

T (PVT) LTD
versus
ZIMBABWE REVENUE AUTHORITY

FISCAL APPEAL COURT
KUDYA J
HARARE, 16 and 17 September 2014 and 25 March 2015

Value Added Tax Appeal

D Ochieng, for the appellant
SP Msithu, for the respondent

KUDYA J: The appeal seeks to answer the question whether the income that accrued to the appellant and reflected in the International Air Transport Association Bank Settlement Plan schedules was liable to value added tax, VAT, or not. The appellant submitted that these amounts, being in nature discounts, were not liable to VAT. The contrary submission of the respondent was based on the contention that the amounts in issue were commissions.

Introduction

The appellant called the evidence of its managing director while the respondent relied on the testimony of one of its revenue specialists. Both witnesses relied on the annexures attached to the respondent's reply.

The background

The appellant is a company duly incorporated in Zimbabwe, carrying on the business of a travel agent in Harare. The respondent is the statutory taxation authority in Zimbabwe. The revenue specialist of the respondent and a colleague conducted a tax audit on the appellant between 5 September 2007 and 8 October 2008. He interacted with the managing director and her accountant. The appellant provided him with all the annexures attached to the respondent's case. He presented the report of his findings to the appellant on 8 October 2008. His investigations revealed that while the appellant was paying VAT in local currency on commissions earned on the sale of tickets on domestic flights it was not paying any VAT for commissions earned on international flights. The VAT on commissions earned on

international flights was due in foreign currency, in terms of s 38 (4) of the VAT Act [Chapter 23:12].

On 10 October 2008 the respondent issued an assessment for the calendar years 2006, 2007 and 2008 on the appellant claiming US\$28 917 in unpaid value added tax. The amount consisted of the principal sum of US\$14 458.65 and an equivalent amount in penalties. The appellant objected to the assessment on 5 December 2008. On 27 February 2009 the objection on the principal amount was disallowed while the penalty was reduced to 40% of the principal amount. The appellant appealed to this Court against both the disallowance and penalty.

A total of 11 issues were referred for determination. The bulk of the issues depend on the resolution of the main issue, *viz*, whether the amounts constituted discounts or commissions and thus vateable and if they were so vateable whether any penalty was due on the appellant.

The facts

The agreed facts

The bulk of the facts in this appeal emerged from the evidence of the managing director of the appellant and the annexures attached to the respondent's case. The appellant interacted on a daily basis with three major players in the international flight business. These were the passengers, the airlines and the International Air Transport Association, IATA. The latter is an international trade association of the world's airlines, which *inter alia* facilitates the issue of tickets by airlines and their payment. The appellant was a member of this international organisation.

The passenger interacted with the airline and IATA through the appellant. The appellant assisted the passenger in the selection of a suitable airline that was compatible with his needs on cost, class and convenience. It booked the seat, received payment for the airfare and issued the ticket to the passenger. The appellant also handled the complaints raised by the passenger against the chosen airline. The appellant charged the passenger a fee for these services that was based on the rates stipulated in the Esther guidelines on domestic, regional and international routes. The service fee was liable for value added tax. It was common ground that value added tax was paid to the respondent on the service fee.

The appellant interfaced with the airline on two fronts. The appellant actively dealt with the airline in trouble shooting passenger complaints. The main interaction was carried out indirectly through the IATA run Amadeus Central Reservation System. This is a real time computer based information system on which airlines sign up, post their services and quote

their fares. The system provides information on the class of flights, fares, promotions, flight routes and flight times.

IATA operated the central reservation system. The system captured the price of the airfare. The airfare was the aggregate of the amount charged by the airline for the flight, airport taxes, fuel surcharges and departure taxes charged by governments and civil aviation authorities. The airfare was fixed by the airline. IATA, through the Billing and Settlement Plan also known as the Bank Settlement Plan, every two weeks, running from the 1st -15th and 16th to the end of the month, generated gross billing schedules that it dispatched to the appellant. A sample of the schedules entitled “breakdown of the agent sales per carrier” were attached as annexures A1-A14 to the respondent’s case. They cover the months of January, June and the last two weeks of December 2006, the first two weeks of January and June and the whole of December 2007, the whole of January 2008, the first two weeks of June and September 2008 and last week of August 2008. The amounts are denominated in United States dollars. They bear the appellant’s name and address and amongst other things, the gross ticket sales, taxes charged and the “commission” due to the appellant. The reconciliation on each breakdown indicates the “total commission” amount due to the appellant.

