ZS (PVT) LTD
versus
ZIMBABWE REVENUE AUTHORITY

FISCAL APPEAL COURT
KUDYA J
HARARE, 15 & 16 February 2018 & 5 February 2020

Value Added Tax Appeal

E. T. Moyo, for the Appellant.
T. Magwaliba, for the Respondent

KUDYA J: The two real questions for determination in this appeal are firstly, whether this appeal is properly before this Court and secondly, whether the services rendered by the appellant to two related companies for no consideration are vatable.

The background

The appeal proceeded by way of a statement of agreed facts, Exhibit 1, which captured common cause facts, and the leading of both oral and documentary evidence on contested facts. The appellant called the evidence of its general manager, SJF and produced a seven paged document, exhibit 2. The respondent did not call any evidence but relied on the pleadings. I reproduce the statement of agreed facts, which adequately captures the facts in this appeal.

The statement of agreed facts

1. The appellant is a special purpose vehicle incorporated in 1963 to provide a central platform for the marketing and distribution of sugar produced by two milling companies, R Ltd and V Ltd from sugar cane grown by these companies and approximately 880 sugar farmers, collectively called, “the industry”.
2. It is a registered operator in terms of the VAT Act *[Chapter 23:12]*. It is jointly owned in equal shareholding by R Ltd and V Ltd, the Mills, which are both registered tax entities,

and its annual accounts are incorporated into the annual accounts of the two milling companies.

3. The industry grows sugar cane and delivers it to any one of the two Mills, where it is crushed and processed into sugar and other products.
4. On delivery, samples of sugar are collected and tested at the point of milling to determine and track the particular sugar content in each farmer's cane. This ensures that each farmer is paid for the quality of the cane produced.
5. On an ongoing basis, the appellant tracks the entire sugar production and stocks of the mills for each particular growing season. It pools the sugar and arranges for the packaging, sales, shipments and collection of proceeds to and from the various national and international markets. The proceeds, less all the costs incurred by the appellant, are passed back by the appellant to the Mills, which apportion them to the industry on the basis of the industry agreed ratios commensurate with each farmer's deliveries.
6. The principles governing the distribution of proceeds from sugar sales are enshrined in the "*Memorandum of Decisions Taken at Meetings Held in May 1963 to Discuss Accounting and Administrative Arrangement for Rhodesia Sugar Association and S (Pvt) Ltd (the 1963 Memorandum).* In terms of clause 4 thereof, the appellant was required to open and operate two bank accounts, firstly, a "S Crop Disposal Account" into which all proceeds of sugar will be paid and from which distribution to estates and commission due to S will be paid" and secondly, a ""S Administration Account" from which the expenses of S Company will be paid."
7. In practice, however, S operates purely on a cost recovery basis and it does not receive any consideration from either R Ltd or V Ltd for carrying on marketing and distribution of sugar from the two milling companies. All income from the sale of sugar is transferred to the Mills on receipt from the buyers less any costs and expenses incurred by S for the marketing and distribution of sugar.
8. Sometime in 2015, the appellant claimed for VAT refund for the period December 2014, January 2015 and July to September 2015. By letter of 14 January 2016, the respondent disallowed the refund on the basis that the input tax should be claimed by the respective principals of the appellant, namely, R Ltd and V Ltd.

