

BATH LTD
versus
ZIMBABWE REVENUE AUTHORITY

SPECIAL COURT FOR INCOME TAX APPEALS
KUDYA J
HARARE, 5 and 8 February 2019 and 28 August 2020

Income Tax Appeal

ET Matinenga, for the appellant
T Magwaliba, for the respondent

KUDYA J: The main question for determination is whether the appellant made culpable misrepresentations in its 2009 and 2010 self-assessment tax returns, entitling the Commissioner to re-open these otherwise prescribed assessments. The incidental question being the stage at which the respondent is legally obliged to advise the taxpayer of the specific reason for the re-assessment. The perennial issue on penalty was by consent settled, at the pre-trial hearing of 5 October 2018, at 10%.

The background

The appellant is a local company, which manufactures, distributes and sells cigarretes in Zimbabwe and exports semi-processed tobacco to Mozambique. The respondent's case manager commenced an extensive tax investigation of the appellant in respect of the 2009 to 2014 tax years in 2016. The parties exchanged correspondence and documents and held meetings which culminated in the case manager's preliminary findings of 8 November 2016, in which he sought to disallow 12 items of expenditure that had been deducted by the appellant in its 2009 to 2014 self-assessments tax returns and charged tax, inclusive of a penalty of 50% and interest in the total sum of US\$22 293 369.63¹. The parties entered into further correspondence and held further meetings between 10 November and 27 December 2016, which resulted in the amended manual

¹ Comprised of principal of US\$11 699 768.11, penalty at 50% of US\$5 849 884.06 and interest of US\$4 743 717.46 computed at p 190 and summarized at summarized at p 191 of appellant's case.

notices of assessment for income tax of 6 January 2017², for the tax period under investigation in the aggregate sum of US\$6 679 488.23 comprising of a cumulative principal of US\$3 298 118.07, 50% penalty of US\$1 649 059.04, interest of US\$1 732 311.12.

In view of the confinement of the objection and appeal to the 2009 and 2010 tax years, it is necessary that I limit the results of the meetings and correspondence exchanged between the parties to these specific years. The manual assessments of 6 January 2017, raised an additional principal tax of US\$913 465.82 and US\$295 748.77 for the two tax years³, respectively. The respondent reduced these amounts on 23 January 2017, to US\$307 918.09 and US\$78 483.27, respectively⁴, in response to the discussions between the parties of 19 and 20 January 2017. An initial objection lodged by the appellant on 6 February 2013, was withdrawn at the request of the respondent to enable the parties to pursue further negotiations. These negotiations were conducted between 14 February 2017, and 15 September 2017. They resulted in the overall reduction of the total tax bill for the 2009 to 2014 tax period to US\$1 510 673.91⁵ inclusive of penalty of 50% and interest, which the appellant paid on a without prejudice basis over a period of 5 months, commencing 22 September 2017. They, however, did not affect the respondent's computations of 23 January 2017, in respect of the 2009 and 2010 tax years⁶.

On 10 October 2017, the respondent issued manual notices of the amended assessments in the tax amounts that the appellant paid on a without prejudice basis. The appellant objected to the amended assessments for the 2009 to 2011 tax years, but later abandoned the objection to the 2011 tax year, and the imposed penalty and interest to the amended assessment of 2014, on 30 October 2017. The determination to this objection was made on 17 February 2018. The appellant filed its notice of appeal on 7 February 2018, and followed it up with its case on 3 April 2018. Thereafter, the respondent filed the Commissioner's case on 30 May 2018. A pre-trial hearing was held on 5 October 2018, at which two issues, upon which the appellant, by consent, bore the onus on a balance of probabilities, were referred for determination on appeal.

The facts

² At p 215-219 of appellant's case but computed at p 213 and summarized at p 214 thereof and pp 63 and 64 of r 11 documents.

³ P220 of appellant's case and 63 and 64 of r 11 documents.

⁴ P220 of appellant's case and 53 of r 11 documents.

⁵ Summary of income tax due on p 225 of appellant's case and para1.15 and 1.16 of appellant's case.

⁶ P224 of appellant's case.

It was common cause that the appellant filed self-assessments income tax returns, ITF 12C, for the 2009 tax year on 29 April 2010, and for the 2010 tax year on 29 April 2011. It was further common cause that these tax returns were accompanied by a tax computation. It was further common ground that the amended assessments of 10 October 2017, in respect of these two tax years, were issued after the expiration of the prescription period of 6 years that is set out in s 47 (1) of the Income Tax Act for the reopening of assessments.