The appellant deposited the airfare paid by the passenger into a transitory bank account housed in a local bank for the benefit of the airlines. The account was in the name of the appellant. The appellant could not withdraw any funds from the account. The account was also beyond the reach of the Reserve Bank of Zimbabwe.

The financial statements of the appellant for the years ending on 31 July 2004, 31 July 2005 and 31 July 2006 [B1-B3 of the respondent’s case], compiled by a firm of chartered accountants, consistently reported “sales commission” under the headline of “Commission Income”. In letters written by the accounts supervisor and managing director of the appellant dated 2 September, 10 October and 27 October 2008 [C1-C3 of the respondent’s case], the amounts in contention were referred to as “foreign commissions”. The appellant’s tax consultants who objected to the assessment on its behalf used the appellation “commission” to refer to this income.

The appellant did not dispute paying VAT on commission earned from the sale of domestic tickets. The appellant did not lead evidence on the ZWD \$5 555 015.26 that it paid, under protest, on the advice of the Association of Zimbabwe Travel Agents on 13 October 2008 purportedly in discharge of its liability for the value added tax and penalties in question.

It was the uncontroverted testimony of the revenue specialist that the respondent presented a foreign currency denominated bill for payment to the appellant, which was never paid.

The disputed facts

In evidence, the managing director referred to the “commissions” in the “breakdown of the agent sales per carrier” that were generated by the International Air Travel Association Bank Settlement Plan as discounts received. It was only in rare lapses of concentration that she called them commissions.

She stated that these discounts were fixed by the airlines at between 0 % and 1 % of the real fare charged by the airline exclusive of charges and taxes levied by civil aviation authorities and governments. The discount received by the appellant represented the difference between the full purchase price paid by the passenger and the amount charged to the appellant by the airline inclusive of government and civil authority charges, levies and taxes.

The revenue specialist stated that the documents attached to the respondent’s case established that the income that accrued to the appellant in the “breakdown of the agent sales per carrier” was commission. He further revealed that in all his dealings with the appellant’s officials, the income was referred to as commission. Even on 27 October 2008, after the assessment had been issued, the managing director referred to the income as commission. Her major concern at that time was the refusal by the exchange control authorities to authorise payment of VAT in foreign currency. It was only in the objection of 8 December 2008, that the term discount was raised for the first time. He disputed that the commission could be transmuted to discounts.

The managing director provided a historical backdrop to the commission going back the 25 years that she has been in the travel agency trade. The airlines used to pay travel agents 9% commission across the board on the tickets sold for the airlines. At that time, the commission constituted the sole source of income for the travel agent. The travel agent did not charge any service fee to the passenger. In time, the airlines unilaterally stopped paying commission to travel agents. In its place, they introduced discounts ranging between 0% and 1%. The travel agents resorted to charging service fees to augment their income. She attributed her constant use of the word commission for discount as a throwback to those halcyon days.

Assessment of the credibility of the witnesses

The managing director generally gave truthful evidence on the operations of the appellant. Her version was heavily tilted towards the relationship between the appellant and the passenger. It was thin on the nature and scope of the relationship between the appellant and IATA on the one hand and between the appellant and the airlines on the other. I formed the distinct impression that she deliberately did not make full and complete disclosure on these relationships in fear of undermining the appellant's position that the amount was a discount. I, therefore, found her to be a calculating witness who deliberately proffered a half-baked story. In any event, her evidence on how the discount was received was unclear. She stated that the full amount paid by the passenger was deposited into the transitory account for the benefit of the airline. This appears to contradict para 13 of the appellant's case that averred that only the discounted total was remitted to the airline while the discount was retained by the appellant. It would also contradict the reasonable inference drawn from the reconciliation on the IATA schedule of the "total net to be paid" presumably to the airline that excludes the agent's commission and taxes levied.