9. Consequently, on 29 March 2016, 18 assessments[1] were issued in respect of input tax in the sum of US$3 070 697.44. A 50% penalty in the sum of US$ 1 535 348.72 was imposed bringing the total tax liability due from the appellant to the sum of US$ 4 606 046.16.
10. By letter of 28 April 2016, the appellant objected to the Commissioner, placing reliance on past practice and treatment of input tax claims and the position articulated in the ruling dated 20 January 2004.
11. The Commissioner made decision to the objection by letter of 30 December 2016 and agreed that the appellant was entitled to the input tax refund which had been disallowed. He resultantly allowed the objection but further determined that the appellant was offering a service to R Ltd and V Ltd from which income should be earned and VAT charged. He directed the appellant to account for such VAT based on the open market value principle and amend its returns accordingly to account for output tax related to such transactions.
12. Dissatisfied with part of the decision by the Commissioner where he determined that the appellant must account on the open market value principle for output tax related to what he said should have been charged R Ltd and V Ltd, the appellant appealed to this Court.
13. The appellant contended that the respondent's past practice preceding the enactment of the VAT Act exempted it from accounting for income from consideration received from the principals for the marketing and distribution of sugar because it did not earn any such income.
14. The appellant further contended that after the promulgation and operationalization of the VAT Act, on 6 January 2004, it sought a special ruling exempting it from accounting for tax incurred in its operations in preference for passing on such an obligation to the principals who carried all the expenses and costs incurred by the appellant with the result that on 20 January 2004, the Commissioner ruled that the Appellant would claim input tax from its special purpose vehicle transactions in the same manner that it claimed input tax on other transactions.

[1] 17 Assessment Numbers 010000430186, 000000427431, 000000430126, 020000428930, 000000427500, 020000428950, 010000427604, 040000430387, 000000427432, 010000430213, 020000426246, 030000430411,000000427434, 030000430420, 030000427705, 040000430395, and 030000427712, amended assessment for March 2015 number 020000426246 on p of respondent's discovery exclude in letter of objection

15. The appellant further contended that in response to its letters of 6 August 2012, and 28 February 2013, seeking confirmation of its tax status, by letter of 7 March 2013, confirming its purely cost recovery status, the respondent implicitly exempted it from accounting for VAT in the marketing and distribution service accorded to both R Ltd and V Ltd for no consideration.
16. The respondent submitted, *in limine*, that this Court did not have jurisdiction to hear the appeal and on the merits that the marketing and distribution service provided by the appellant to the two milling companies was a taxable service, which was vatable.
17. The delay in making the decision to the objection was condoned by the appellant.

The issues

The first issue arose on the first day of the appeal hearing while the remaining 4 were referred for determination at the pre-trial hearing held on 15 June 2017. The issues for determination are therefore as follows:

1. Whether or not this appeal is properly before this Court?
2. Was the respondent confined in its determination to the specific objections raised by the appellant?
3. Whether or not the respondent misdirected itself in concluding that the appellant offered an income earning service for which it must account at the open market value?
4. Is the open market value principle applicable in the circumstances in the light of the provisions of s 9 (4) (c) of the VAT Act?
5. Whether or not the respondent erred in rejecting its past decision dated 20 January 2004 and subsequent practice arising from it and if it did not whether it could purport to do so retrospectively?

The resolution of the issues

The preliminary point

Whether or not this appeal is properly before this Court.

The facts which give rise to this issue emanate from the decision made by the respondent on 30 December 2016 to the first three objections raised by the appellant in the letter of 28 April

2016. The first objection was that the costs from which the input tax was claimed were incurred by the appellant as a principal and not agent as envisaged by section 56 (1) and (2) of the VAT Act. The appellant incurred in its own right the costs of packaging, transport, salaries and other administrative functions associated with the business for which it issued tax invoices in its own name.

The second ground of objection was that the position adopted by the respondent undermined the effectiveness of the VAT system and disadvantaged the fiscus. The VAT system was designed to account for VAT at each stage of the transaction cycle until it reached the final consumer. Any intermediate consumer in the cycle is entitled to claim as input VAT, the VAT incurred on receipt by him of any taxable supply and charge output VAT on any further supply thereof. In other words, output VAT is charged by the supplier and incurred as input VAT by the recipient of goods or services while input VAT is claimed by such a recipient when it further supplies the goods or services to other recipients in the consumption chain. The appellant further averred that the Mills, charged output tax which it paid as input tax for the supply of the services in respect of the packaging and storage of the sugar and related products.