It was also common cause that the respondent specifically justified the re-opening of the 2009 and 2010 tax years on the basis of misrepresentation in paras 1.2.4, 1.2.5, 1.2.6, 1.2.7 and 3.2.2 of the determination to the objection of 17 January 2018, in these words:

- “1.2.4 The company however claimed non-deductible expenses including provisions for sundry creditors, provisions for unpaid leave, entertainment expenses, gifts, administration and professional services fees and bad debts expenses which had not proven to be bad thereby misrepresenting the magnitude of its taxable income.
- 1.2.5 The total expenses that were claimed by Appellant amounted to \$996 497.70 for 2009 and \$304 788.94 for 2010.
- 1.2.6 I have taken note of the decided cases cited in your objection letter and all cited cases highlighted the need for fraud, misrepresentation or wilful non-disclosure of facts to obtain in order to allow amending assessments beyond the prescription period, I fully concur with the premise.
- “1.2.7 It is my considered view that the improper and unjustified claims by Appellant in the income tax returns constitute misrepresentation of facts as highlighted in 1.2.4 and 1.2.5 above.
- 3.2.2: The prescribed period was opened due to misrepresentation of facts. This therefore warrants the charging of additional tax in terms of s 46 of the Income Tax Act.”

The appellant averred that it attached to the tax returns the financial statements comprising an annual report and an independent auditor’s report, in which the questioned expenses were enumerated. This was disputed by the respondent. The appellant thus asserted in paragraph 6 of its summary of evidence, filed on 29 February 2018, that:

“From the appellant’s case and the Commissioner’s case filed of record, respondent has accepted that proof of the inclusion of the aforementioned financial statements cures the allegation of misrepresentation which entitled the respondent to reassess the applicant (sic).”

In regards to the first issue, the appellant contended that it had not wilfully misrepresented the questioned expenses in each respective tax year while the respondent contended that it had

actually misrepresented these expenses, as envisaged by proviso (ii) to section 47 (1) of the Income Tax Act.

On the second issue, the appellant contended that the reopening of the assessments was unlawful because the respondent did not, in the main, justify the reopening of the statutorily prescribed self-assessment returns as required by s 37A (13) of the Income Tax Act before commencing investigations alternatively, specify at the time of issuing the amended assessments that they were based on misrepresentation, but only did so as an afterthought in the determination to the objection. The respondent made the contrary contention that the reasons for reopening the assessments were provided to the respondent at the point of contact at the commencement of the investigations and in the detailed letter of 8 November 2016, prior to both the amended assessments of 6 January 2017, and the further amended assessments of 10 October 2017.

The Issues

1. Whether or not there was any misrepresentation entitling the respondent to reassess the appellant after the expiry of the six year prescription period?
2. At what stage is the respondent legally obliged to communicate to the appellant that it is reassessing the appellant on account of misrepresentation?

Determination of the issues

At what stage is the respondent legally obliged to communicate to the appellant that it is reassessing the appellant on account of misrepresentation.

I find it convenient to determine the second issue first in view of the contention by the appellant that the re-assessments subsequent to the self-assessments of 2009 to 2014 were all unlawful and invalid for failure to abide by the peremptory provisions of s 37A (13) of the Income Tax Act [Chapter 23:06]. Self-assessments were introduced in 2006 and inserted in the Income Tax Act by Act No. 12 of 2006. In terms of s 37A (1), the Commissioner-General publishes a notice whereby he calls upon specified taxpayers to submit income tax assessments by a specified date within four months of the calendar year tax end. The assessment is furnished in a prescribed form and the tax payer computes the income tax or refund of income tax payable. In terms of subsection (5), the taxpayer is required to affirm and declare by his or her or its signature the completeness and accuracy of the information recorded in the self-assessment form. Subs (10) deems the computed amount to be the tax payable on the disclosed taxable income in the self-

assessment return, which must be accompanied by the relevant supporting documents of the computations. By virtue of subs (11), the self-assessment return furnished in terms of subs (1) is ascribed to the Commissioner-General as at the later of either the due date or actual date of the furnishing of the return.

The resolution of the second issue revolves upon the construction of subs (12) and (13) of s 37A of the Act, which provide that:

- “(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.”