The revenue specialist on the other hand gave his evidence well. He only testified on how he carried out his investigations. His version was mostly supported by the documents that were furnished to him by the appellant. His assertion, first raised in his summary of evidence filed and served on the appellant on 16 September 2014 after the managing director had testified that the appellant received commission on domestic ticket sales for which VAT was paid was not canvassed with the managing director when she was cross examined. For that reason, it lacks probative value. I did not find the relevance of the juxtaposition of the old nomenclature of a geographic location in Harare to commission by appellant's counsel. It did not dent the credibility of the revenue specialist on his understanding of what constituted commission nor did it justify the appellant's purported predilection for "commission" in place of "discount".

The issues

A total of 11 issues were referred to trial. These were:

1. Whether the payment by the appellant of the sum of ZW\$5 555 015.26 on 13 October 2008 , which amount was admittedly received, retained and not returned did not discharge any liability that the appellant might have to the respondent;
2. Whether the amount due in respect of VAT was due in Zimbabwe currency and not in foreign currency;

3. Whether the amount sought to be taxed by the respondent as VAT was received by the appellant for the supply of goods and services;
4. Whether the appellant received any commission or simply a discount in respect of the purchase price payable by the appellant's principal;
5. Whether such amount was received for a service rendered by the appellant;
6. Whether the principles laid down in *CSARS v Cape Consumers* applied and thus confirmed that there was no VAT payable in respect of the discount;
7. Whether in terms of a direction from the Reserve Bank VAT was payable on the full amount of the discount or a lesser amount;
8. Whether the amount received by the appellant was from a source within Zimbabwe;
9. Whether the appellant acted as an agent of the airlines concerned or on behalf of its own customers;
10. Whether the appellant received any amount in respect of services, in furtherance of a trade;
11. Whether the penalty imposed was fair and reasonable in all the applicable circumstances.

It seems to me that issues 3 to 10 will all be resolved by the determination of whether the income earned was a commission or a discount. No evidence was led nor argument made in this appeal on issue 1, 2, 7 and 10. I concluded that the appellant abandoned these issues.

The onus

In his submissions Mr *Ochieng*, for the appellant, suggested that the onus was on the respondent to show that the appellant provided a service to the airlines. S 37 of the VAT Act casts the onus on the taxpayer to show on a preponderance of probability that the decision of the respondent against which it appealed was wrong. See *SARS v Pretoria East Motors (Pty) Ltd* (291/12) [2014] ZASCA 91 at para [6] and *CIR v SA Mutual Unit Trust Management Co Ltd* 1990 (4) SA 529 (A) at 538D. The onus lay on the appellant to show on a balance of probabilities that it received a discount rather than a commission from the airlines.

The determination

The submission by counsel were confined to whether the amounts assessed for VAT by the respondent constituted discounts or commissions in the hands of the appellant. Counsel were agreed that a discount was distinct from a commission. Indeed Russell J in *R v Lethaby* 1925 SR 61 at 63 recognised that "the word "discount" may suggest a different idea from the word "commission". By reference to *R v Lethaby* Mr *Ochieng* suggested that a

discount was a reduction of the normal retail price availed to a trader by the supplier of goods or services” while Mr *Msithu*, for the respondent, defined discount as “an allowance or a concession or a reduction of the price by the seller to the buyer.”

Counsel were agreed that a commission would attract VAT while a discount would not do so. The other issues referred to trial appear to have been abandoned by the appellant’s counsel who took the view that the definition for commission suggested by the revenue specialist narrowed the issues for determination. Simply put, it was that commission was a payment for a taxable supply rendered by a registered operator.

The word “discount” is defined in the *Shorter Oxford English Dictionary* as follows:

“1. An abatement or deduction from the amount or from the gross reckoning of anything; 2. Commerce: a. a deduction made for payment before it is due or for prompt payment of a bill or account; any deduction or abatement from the nominal value or price; to reckon as an abatement or reduction from a sum due; to deduct from”.