The third objection was that the position advocated by the respondent failed to deal with multiple principals. The appellant contended that it was impractical and unwieldy to request approximately 880 sugar producers plus the 2 Mills to individually claim their respective share of input tax on the marketing and distribution services provided on their behalf by the appellant. The pooling arrangement adopted by the appellant appeared to be in tandem with the intention of the legislature found in s 54 (1) of the VAT Act, which provides:

> "54 **Pooling arrangements**
> (1) Any pool managed by any board or body for the sale of agricultural, pastoral or other farming products, may, on written application by such board or body, for the purposes of this Act be deemed to be a trade or part of a trade carried on by that board or body separately from the members of such board or body:
> Provided that such board or body may−
> (*a*) elect in writing that the pool be treated as a separate trade for the purposes of this Act and may apply for such pool to be registered separately in terms of section *fifty-one[repealed by Act 10 of 2009]*;
> (*b*) notwithstanding subsections (1) and (2) of section *fifty-six*, if it makes an election in writing, be treated for the purposes of this Act as a principal and not as an agent of its members.

I reproduce the composite decision made by the respondent on the first three objections.

"From the facts of the case and the provisions of the Value Added Tax Act I comment as follows:

3.1. In terms of the provisions of s 56 (1) of the VAT Act *[Chapter 23:12]* if an agent is a registered operator, it is entitled to issue a tax invoice in relation to the supply.

3.2. In the case of the Appellant zero rated sales of sugar were declared and they claimed input tax on expenses incurred in the sale, distribution and packaging of sugar against the income. It is agreed that the input tax was correctly claimed by the Appellant.

3.3. I have also noted that paragraph 2 (x) of the Articles of Association states that the Association was to distribute dividends from the profits made. In addition, para 4 of the (1963 Memorandum), a commission was to be paid to Appellant. In view of the above, I have drawn the conclusion that you offered a service to the principal which should be income earned in the hands of the Appellant.

3.4. You are therefore advised to determine the income that relates to the services you offered to the principals. This should be declared as income against which input tax should arise. Although you incurred expenses that you recovered from the principals, may I draw your attention to the fact that a supply of a service to the principal was made and VAT should have been charged.

3.5 Based on the above comments the grounds of objection are allowed in full. However, VAT is still to be accounted for on the services offered to the principals by Appellant based on the open market value principle in terms of s 3 (4) of the VAT Act *[Chapter 23:12]*. You are therefore required to amend all your VAT returns to account for output tax related to such transaction."

The concluding remarks of the Acting Commissioner-General were that if the appellant was dissatisfied with his decision, he could appeal to the Fiscal Appeal Court in terms of s 33 of the VAT Act.

Mr *Magwaliba*, for the respondent, submitted that the appellant had no right of appeal against the directive to adjust the input VAT claimed by incorporating the output tax due from the commission payable to the appellant in terms of the 1963 Memorandum, which was held to be extant by the appellant's chairman, deputy chairman and general manager in the Distribution Policy and Procedure of 3 November 2003. He contended that once the ground of objection had been granted in full, the only recourse open to the appellant was to enforce the claim for input tax and not to appeal against the directive. He further contended that as all the 4 grounds of appeal were based on the directive, which had not been the subject of objection, the appellant

was non-suited from seeking any relief based on that directive. In response, Mr *Moyo* for the appellant contended that the directive constituted a decision, albeit irregular, of the Commissioner which was subject to appeal in terms of s 33 (1) of the VAT Act.

The right of appeal to the Fiscal Appeal Court

The right of appeal against any decision or assessment of the Commissioner, as notified in terms of s 32 (4) of the VAT Act, is set out in s 33 (1) of the same Act in these words:

> "**33 Appeals to Fiscal Appeal Court**
> (1) An appeal against any decision or assessment of the Commissioner, as notified in terms of subsection (4) of section *thirty-two*, shall lie to the Fiscal Appeal Court in terms of the Fiscal Appeal Court Act [*Chapter 23:05*]."