It is apparent that the Commissioner-General is empowered by subs (12) to revisit the self-assessment, which he is deemed to have made, if the provisions of either s 46 or s 47 of the Act are met. Section 46 is designed to whip into line a taxpayer who has under paid tax by defaulting to render a return, or omitting a taxable amount from the return or inserting an incorrect amount in the return, or providing incorrect facts or incorrect particulars. Again, s 47 empowers the Commissioner to reopen an assessment in which the incorrect amount of tax has been paid. In both instances, the Commissioner must in addition to the underpaid principal tax impose a dollar for dollar penalty unless he is satisfied that the taxpayer was not motivated by an intention to avoid or evade the payment of the correct amount of tax chargeable.

Subs (13), in peremptory language, requires the Commissioner-General to provide written reasons for re-opening the initial assessment with the amended assessment. As worded, the subsection does not require the Commissioner to specifically state that he is re-opening the prescribed self-assessment by reason of either fraud, or misrepresentation or wilful non-disclosure of facts. In my view, the provision of reasons is an internationally recognized administrative best practice which not only protects the taxpayer from arbitrary action but also affords him the opportunity to challenge the decision from an informed position. In practice, the Commissioner-General only makes a reassessment after conducting an investigation or audit on the taxpayer's compliance with all the tax heads chargeable in Zimbabwe. The investigation is initiated by a letter

from the Commissioner-General introducing and identifying the investigators and their terms of reference. Thereafter, the investigators and the taxpayer interact and dialogue until the investigators reach a final position. It is during that final position that the investigators provide a trial run of the impending re-assessment, which encompass detailed schedules of the income tax computations and their respective justifications in a separate letter. The parties may thereafter conduct further discussions centered on further points of disagreement. All these interactions afford the taxpayer the opportunity to be heard on contentious factual and legal contentions. Often, the investigators close the dialogue by issuing re-assessments with an accompanying letter, which may or may not regurgitate explanations provided in prior correspondence that form the basis of the re-assessments.

In the present case, the investigators reached their putative final position by letter of 8 November 2016, which not only embodied the explanations for the impending re-assessments but was accompanied by the detailed income tax expenditure line computations. The appellant contended that the re-assessments were invalidated by the absence of the statement of reasons envisioned in s 37A (13), while the respondent made the contrary submission that the re-assessments were validated by the letter of 8 November 2016, which constituted the envisaged statement of reasons preceding the impending re-assessments in question.

I am satisfied that the letter of 8 November 2016 constituted the statement of reasons prescribed in s 37A (13) of the Act. That letter was in conformity with the Commissioner's generally prevailing practice. It also provided reasons on which the Commissioner acted. In any event, the letter from the appellant's tax advisors of 14 November 2016, wherein they requested time to "analyze the computations and study the explanation given in the letter", and their subsequent detailed 21 paged response of 9 December 2016⁷, showed that the appellant understood and acted upon those explanations. That the appellant understood the explanations was further confirmed by the admission made in that letter of 9 December 2016, that it owed an additional principal tax obligation of US\$693 520.71 in respect of the 2010 and 2011 tax years, which was quantified by the investigators in their letter of 16 December 2016⁸. Again, in the objection of 6 February 2017, which was withdrawn by consent on 13 February 2017⁹, the appellant understood

⁷ P192 to 212 of Appellant's case replicated without appellant's computations on p 68to 75 of r 11 documents.

⁸ P 67 of r 11 documents.

⁹ P24 of r 11 documents, agreement to withdraw reached on 10 February 2017 on p 25 and 26 of r 11 documents.

the explanations in the letter of 8 November 2016 constituted the statement of reasons for the reassessments¹⁰.

The appellant conceded at the pre-trial hearing that it bore the onus to establish whether or not this was done. The purported failure to provide in the statement of reasons that the reassessment was based on misrepresentation was never raised in any correspondence between the parties prior to the letter of objection. The reassessments that form the subject of the objection, whose determination was appealed to this Court were issued on 10 October 2017. The letter accompanying those amended assessments was not produced by the respondent in the rule 11 documents nor discovered and produced by the appellant in its case. That letter would have demonstrated whether the respondent provided reasons for the re-assessments. The pleadings, however, established that the respondent last provided detailed explanations for the impending reassessments on 8 November 2016. From that date until the 10 October 2017, the parties dissipated their energies on the correctness of the computations based on those explanations. Thus, even without the letter accompanying the amended assessments, of 10 October 2017, which form the basis of the present appeal, I am satisfied that the appellant understood the explanations given on 8 November 2016 to constitute the statement of reasons for the reassessments that were finally issued on 10 October 2017. S 37A (13) simply requires the Commissioner-General to give a statement of reasons. It does not require him to provide incontrovertible reasons. Thus, whether those reasons eventually pass muster the test of legal validity is not a relevant consideration. I am satisfied that the letter of 8 November 2016 constituted the statement of reasons contemplated in s 37A (13). The submission of unlawfulness moved by Mr *Matinenga* that was predicated upon the purported failure of the respondent to abide by the provisions of s 37A (13) is devoid of merit. It must fail.