And in the online *Free Dictionary.com* by Farlax 2015 it is defines as:

“a deduction from the usual cost of something; synonyms: reduction, deduction, markdown, price cut, lower price, cut price, concessionary price, rebate, and take off”.

On the other hand commission is defined In the *Shorter Oxford English Dictionary* as:

“10. A *pro rata* remuneration for work done as an agent.”

And in the on line *Free Dictionary.com* by Farlax 2015 defines it thus:

“4. A fee or percentage allowed to a sales representative or an agent for services rendered; noun: 1. a fee paid based on a percentage of the sale made; mutually agreed upon or fixed by custom or law, fee accruing to an agent broker”

It seems to me that a discount represents a reduction in the normal price of goods or services provided by a supplier to a customer while a commission is a fee based on a percentage of the sale made that is mutually agreed upon or fixed by custom or law that accrues to an agent or a broker.

The starting point in resolving the dispute is to ascertain what constitutes value added tax in our law. Value added tax is levied under s 6 of the Value Added Tax Act, *supra*. In terms of s 6 (1) (a) as read with s 6 (2) (a) the tax is paid by the registered operator for the supply of good or services made by him on or after 1st January 2004 in the course or in furtherance of his trade.

It was common ground that the appellant was a registered operator. It was further common cause that the transactions that attracted VAT took place after 1 January 2004. It was further agreed that the payments were undertaken in the course or in furtherance of the appellant’s business of travel agency. Mr *Ochieng* submitted that the appellant did not supply

any service to the airlines but merely acted as an agent for the passengers. The appellant therefore placed the supply of a taxable supply in dispute.

Mr *Msithu* correctly submitted that in terms of s 10 (2) (a) (ii) of the Value Added Tax Act, the airfare paid by a passenger for a flight from Zimbabwe to a foreign destination was zero rated for VAT while any payment by the airline to the appellant was subject to value added tax as it was neither exempted nor zero rated.

The basic issue for determination is therefore whether or not the appellant supplied a service to the airlines. Mr *Ochieng* contended that three conjunctive elements must be fulfilled before the appellant could be found liable for value added tax. These are firstly, whether the appellant provided a service to the foreign airlines, secondly, whether the appellant charged the airlines for the service and lastly whether the airlines paid for the service.

In regards to the first element, he contended that the appellant provided a service to the passengers and not to the airlines. It is correct that the appellant provided a service to the passenger for which it charged a fee, which fee was liable for VAT. Mr *Msithu*, for the respondent contended that the appellant also supplied a service to the airlines that were chosen by the passengers. Both “services” and “supply” are defined in the Act thus:

“services” means anything done or to be done, including the granting, assignment, cession or surrender of any right or the making available of any facility or advantage, but excludes the supply of goods, money or any stamp, as contemplated in paragraph (c) of the definition of “goods”;

“supply” ” includes all forms of supply, irrespective of where the supply is effected, and any derivative of “supply” shall be construed accordingly;

“supplier”, in relation to any supply of goods or services, means the person supplying the goods or services;

The two words are of wide import. The positive acts of the appellant in purchasing the ticket on behalf of the passenger from the chosen airline through the central reservation system in my view, constitutes “anything done” for the airline. The appellant availed a monetary advantage to the airline. The positive deeds of the appellant thus constitute a service. The *Shorter Oxford English Dictionary* defines the word supply *inter alia* as “the action of supplying or condition of being supplied; the act of making up a deficiency, or of fulfilling a want or demand, to furnish with and to provide”. Supply thus carries a variety of meanings. In *casu*, the appellant rendered service to the airline by sourcing passengers and

securing the fare paying passengers, receiving payment, selling, processing and issuing tickets to the passengers. In addition, it remitted the fares to the airline. In short, it carried out the duties that should have been performed by the airlines. I am satisfied that the appellant provided a service to the airlines.