The clear and unambiguous wording of the above cited subsection is that any decision or assessment made by the Commissioner and notified in terms of s 32 (4) is appealable to this Court. It was common cause that the decision appealed against was a decision of the Commissioner. It was further common ground that it was notified to the appellant in terms of s 32 (4). The determination, as structured in para 3.1 to 3.5, together with the concluding remarks thereon would have justified the contention advanced by Mr *Moyo* but for the provisions of subs (3) of the same section. The latter subs restricts the appeals that can be heard by this Court in these words:

> "(3) At the hearing by the Fiscal Appeal Court of any appeal to that court—
> (*a*) the appellant shall be limited to the grounds of objection stated in the notice of objection referred to in subsection (2) of section *thirty-two* unless the Commissioner agrees to the amendment of such grounds or the appellant, on good cause shown prior to or at such hearing, is given leave by the court to amend such grounds of objection within a reasonable period and on such terms as to any postponement of such hearing and costs which may result from such postponement as the court may order;"

An appeal before this Court is limited to the grounds of objection stated in the notice of objection, which may only be extended by an amendment agreed between the parties or granted by this Court on demonstrable good cause. It seems to me that the clear and unambiguous provisions of subs (1) are subordinated to the provisions of subs (3) of s 33 if the VAT Act.

It was common ground that all the grounds of appeal could not have been raised in the letter of objection for the simple reason that the directive from which they all emanate did not

form part of the reasons advanced by the investigators for raising the amended assessments. However, these grounds of appeal could only have been properly taken in this Court had the appellant abided by the mandatory requirements of subs (3) of s 33. It neither sought the Commissioner's consent nor moved an amendment in this Court for the adoption of these grounds of appeal in this appeal hearing.

I am fully persuaded by Mr *Magwaliba* that such a failure could not be corrected by the Commissioner's invitation to appeal his decision and was, therefore, fatal to the appeal. I would have granted the respondent its costs had the preliminary point been raised on time and not at the eleventh hour. Accordingly, I uphold the preliminary point taken by the respondent and strike off the appeal from my roll with the order that each party shall bear its own costs.

That should be the end of the matter. However, due to the delay in handing down this judgment and because I heard argument on the merits, I proceed to determine the issues initially referred on appeal on 15 June 2017.

Was the respondent confined in its determination to the specific objections raised by the appellant?

The directive to submit amended returns incorporating output VAT on notional commission income computed on the open market value evoked this issue. It will be recalled that the first 3 of the 5 objections raised by the appellant gave rise to this directive. These were whether the appellant was entitled to claim input tax refunds in its own right and not as an agent of the Mills and whether imputing the claimed input tax to the Mills undermined the effectiveness of the VAT system to the prejudice of the fiscus and ignored the application of the VAT system to multiple principals. The amended assessments effectively disallowed the input VAT refund claims while the setting aside of the amended assessments by the Commissioner effectively reinstated them. The appellant treated the allowance of these three objections as constituting an implicit concession of the validity of its claims for refund. The inescapable conclusion emanating from the determination was, however that the Commissioner upheld the appellant's contention that it was entitled to claim input VAT in its own right but found the computation of the claims for refund to have been inaccurate.

The appellant contended that such a finding was outside the power accorded to the Commissioner by the common law while the respondent made the contrary contention that it was empowered to do so by the provisions of s 32 (4) of the VAT Act.

The appellant relied on the common law principle enunciated in such cases as *Chikomba District Council* v *Marecha* SC 81/2005 and *Zimra* v *P (Pvt) Ltd* 2016 (2) ZLR 84 (S) that a court of law is precluded from deciding an issue that has not been placed before it by the parties. In the latter case at 93C, GOWORA JA formulated the principle thus:

> "A court of law cannot go outside the pleadings on a dispute before it and pick a dispute for the litigants completely and utterly unrelated to the papers before it nor can it dispose of the matter on the basis of the issue so raised by it".