The question referred on appeal erroneously presupposes that the respondent is legally required to specifically indicate in his statement of reasons that the reassessment is based on fraud, misrepresentation or non-disclosure of facts. Such an averment appears to be based on the interpretation rendered to section 79 (1) of the South African Income Tax Act, which is equivalent to proviso (ii) of s 47(1) of our Income Tax Act. The sentiments expressed in the South African cases, such as *ITC 1454* (1988) 51 SATC 107 at 108-11 and *ITC 1685* 62 SATC 424 at 431-2 do

¹⁰ P 28, last 3 lines thereof of r 11 documents.

not seem to have been directed to the equivalent, if any, of our s 37A (13). Those sentiments, are to that extent distinguishable and would not apply to our situation in the absence of proof that they were directed to the interpretation of wording similar to s 37A (13) of our Income Tax Act. It seems to me that the basis for reassessment required by s 37A (13) was fully met by the letter of 8 November 2016, upon which all the letters pertaining to the amended assessments were predicated. It does not appear to me that Commissioner is required to specially inform the taxpayer that he is reopening a prescribed assessment by reason of fraud, or misrepresentation or non-disclosure of facts at any time prior to issuing the amended assessments or even during the issuing of the amended assessments. All that s 47 (1) requires of him is to be satisfied of the presence of any one of the three preconditions enumerated in (ii) of s 47 (1) of the Income Tax Act, before exercising the legal power conferred on him to reopen any self-assessment.

Whether or not there was any misrepresentation entitling the respondent to reassess the appellant after the expiry of the six year prescription period?

I have already determined the meaning and legal import of “misrepresentation” in *NT Zimbabwe (Pvt) Ltd v Zimbabwe Revenue Authority* HH 257/2020 at p 4 of the cyclostyled judgment in the following manner:

“The resolution of the matter revolves upon the meaning of the word “misrepresentation”, enshrined in proviso (ii) of s 47 (1) of the Income Tax Act. I also had occasion to construe the meaning of “misrepresentation” in *DEB (Pvt) Ltd v Zimra* HH 664/2019 at p 12, *MAN Ltd v Zimra* HH 78/2010 at p 7 and *SZ (Pvt) Ltd v Zimra* HH 142/2020 at page 8. I accorded a wider meaning to the word, which was unaffected by the state of mind of the taxpayer. The essence of my finding was that the making of any incorrect statement, which was prejudicial to the fiscus, constituted the “misrepresentation” contemplated by proviso (ii) to s 47 (1) of the Income Tax Act. That finding, which I still maintain, accords with the submissions made on the point by Mr *Bhebhe* and is contrary to all the submissions made by Mr *de Bourbon*. It seems to me that “misrepresentation” encompasses the activities of the taxpayer which are excluded from “fraud” and “wilful non-disclosure of facts”; otherwise to preface misrepresentation with wilful or any other state of mind would render “misrepresentation” meaningless. After all, the avowed architectural scheme of our Income Tax Act is to ensure that all taxpayers pay their correct and fair share of the tax burden.”

The position at law is that the Commissioner is especially precluded by proviso (ii) to s 47 (1) of the Income Tax Act from reopening an initial assessment which is at least 6 years old, unless he is satisfied that it was based on fraud or misrepresentation or wilful non-disclosure of facts. Prescription commences to run from “the end of the relevant year of assessment”. I agree with the sentiments expressed by CLOETE J in *CSARS v Brummeria Renaissance (Pty) Ltd* 69 SATC 205, 2007 (6) SA 601 (SCA) at para 26 that:

“It is obviously in the public interest that the Commissioner should collect tax that is payable by a taxpayer. But it is also in the public interest that disputes should come to an end-interest *reipublicae ut sit finis litium*, and it would be unfair to an honest taxpayer if the Commissioner were to be allowed to continue to change the basis upon which the taxpayer were assessed until the Commissioner got it right-memories fade, witnesses become unavailable, documents are lost. That is why section 79 (1) seeks to achieve a balance; it allows the Commissioner three years to collect tax, which the legislature regarded as a fair period of time, but it does not protect a taxpayer guilty of fraud, misrepresentation or non-disclosure.” (My emphasis).