The second question for consideration that arises from Mr *Ochieng's* submission is whether or not the appellant charged the airlines for the service rendered. In my view, it did. Para 13 of the appellant's notice of appeal revealed the existence of a contractual arrangement between the appellant and the airlines which incorporated a payment formula. The payment formula, according to the testimony of the managing director, was initially unilaterally set by the airlines and then accepted by the travel agents before becoming a fixed custom. The charges of the appellant were embedded in that contractual arrangement. The payment formula can easily be computed from the gross billing schedules appropriately termed "breakdown of the agent sales per carrier". The managing director equated the charge to between 0% and 1%. A calculation of the amount due to the appellant from the gross billing schedule of 1st -15th January 2006 reveals a cost to gross charge of just in excess of 6%. The title of the IATA gross billing schedules discloses the nature of the relationship between the appellant and the airline. The appellant was an agent of the airline. It must therefore have charged the airline in terms of the agreed formula fixed by custom.

The money paid by the passenger, according to the managing director, belonged to the airline. The outflow of funds from the transitory account for the credit of the appellant would thus constitute a payment from the airline. In my view, it would be irrelevant whether the appellant accessed the funds before they were transferred to the airline as suggested in para 13 of its founding papers. Indeed, all the experts in the know ranging from the appellant's senior management, through its auditors and tax advisers to IATA's Bank Settlement Plan all treated the amounts in issue as commissions. I am satisfied that payment was made by the airline to the appellant for the services rendered. The basis set out for receipt of the money by the appellant in para 14, 15 and 16 of its case was the collection and remission of the airfare to the airlines. The amounts credited to the appellant were analogous to collection commission earned by legal practitioners and estate agents for collecting debts. It would be a misnomer to call them collection discounts.

The payment of commission could only have been on the basis laid out by Tindall J in *Liquidator Pretoria Hotels Ltd v Commissioner for Inland Revenue* 1929 TPD 946 at 951 where he stated that:

“The words “selling commission” can only mean a commission earned for selling, and that implies a relationship of principal and agent between the seller and the agent.”

The only conceivable reason why the appellant earned commission consistently from the airlines over the years in question was because it was an agent of those airlines. The facts and principles set out by Davis J in *Commissioner for the South African Revenue Services v Cape Consumers (Pty) Ltd* 1999 (4) SA 1213 (C) are distinguishable from the present case. In regards to the VAT issue it was stated at 1226J that:

“The dispute is whether the discounts granted by suppliers are received as a result of a supply of services or goods by respondent.”

It was common cause in the *Cape Consumers’* case that the taxpayer, a mutual buying organisation, received discounts for the benefit of buyers and not for its own benefit. In the present case, the appellant received commissions for its own benefit. There was a clearly defined contractual arrangement between the taxpayer and the buyers that defined the nature and scope of their relationship. The buyers were aware that they could only access the discount through the taxpayer. There was an absence of a similar arrangement between appellant and the passengers. The claim for VAT in the *Cape Consumers* case, unlike in the present case, was not based on commission but on the contention that the taxpayer rendered services to suppliers and buyers and that its operations constituted an enterprise which received consideration for such services.

Davis J held that no income had accrued to the taxpayer. In the present case the IATA Bank Settlement Plan schedules demonstrate that income accrued to the appellant. Davis J held further that the arrangement did not constitute a service as defined in the South African Value Added Act. In the present case not only did the appellant interpose as the buyer’s agent; it also supplied a taxable service to the airlines by performing their obligations towards passengers.

In the present case the seller was the airline. The buyer was the passenger. There was no evidence adduced to show that the appellant ever bought tickets from the airlines, which it in turn sold to the passengers. Rather, the evidence demonstrated that the appellant stood in the shoes of the seller of the tickets. A discount, by definition, cannot arise in the absence of a sale of tickets by the airlines to the appellant. The three contentions advanced by Mr *Ochieng* are all determined against the appellant. I am satisfied that the income disbursed to the appellant by the airlines constituted commissions rather than discounts.

The cases of *R v Lethaby* and *Commissioner for the South African Revenue Services v Cape Consumers (Pty) Lt* are unable to salvage the appeal.