The respondent, however, relied on the provisions of s 32 (4) of the VAT Act, for making the directive appealed against. The subsection states that:

> "(4) After having considered the objection, the Commissioner may—
> (*a*) alter any decision pursuant thereto; or
> (*b*) alter or reduce any assessment pursuant thereto; or
> (*c*) disallow the objection;
> and shall send to the person upon whom the assessment has been made or to whom the decision has been conveyed or, as the case may be, to whom the reduction has been allowed, notice of the reduction, increase, alteration or disallowance:

There was argument between counsel on whether the judicial pronouncement made in the *Chikomba District Council* and *P (Pvt) Ltd* cases, *supra,* applied to the Commissioner whom both counsel characterized as an administrative and *quasi*-judicial authority. While I agree with Mr. *Moyo* that the determination of the objection by the respondent was in the nature of a judicial decision and would be subject to the common law principle that restricts the decision making power of the Commissioner to the objections raised, I am persuaded by Mr. *Magwaliba* that the Commissioner is permitted by the GOWORA JA formulation and the provisions of s 32 (4) of the VAT Act to alter any decision or assessment made by his officers, to which the objection relates.

The format and contents of a VAT self-assessment return, form VAT 7 were discussed in full in *P (Pvt) Ltd* v *Zimbabwe Revenue Authority* 2017 (1) ZLR 52 (H) at 57C-G. The form has 5 Parts, which a taxpayer is required to complete. At p 57 C-E I said:

> "The first Part covered the particulars of the registered operator. The second provided for the declaration of output tax, the third covered claims of input tax, the fourth set out the calculation of VAT payable or refundable and the fifth dealt with export sales. The form was submitted in duplicate to the Commissioner by the public officer who printed his name and appended his or

her signature and date after certifying that all the information in the return was true and correct. The form carried a warning of severe penalties for false declaration, failing to pay tax and submitting the returns after the due date".

A claim for refund entails the incurral of higher input VAT against the accrual of lower output VAT by a taxpayer. In the present matter, the appellant paid more input VAT to its suppliers and received less output VAT from the recipients of its services. The amended assessment that evoked the objection entailed verifying the figures supplied by the appellant in the self-assessments against the information upon which those figures were based. The verification process involved the request for and submission and scrutiny of various documents such as the 1963 Memorandum and the 2003 Distribution Policy and Procedure document. These documents helped the respondent appreciate and understand the nature and scope of the appellant's business operations. It was from these operations that the figures which constituted taxable amounts were derived. The amended assessments of the investigators and the determination of the Commissioner utilized these documents in calculating whether or not any input VAT was due to the appellant. Again, this method of computing output VAT payable or input VAT refundable was confirmed by the sole witness during cross examination. I, therefore, find that the process of reassessment involved the matching of the amounts recorded in each section of the VAT 7 form to the information provided by the appellant during the investigation and objection such as the 1963 Memorandum and the Distribution Policy and Procedure document.

In my view, the determination making process of the respondent conformed to the requirements set out in the VAT 7 forms and for which I cannot say, in the words of GOWORA JA, was "completely and utterly unrelated to the papers before it". In addition, it seems to me that the Commissioner complied with the provisions of s 32 (4), which permitted him to alter any decision made by his officials to which the objection related. I would, therefore, have found that the Commissioner did not stray from the four corners of the objection raised by the appellant, whose essence was the accuracy of the refund amounts claimed in each VAT 7 self-assessment return.

Whether or not the respondent misdirected itself in concluding that the appellant offered an income earning service for which it must account at the open market value? And, is the open

market value principle applicable in the circumstances in the light of the provisions of s 9 (4) (c) of the VAT Act?

The third and fourth issues referred for determination on appeal concern the propriety of invoking the provisions of s 3 (4) and 9 (4) of the VAT Act.