The above sentiments aptly encapsulate the legislative philosophy behind proviso (ii) to s 47 (1) of our Act. It seeks to balance the interests of revenue collection and those of finality of assessments without protecting a tax payer adjudged by the collector of revenue to be guilty of fraud, misrepresentation or wilful non-disclosure of facts. It seems to me that the words that I have underlined in CLOETE J’s formulation underscore the separate and distinct nature of each of the three bases upon which the prescription period can be pierced. I, therefore, agree with Mr *Magwaliba*’s contention that the three stand-alone bases for piercing the prescriptive immunity accorded the taxpayer by proviso (ii) are firstly, fraud, secondly misrepresentation and thirdly, the wilful non-disclosure of facts. I did not hear Mr *Matinenga* make any contrary submission.

In the communication prior to the objection of 27 October 2017 and in that objection and subsequent grounds of appeal, appellant’s case and in both oral and written submissions, the appellant contended that the Commissioner was precluded from reassessing it in the absence of wilful misrepresentation. Mr *Matinenga* forcefully argued that the type of misrepresentation envisaged by proviso (ii) was wilful as opposed to innocent misrepresentation. He contended that the “misrepresentation” attributed to the appellant, being at best innocent in nature, fell outside the ambit of proviso (ii). The Commissioner’s contrary contention has always been that the “misrepresentation” envisioned by the Legislature in proviso (ii) was not delineated by any preceeding adjective such as “fraudulent”, “wilful”, “gross”, “negligent” or “innocent”. Mr *Magwaliba* strongly argued that any type of misrepresentation fell within the wide reach of proviso (ii).

In the present case, in both the withdrawn and current objection, the appellant raised the issue of prescription against the initial amended assessments of 6 January 2017, and the further amended assessments of 10 October 2017, in respect of the 2009, 2010 and 2011 tax years. On appeal, the appellant correctly conceded that the 2011 amended assessments had not prescribed when the amended assessments were issued before 31 December 2017. It was common cause that

in the absence of misrepresentation, the 2009 and 2010 self-assessments had prescribed by the time the amended assessments were issued. It was further common ground that the relevant supporting documents prescribed in s 37A (10) of the Act that were filed together with the self-assessments were the attached tax computations.

The appellant averred that it had also attached its audited annual financial statements, which embodied the “Report of the Independent Auditors.” The sole witness called by the appellant sought to confirm this averment by basing it on what he characterized as the appellant’s “norms of submitting self-assessments”, which always entailed attaching the audited financial statements and the independent auditors’ report. The probative value of his testimony in this regard was undermined by the following factors. The 2009 self-assessment return was submitted to the Commissioner on 29 April 2010. The 2009 financial statements were approved by the directors and signed on their behalf on 20 April 2010¹¹. The “Report of the Independent Auditors” was, however, provided on 12 May 2010¹². The hard copies of 2009 annual report¹³ were only availed to the shareholders at the annual general meeting on 19 May 2010¹³. In regards to the 2010 tax year, the self-assessment return was filed with the Commissioner on 29 April 2011. The financial statements were approved by the board on 24 March 2011 while the independent auditors’ report was produced on 9 May 2011¹⁴. This sequence of events established beyond a peradventure that the averments in the appellant’s pleadings and paragraph 7 and 8 of its summary of evidence together with the “norm based” oral testimony of the appellant’s sole witness that the financial statements together with the independent auditor’s report were always filed with the self-assessment return were demonstrably false.

In any event, there was no direct evidence from the persons who were involved in compiling and submitting the self-assessment returns to establish the so called norm. The sole witness was not the appropriate witness to testify on the events that transpired in 2009, 2010 and 2011, long before he joined the appellant in 2014. He had no contact with the transactions in issue or as it turned out from the contents of the financial statements, access to the memories of the appellant. He did not meet the legal capacity to testify for the appellant that was eloquently

¹¹ P48, at the bottom, of the appellant’s case.

¹² Bottom of p 46 of appellant’s case.

¹³ P 77, last sentence, of appellant’s case.