In *R v Lethaby* RUSSEL J did not accept the accused's version that he had purchased the goods dispatched to him for "on sale or return". The accused had been convicted of theft for failing to return the goods that he could not sell. The learned judge did not find that the goods had been sold on discount to the accused as contended by Mr *Ochieng*. He upheld the accused's appeal on the ground that he might have misunderstood the terms of the contract wherein "the best commission to allow you on these goods is a discount of 10% of the retail prices" because of the use of both the words "commission" and "discount" in that contract. He also gave the accused the benefit of the doubt following upon the English Law concept of "on sale or return" that deemed all the goods that were not sold and not returned to the supplier to have been purchased by the holder.

In the present case, I hold that the appellant earned commission income from the airlines for the services rendered. The amount was subject to VAT. The resolution dispenses of the second, third, fourth, fifth, sixth and 10th issues. Those issues are all resolved in favour of the respondent.

The seventh issue refers to a direction of the Reserve Bank of Zimbabwe and seeks determination of whether VAT was payable on the full amount of the Commission or a lesser amount. The directive was not produced. The appellant did not lead any evidence on it. Counsel for the appellant did not make any submissions on the issue. It is fair to hold that it was abandoned. The same applies to the eighth issue which sought determination of whether the amount was received by the appellant from a source within Zimbabwe. It was not argued before me. I, therefore, consider it abandoned. The effect is that it is determined against the appellant.

The same fate would befall the first and second issues. The appellant did not pursue them in the appeal through evidence or argument. The provisions of s 38 (4) as read with s 69 (1) of the VAT Act may have persuaded the appellant to abandon the point. Section 38 (4) reads:

"(4) Notwithstanding section 41 of the Reserve Bank of Zimbabwe Act [*Chapter 22:15*] and the Exchange Control Act [*Chapter 22:05*] where a registered operator—

(a) receives payment of any amount of tax in foreign currency in respect of the supply of goods or services, that operator shall pay that amount to the Commissioner in foreign currency;

In this subsection "foreign currency" means the euro, British pound, United States dollar, South African rand, Botswana pula or any other currency

denominated under the Exchange Control (General) Order, 1996, published in Statutory Instrument 110 of 1996, or any other enactment that may be substituted for the same”.

And s 69 (1) reads:

“(1) Any price charged by any registered operator in respect of any taxable supply of goods or services shall for the purposes of this Act be deemed to include any tax payable in terms of paragraph (a) of subsection (1) of section six in respect of such supply, whether or not the registered operator has included tax in such price.”

Section 38 (4) prescribes how the VAT for income denominated in foreign currency is to be paid. It does not grant the respondent or the Reserve Bank of Zimbabwe or the Association of Zimbabwe Travel Agents or the Court, or anyone else for that matter the power to order payment for value added tax in any currency other than foreign currency. The appellant conceded in the papers that it earned the commissions in United States dollars. The value added tax was due in that currency. Had the appellant not abandoned the point, I would have found against it. The answer to the first issue would have been that the appellant did not discharge the VAT liability by defying the law and paying VAT in a currency of its choice. The answer to the second issue would have been that the currency of account was United States dollars and not local currency.

The last point related to the penalty of 40% that was imposed by the respondent. The appellant did not lead any evidence on it. It did not argue on it. It did not lay any basis for me to exercise my discretion on the point. It simply abandoned the issue without explanation. I must dismiss the appeal on the last issue.

Costs

The respondent sought dismissal of the appeal in its entirety with costs. I am empowered by s 10 of the Fiscal Appeals Court Act [*Chapter 23:05*] to impose costs against the respondent where I form the opinion that the decision appealed against was grossly unreasonable or against the appellant if I find that the grounds of appeal were frivolous. The question raised on discounts in view of the documentation of the appellant satisfies me that the grounds raised were all frivolous. I will grant the respondent’s prayer for costs.

Disposition

It is ordered that:

The appeal be and is hereby dismissed with costs.

Atherstone and Cook, the appellant's legal practitioners