The Respondent used the contents of clause 3 and 4 under "Export Sales" and clause 4 under "Local Sales" in the 1963 Memorandum to invoke the open market value against the appellant. That clause contemplated the charging of commission as a direct expense against the Mills by the appellant for the marketing and distribution services that it would provide to them. The sole witness called by the appellant established through his uncontroverted evidence on the point that the appellant did not actually charge any such commission to the Mills. The respondent conceded this position in its letter of 7 March 2013, which effectively recognized the appellant as a not-for-profit entity. I agree with Mr *Moyo* that the appellant could not have properly invoked the open market value principle on the basis of the unactualised contents of clause 3 and 4 of the 1963 Memorandum.

Mr *Moyo* further contended that the Commissioner wrongly relied on s 3 (4) of the VAT Act in making the directive in question. He conceded that while s 3 (4) of the Act prescribed the use of the open market value to assess a taxpayer's correct output VAT, its application was proscribed by the provisions of s 9 (4) of the same Act. Section 3 (4) provides that:

> "(4) Where the open market value of any supply of goods or services cannot be determined under subsection (2), the open market value shall be the consideration in money which a similar supply would generally fetch if supplied in similar circumstances at that date in Zimbabwe, being a supply freely offered and made between persons who are not connected persons."

And s 9 (4) states:

> "(4) Where—
>
> (*a*) a supply is made by a person for no consideration or for a consideration in money which is less than the open market value of the supply; and
>
> (*b*) the supplier and recipient are connected persons in relation to each other; and
>
> (*c*) if a consideration for the supply equal to the open market value of the supply had been paid by the recipient, <u>he would not have been entitled</u> under subsection (3) of section *fifteen* to make a deduction of the full amount of tax in respect of that supply,
>
> the consideration in money for the supply shall be deemed to be the open market value of the supply (underlining my own for emphasis):

It was common cause that the open market value would be invoked where all the three requirements set out in s 9 (4) were met. It was further common cause that the supply made by the appellant to the Mills was for no consideration. It was also agreed that the appellant and the Mills were connected parties. The provisions of s 9 (4) (a) and (b) were therefore met. Mr *Moyo,* however, contended that the provisions of s 9 (4) (c) were not met. He argued that even if the Mills had paid the open market value for the provision of the marketing and distribution services provided to them by the appellant, they would have been entitled to deduct the full amount of the tax payable in terms of s 15 (3). It is correct that s 15 (3) deals with the deductions which the Mills, as the recipient registered operators, could make in respect of input VAT.

In both his oral address and para 16 of the written summations, Mr *Moyo* argued that:

> "However, because the recipients who are the alleged principals are registered operators and would be entitled to make a deduction for the full amount of tax in respect of the supply under s 15 (3), the open market principle does not apply. This is precisely because the third requirement necessary for invoking the principle is not met and satisfied."

He misread s 9 (4) (c) but still correctly made the explicit concession that the Mills would have been entitled to deduct the input VAT payable by them to the appellant for the marketing and distribution services rendered. The concession was correctly made because while the actual supply of sugar and sugar products was zero rated, the supply of the distinct and separate marketing and distribution services was not. The effect of that concession was that contrary to Mr *Moyo's* conclusion, the provisions of s 9 (4) (c) would have been met. The Commissioner would, therefore, have been correct in applying the open market principle and requiring the appellant to declare income on a deemed supply for which it had not received consideration.

The cumulative effect of these findings would have been the satisfaction of the requisites for VAT set out in *S (Pvt) Ltd* v *Zimbabwe Revenue Authority* 2014 (2) ZLR 580 (H) at 583H-584A. The appellant supplied the marketing and distribution services to the Mills. The supply was in furtherance of the appellant's trade. The consideration for the supply was equivalent to the deemed open market price calculated in terms of s 3 (4) as read with 9 (4) of the VAT Act.

I would have upheld the directive made by the Commissioner had the appeal been properly before me.