¹⁴ Pp 102 and 100 of the appellant’s case.

prescribed by MAKARAU JP, as she then was, in *Antonio v Ashanti Goldfields Zimbabwe Ltd & Anor* 2009 (2) ZLR 372 H) at 384D-E, that:

“It is trite, in my view, that it is not every employee who can give evidence on behalf of a corporate body such as the defendant which has a board of directors and an executive management. The employee who gives evidence on behalf of a corporate litigant must be suitably placed within the corporate governance structures of the defendant to have knowledge of the facts that he testifies about. This knowledge can be derived from the employee’s contact with the transactions in issue or from their position in the corporation that allows them access to the memories of the corporate body.”

It was further common cause that the globular expenses indicated in the self-assessment returns were not desegregated in the accompanying relevant tax computation document. The effect being that the Commissioner would not know by merely looking at the figures what expenditure lines constituted these expenses. It was further common cause that the financial statements together with trial balances would have provided full and frank disclosure of the composition and nature of the expenses claimed in the self-assessments. These documents were only supplied to the Commissioner at his request during the investigation in 2016. The Commissioner scrutinized the expenses in the documents supplied during the investigation and disallowed those expenses that did not fall within the ambit of the general deduction formula such as provisions for creditors, leave pay provisions, entertainment, sundry creditors, administration and professional fees, advisory taxes and consultancy, gifts, software and development, bonus provisions and inter-company accruals and management fees in the sum of US\$996 497.70 in 2009 and US\$304 788.94 in 2010 for the cumulative underpayment of tax in the two years of US\$386 401.35. He took the view that the non-disclosure of the composition or nature of these “expenses” constituted the necessary misrepresentation, which entitled him to re-open the self-assessments that were six or more years old.

In his oral testimony, the sole witness called by the appellant virtually conceded that the globular expenses in the self-assessments embodied misstatements of figures that constituted non-deductible amounts and which falsified the appellant’s tax liability to the prejudice of the fiscus. He, however, variably termed them human errors, errors of law, ignorance of the law, interpretation differences and innocent misrepresentations.

Our Income Tax Act does not define misrepresentation. It is trite that in construing the term, I am required to pay regard to both the text of the word and the context in which it appears.

In the absence of a statutory definition of the word, regard must be had to the golden rule of interpretation, which requires effect to be had to the ordinary grammatical meaning of the word under consideration before migration to the context, where the ordinary grammatical meaning leads to an ambiguity. Legal dictionaries define misrepresentation as follows:

“a false statement of fact made by one party to another before a contract is entered. Such a statement may be innocent or fraudulent.”¹⁵

“the act or instance of making a false or misleading assertion about something, usually with intent to deceive. The word denotes not just written or spoken words but also any other conduct that amounts to a false assertion.”¹⁶

“a false representation of fact, made expressly or impliedly, that induces a party to enter into a contract.”¹⁷

Mr *Matinenga* submitted that the word should be construed in the context of the words “fraud” and “wilful non-disclosure” that sandwich it and give it colour. He submitted that the application of the *noscitur a sociis* rule of construction would require the Court to construe the word in tandem with “fraud” and “wilful non-disclosure”, both of which import positive proof of an intention to conceal information. He argued that the Legislature sought to remove the prescriptive veil in those circumstances where the misrepresentation was deliberate and intended. The essence of his argument being that “misrepresentation” should be determined subjectively as adverted to by the appellant in para 3.16 of its case thus:

“Consequently, the only reasonable and logical meaning of misrepresentation should be the one which means that the representation was “*false, material and made with the intention of inducing the respondent to act to its prejudice.*” No other interpretation would make legal sense.” (Appellant’s emphasis).

Mr *Matinenga* sought to buttress his contention by reference to the sentiments of BEADLE CJ in *S v Zemura* 1973 (2) RLR 357 at 365D and *Principles of Criminal Law*, Burchell, 4th ed at 380. In the former matter, the LEARNED CHIEF JUSTICE said:

“Examples of statutes expressly providing that the offence falls within the “positive group” are those statutes which use such words as “knowingly” or wilfully” when describing the offence.”

And in the latter book, the learned author wrote:

¹⁵ *The Dictionary of Legal Words and Phrases*.

¹⁶ *Black’s Law Dictionary* (2014) p1152.

¹⁷ *Australian Law Dictionary*, 2010, 1st Ed.

