplates or even says. I think it has always been recognised that no constitution in the world is able to provide absolute equality to all its citizens. The test of constitutionality of an enactment is not measured against absolute rights. I intimated in *CRS (Pvt) Ltd v Zimbabwe Revenue Authority* HH 728 /2017 at p 27 of the cyclostyled judgment that in our law the test of constitutionality of an enactment is measured against the provisions of s 86 (2) of our Constitution. That provision allows the enactment of laws such as the tax amnesty or any laws which restrict such a fundamental right as s 56 (1) as long as it is a law of general application which is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom.

These constitutional imperatives are in turn measured against all relevant factors including the six that are enumerated in s 86 (2) (a) to (f). The submission made as to the possible infraction of s 56 (1) fails to address these factors. Mr *de Bourbon* did not attempt to address these factors in his application for leave to introduce and rely on this ground. He failed to show good cause for its introduction into argument. He has failed to demonstrate the existence of a possible breach of the right to equality and equal protection and benefit of the law against the appellant and those taxpayers who have been excluded in the tax amnesty. It seems to me that since the Constitution itself allows for the enactment of the tax amnesty

legislation, it cannot be unconstitutional for that enactment to treat taxpayers differently. Accordingly, I decline yet again to allow the introduction of the tax amnesty argument.

Costs

It seems to me that the Commissioner may very well have been justified in invoking the provisions of s 24 of the Income Tax Act by the acts of commission and omission of the appellant in respect of both management fees and goods in transit at the time he did. However, in accordance with the provisions of s 65 (12) of the Income Tax Act I did not find the claim of the Commissioner unreasonable even in respect of the interest issue that the Commissioner conceded at the eleventh hour or the grounds of appeal frivolous. I will therefore make no order of costs against either party other than that each party is to bear its own costs.

Disposal

Accordingly, it is ordered that:

1. The amended assessments number 20211442 for the year ending 31 December 2009, 20211443 for the year ending 31 December 2010, 202211446 for the year ending 31 December 2011 and 20211448 for the year ending 31 December 2012 that were issued against the appellant by the respondent on 27 June 2014 are hereby set aside.
2. The Commissioner is directed to issue further amended assessments against the appellant in respect of each year of assessment in compliance with this judgment and in doing so shall:
 - a. Add back to income 7% interest on the cost of services rendered by the appellant for the consignment stock in transit to Zambia, Malawi and Tanzania in the sum of US\$2 240 for 2009, US\$ 2 505.87 for 2010, US\$ 2 198.13 for 2011 and US\$3 273.20 for 2012 tax years, respectively.
 - b. Add back to income management fees that were deducted by the appellant in each year in the sum of US\$130 000 for 2009, US\$140 000 for 2010, US\$ 256 629 for 2011 and US\$ 140 000 for 2012 tax year, respectively.
 - c. Bring to income the provisions for leave pay in the sum of US\$10 000 for 2009, US\$ 9 960 for 2010, US\$2 049 for 2011 and US\$ 491 for 2012 tax year.
 - d. Bring to income provisions for audit fees in the sum of US\$ 10 199.17 for 2009, US\$12 372 for 2010, US\$10 575 for 2011 and US\$ 1 260 for the 2012 tax year, respectively.
 - e. Discharge the notional interest he sought to impose on loans and advances made to ADI and GS, respectively.
3. The appellant is to pay 100% additional tax on management fees,
4. The appellant shall pay additional penalties of 10% in respect of leave pay and audit fee provisions.
5. The tax amnesty application is dismissed.
6. Each party shall bear its own costs.

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