Whether or not the respondent erred in rejecting its past decision dated 20 January 2004 and subsequent practice arising from it and if it did not whether it could purport to do so retrospectively

On 6 January 2004, through the aid of its tax consultants, the appellant sought a "Special Ruling on the Application of Zero-Rating for VAT" on the storage, marketing and distribution costs of sugar and related products provided by the appellant to the Mills[2]. Apparently, the Mills produced sugar and related products which passed to and became the products of the appellant after being weighed on the weighbridge. The appellant packaged and stored the sugar at the packing plants owned by the Mills for a fee before selling the sugar on the local and export markets. The Mills charged the appellant storage and packing costs from which they levied input VAT on the appellant and remitted it to the Commissioner as output VAT. The appellant did not remit any output VAT for the sale of the sugar and related products because these were zero rated but it claimed and received the input VAT paid to the Mills from the Commissioner. For some inexplicable reason, which even the sole witness called by the appellant could not fathom, the appellant then forwarded the refunds to the Mills. The appellant deducted all the direct and indirect expenses incurred in the storage, packaging, distribution, transport and marketing costs from the sales' proceeds and remitted the balance to the Mills *pro rata* to production proportions. The appellant sought exemption from paying input VAT to the Mills for the storage and packing costs and raising intercompany tax invoices on these transactions on the basis that the Commissioner did not actually collect any output VAT on these transactions. The only tax invoices that would remain would be those issued by the Mills to the appellant on transfer of the sugar to appellant and those issued by the appellant on the sale of the sugar and related products on the local and export markets.

On 20 January 2004, the Commissioner-General declined to grant the application for zero rating the packing costs paid by the appellant to the Mills. The letter read:

> "The issue raised has been considered carefully and it has been noted that it is not desirable to grant the ruling sought. Appellant will always need to claim input tax on other transactions. Therefore, the tax incurred on packaging of the sugar can be claimable in the same manner."

The effect of this letter was that the appellant was permitted to claim input VAT for packaging costs.

[2] Pp22-27 of the appellant's notice and grounds of appeal

The fourth objection taken by the appellant questioned the legitimacy of the retrospective rather than prospective variation of the practice, established by the Commissioner-General in 2004, of permitting the appellant to claim refunds of input VAT claimed on storage and packing costs. In his determination, the Commissioner-General confessed the establishment of such a practice from 2004 but sought to avoid it by reference to the power of revocation and modification of delegated authority conferred upon him by s 21A (4) of the Revenue Authority Act [*Chapter 32:11*].

It seems to me that the fourth objection fell away after the Commissioner allowed the appellant to claim the input VAT related to the amounts paid to the Mills.

On appeal, the appellant contended that the respondent could not issue the directive in question as it had the effect of overturning a long established practice, which did not require the appellant to account for output VAT arising from the provision of the marketing and distribution services rendered to the Mills. The duty to establish the existence of such a practice lay on the appellant. The evidence of the sole witness called by the appellant failed to establish that the respondent was aware that the appellant was providing these services to the Mills. It appears from the respondent's letter of 7 March 2013 that the respondent only knew that the appellant was a not-for-profit company whose expenses where deducted from the proceeds of the sale of sugar and related products on the local and export markets. Indeed, the sole witness revealed under cross examination that the Commissioner only became aware of the appellant's entitlement to charge commission for the marketing and distribution services in November 2016. The appellant never disclosed its entitlement to the commission in all the years that it submitted the VAT self-assessment returns.

The appellant characterized the directive to compute output VAT for the marketing and distribution services rendered to the Mills for the months of December 2014, January 2015, May 2015 and July 2015, to September 2015, in the determination of 30 December 2016, as retrospective in nature. And to wit Mr *Moyo* contended, without citing any authority that the Commissioner was precluded by law from issuing such a directive. It seems to me that the provisions of s 41 (d) (i) of the VAT Act do confer upon the Commissioner the power to issue such directives to errant taxpayers to furnish him within correct VAT returns within a period of 6

years. In any event, the retrospective argument would be contrary to the auditing power reposed in the Commissioner. I would also have dismissed the last ground of appeal.

Costs

I have already determined in regards to the preliminary issue that each party will bear its own costs.

Disposition

Accordingly, the appeal is struck off the roll with each party to bear its own costs.

Scanlen & Holderness, the appellant's legal practitioners