“The unanimous Appellate decision in *De Blom* in 1977 boldly swept the *ignorantia juris* rule from our criminal law with the dramatic result that, in line with principle and logic, knowledge on the part of the accused of the unlawfulness of his or her conduct is now always a requirement of *mens rea* in the form of intention. It follows that genuine ignorance or mistake of law invariably negatives *mens rea* in respect of the unlawful element and hence excludes liability.”

Like Mr *Magwaliba*, I find these principles inapplicable in the present case for five reasons. Firstly, in both instances, the sentiments applied to criminal law and not tax law, whose objectives, scheme and jurisprudential underpinnings are distinguishable. After all, both s 46 and s 47 of the Income Tax Act were enacted to bring to tax any errant tax payer who may have evaded or avoided meeting his or her or its correct share of the tax burden, while criminal law is predominantly penal in nature and scope. Secondly, the learned Chief Justice was dealing with the adjective “knowingly” and “wilfully” which preceded specified offences. In the present case no similar adjective precedes “misrepresentation”. Thirdly, a higher standard proof pertains to criminal offences while the lower civil law burden of proof applies to tax matters. Fourthly, the present matter concerns the recovery of the correct amount of tax from an errant taxpayer at the special instance and request of the Legislature. Lastly, except in prescribed strict liability offences and cases of negligence, criminal law predominantly revolves upon subjective intent, while tax law is mainly concerned with objectivity.

In my view, “misrepresentation” bears many permutations, as shown in the legal dictionaries cited in the preceding pages of this judgment. The word has also received judicial recognition. It has been held in decided cases that the non-disclosure of material information, which is prejudicial to the interests of the party to whom such information is directed is a misrepresentation. See *Pretorious & Anor v Natal South Sea Investments Trust Ltd (Under Judicial Management)* 1965 (3) SA 410 (W) at 415D-416A, *SIR v Trouw* 1981 (4) SA 821 (A) at ITC 1582 (1995) 57 SATC 27¹⁸; *ITC 1594* (1995) 57 SATC 25 and Christie’s *Business Law in Zimbabwe* 2nd ed p 77. This definition also accords with the meaning I ascribed to the word in the *NT Zimbabwe Ltd* case, *supra*. It is, therefore, on this basis that I continue to hold that the word misrepresentation in proviso (ii) to s 47 (1) of the Income Tax Act must be accorded a wide rather than a narrow meaning.

¹⁸ Where it was said: “it is clear that the granting of discounts at year ends had not been revealed to the Commissioner and that this was a relevant material fact in order to determine the taxpayer’s liability for tax.”

There are, however, even more compelling practical reasons for finding that the appellant intentionally misrepresented the expenses embodied in the two self-assessment returns in dispute. The appellant conceded through its tax advisors that it could not objectively assert that leave pay provisions were incurred in terms of the general deduction formula, s 15 (2) (a) of the Act. The admitted financial prejudice occasioned by the appellant in 2009¹⁹ alone was computed by the respondent in its letter of 16 December 2016, to be in the sum of US\$693 520.71. The concession amounted to an acceptance that the appellant misrepresented its tax deductible expenses in respect of leave pay in the 2009 tax year, which prejudiced the fiscus in the sum of US\$693 520.71. The self-same tax advisors admitted that the impugned expenses also included social corporate and responsibility costs and software development costs that were amortized in 2010, double deductions for repairs and maintenance, fines and prepayments, all of which did not involve any statutory interpretation differences. I find that these improper, unjustified and unexplained deductions constituted the atypical misrepresentation contemplated in proviso (ii) to s 47 (1) of the Act.

The tax advisors in their concession alluded to a purported Zimra generally prevailing practice of treating leave pay provisions as incurred in the year of provision and further that a difference of opinion in interpreting s 15 (2) (a) could not amount to a misrepresentation. This was a disingenuous attempt to undermine the efficacy of the concession by raising insupportable factual and legal issues. The onus to establish on a balance of probabilities both the purported practice and the correctness of the appellant's interpretation lay on the appellant. It would never have been able to discharge the onus, hence the concession. In my view, the allusions thus made were not genuinely and honestly made but were mere afterthoughts designed to justify the misstatement of the global expenses inserted in the 2009 and 2010 self-assessment returns. The legal argument that provisions were incurred displayed the elementary and culpable ignorance of the tax advisors on the legal definition ascribed to incur by case law and legal literature. It simply means "an unconditional legal obligation to pay". A provision by its nature represents an estimated

¹⁹ P 194 of appellant's case replicated at p 70 of r 11 documents where under leave pay the tax advisors wrote: "This one area where we differ in the interpretation of s 15 (2) (a) and in particular the tax implication of the word incurred for the purposes of trade. Given the current ZIMRA practice of treating accrued leave pay as a mere provision we concede to your current tax treatment of disallowing it as deduction. It is however, the movement of the accrued leave that has tax implication and not the accumulated balance."

anticipated amount for an obligation which is expected or likely to be settled in a subsequent year in which it will become legally due and payable. Clearly a provision cannot be incurred until it becomes due and payable. See *Edgars Stores 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. In the final analysis the appellant pinned its case on the purported disclosures in the financial statements of the composition of the provisions and expenses recorded in the self-assessments. The finding that the financial statements did not constitute part of the relevant documents required of the appellant undermined that line of argument. I find that the appellant deliberately misrepresented the composition of the expenses. I find the explanations made by the appellant in the letter of 9 December 2016, and in the objections to have been after the fact rationalizations of the possible reasons why these unallowable expenses were incorporated in the globular self-assessment expenses. The explanations which would have assisted this Court to delve into the mind of the appellant at the time the self-assessments were submitted could only have come from the public officer who submitted those returns and the actual people who advised her to regard them as expenses. It is apparent from the annexures attached by the tax advisors to their response of 9 December 2016, that their firm was the tax advisors to the appellant. They did not disclose the specific individuals who rendered such advice to the appellant. The appellant should have called the evidence of those witnesses rather than rely on the hearsay testimony of the sole witness and the hearsay rationalizations of its 2016 tax advisors. The appellant failed to lead any evidence of the attempts made to secure the testimony of these witnesses. It was not enough to simply indicate, as the sole witness did, that he personally did not know the whereabouts of the public officer and her coterie of advisors at the time.

I am satisfied that the appellant misrepresented its expenses in both the 2009 and 2010 self-assessments. Accordingly, the Commissioner properly re-opened those assessments by virtue of such misrepresentation.

The 2014 tax year

In the 2014 self-assessment return the appellant deducted the sundry creditors provision of US\$424 480.15. It subsequently conceded during the 2016 investigations that the provision was incurred in the subsequent tax year in which it was expensed. In the result, it sought to correct the error by adding back the same amount in its 2015 tax return. However, during the investigations,

the investigators reversed the 2014 deduction and imposed both a penalty of 50% and interest on that amount. The appellant accepted the correctness of the reversal by the investigators but objected to the imposition of the 50% penalty and interest on the basis that the fiscus was not prejudiced by this mere timing difference. It, however, conceded that the fiscus was entitled to compensation for the time value of money lost between the erroneous 2014 deduction and the 2015 add back. It also sought a complete waiver of the penalty and interest on the further ground that the reversal of the 2014 deduction without a concurrent reversal of the 2015 add back would result in the double taxation of the sum of US\$424 480.15.

I agree with the respondent that the effect of what the appellant characterized as timing differences in the payment of tax was to postpone the payment of the actual amount of tax due in the 2014 tax year; in itself a contravention penalized by s 46 (6) of the Act. In any event, such a wrong tax treatment not only attracts payment of the principal tax shortfall but also penalty and mandatory interest. I do take judicial notice of the Commissioner's prevailing general practice of deducting any erroneous add backs such as the one in the 2015 tax year on reassessment of the 2015 self-assessment; making the spectre of double taxation a mere mirage.

The penalty

At the pre-trial conference the parties agreed to the reduction of the penalty from 50% to 10%. The penalty imposed by the respondent in respect of the 2009, 2010 and 2014 tax years is accordingly reduced to 10%.

Costs

I do not find the claim of the Commissioner unreasonable or the appellant's grounds of appeal frivolous. I will order each party to bear its own costs.

Disposition

It is accordingly ordered that:

1. The appeal by the appellant against the principal tax liability charged and interest imposed thereon in respect of the 2009, 2010 and 2014 tax years be and is hereby dismissed.
2. By consent, the penalty imposed on the amended assessments issued by the respondent against the appellant on 10 October 2017 in respect of the 2009, 2010 and 2014 tax years be and is hereby reduced from 50% to 10%.

3. The notices of amended assessments issued by the respondent against the appellant on 10 October 2017 in respect of the 2009, 2010 and 2014 tax years be and are hereby set aside.
4. The respondent shall issue amended assessments for the 2009, 2010 and 2014 tax years in keeping with this judgment
5. Each party shall bear its own costs.

MawereSibanda, legal practitioners for the appellant.