JK MOTORS (PVT) LTD
t/a FLO PETROLEUM
versus
ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
DUBE JP
HARARE, 21 November 2022, 22 & 30 March 2023, & 02 June 2023

Opposed Application

M Tshuma, for the applicant
T Magwaliba with *S. Bhebhe,* for the respondent

Dube JP

Introduction

1. What constitutes a tax assessment is a subject that has generated much debate. The issue has presented itself in this case.
2. The fall out between the parties centres on the jurisdiction of the taxing authority to issue additional assessments against the applicant. The applicant seeks an order setting aside notices of assessment issued by the respondent. This dispute pits the applicant, a taxpayer and the respondent, Zimbabwe Revenue Authority, (ZIMRA), an administrative authority created in terms of the Revenue Authority Act [Chapter 23:11], tasked with the obligation to collect taxes under the Income Tax Act [Chapter 23: 06], the Act.
3. What started the wrangle between the parties is a tax assessment for the year ended 2019 which the applicant objected to. When some of the objections were disallowed, it challenged the assessment itself before the Special Court for Income Tax Appeals and the challenge is still pending. Following this, the respondent advised the applicant that it had failed to apportion its tax liability according to the ratios of the sales received in local and foreign currency and pay the tax in the currency in which the sales were realised in terms of s 4A of the Finance Act [Chap 23:04]. The applicant was issued with manual amended notices of assessments for the years 2019 and 2020 under

reference numbers 1225192 and 1225193 respectively, for taxes due in foreign currency and penalties.

4. The respondent instituted collection measures. Aggrieved, the applicant approached this court on an urgent basis seeking to bar the respondent from collecting the taxes as levied. The urgent application was deemed not urgent. It is the final order that is under consideration today.

Applicant's submissions

5. The applicant's position is that the jurisdictional facts justifying the issuance of additional assessments and additional tax are absent as there is no taxable income payable by it. It averred that the additional assessments are wrong in principle, are *ultra vires* the powers given to the respondent under the Act, unlawful and void. The applicant submitted that the respondent having failed to impose penalties under assessment number 1225192, was *functus officio* when it issued the additional assessments. Consequently, that the additional assessment under 1225192 for penalties is unlawful for the reason that the assessment discloses no taxable income which should have been charged and has not been charged.
6. It submitted that the respondent can only validly issue additional assessments where there is taxable income due to the *fiscus*. Further that assessment number 1225192 is identical to the one under 1225193 save that the latter includes penalties and tax that has already been paid to create a false impression that there is a sum of money due. It argued that the creation of two assessments with the same amount under two different assessments for the same income tax period renders both assessments unlawful.
7. It maintained that the respondent was not empowered to issue additional assessments in terms of s 47(1) of the Act as a taxing authority cannot issue an assessment solely for penalties as penalties are not taxable income as defined. It argued that even with the changes introduced by Finance Act (No 8) of 2022, (the Finance Act) the respondent has no authority to issue assessments solely for penalties. The applicant contended further that no law permits the levying of penalties in foreign currency rendering the assessment under reference number 1225192 unlawful. It argued that the respondent has resorted to legislating to collect taxes and does so by issuing public notices in order to fill in gaps in the Act.

8. The applicant submitted that the same illegality afflicting the additional assessment number 1225192 also afflicts assessment number 1225193. It submitted in addition that the respondent had no entitlement to issue the additional assessment under 1225193 for the year 2020 having previously unlawfully collected taxes without an assessment thereby rendering the assessment unlawful. The applicant challenges the respondent's use of the term "gross tax" reflected in notices of assessment on the basis it is not defined in the Act rendering the assessments irregular, wrong in principle and ought to be set aside.

Respondent's submissions

9. The respondent took a preliminary point challenging the propriety of the application. According to the respondent, the application is misplaced as it is premised on challenges to validity of notices of assessment which are wrongly described as assessments. It submitted that an assessment is a process as opposed to a notice of assessment which is a document. It argued that instead of challenging the assessments the applicant wrongly challenges notices of assessment. It urged the court to dismiss the application on this basis alone.
10. On the merits, the respondent's position is that it had an entitlement at law to issue additional assessments and impose penalties on the applicant having discovered anomalies with the applicant's tax declarations. The respondent submitted that the applicant did not declare foreign currency tax on its return arising from sales in foreign currency resulting in it issuing the additional assessments and levying penalties on understated tax. It maintained that it had an entitlement to issue additional assessments and impose tax penalties in foreign currency where a tax payer understates its foreign obligation and omits to pay tax on income earned in foreign currency in terms of s (4 A) of the Finance Act. It insisted that it was not *functus officio* when it did so. *Per contra ,* the applicant insisted on the relief sought.

Is the applicant's challenge properly before the court?

11. The court will determine first the preliminary point. To determine this point, I will unpack the meaning, nature and relationship between an assessment and a notice of assessment in order to determine whether the applicant's case is properly pleaded and

the relief sought correct. Section 2 of the Income Tax Act defines the word "assessment'' to mean:

> "assessment" means—
> (a) The determination of taxable income and of the credits to which a person is entitled in terms of the charging Act; or
> (b) The determination of an assessed loss ranking for deduction;
> and includes a self-assessment in terms of section thirty-seven A;''

12. The definition of the word 'assessment' introduced by the Finance Act is not markedly different from the old definition and does not drastically change the ordinary grammatical meaning of the word. It will not be necessary for the purposes of this judgment to make reference to the amended definition as it has no impact on this matter, the amendment being prospective in its operation.
13. An assessment is defined in s2 of the Act as a determination of taxable income and credits to which a taxpayer is entitled to. An assessment involves a determination of an assessed loss ranking for deduction. The definition of an assessment includes a self-assessment. The word assessment as used in the Act, must be taken in its proper context. In *Batagol v Federal Commissioner of Taxes Cath (1963) 109,* the court considered the concept and nature of an assessment as used in s6 of the Australian Income Tax Act which defines an assessment in part as the ascertainment of the amount of taxable income and of the tax payable thereon" and held as follows:

> "….. "ascertainment" is a word the force of which depends upon the context. It is here used in an Act under which the service of a notice of assessment is the levying of the tax. Assessment in the sense of mere calculation produces no legal effect. No step that the Commissioner may take, even to the point of satisfying himself of the amount of the taxable income and of the tax thereon, has under the Act any legal significance. But if the Commissioner, having gone through the process of calculation, serves on the taxpayer a notice that he has assessed the taxable income and the tax at specified amounts, the tax becomes by force of the Act due and payable on the date specified in the notice ……
> The word "ascertainment" being understood in this sense, the definition of "assessment" means, in my opinion, the completion of the process by which the provisions of the Act relating to liability to tax are given concrete application in a particular case with the consequence that a specified amount of money will become due and payable as the proper tax in that case.'' See also *FC of T v Ryan* 98ATC 4323.

14. Another case in point is *R v Deputy FC of T, exparte Hooper* [1926] HCA 37 CLR 368 at 373 where the court stated as follows:

> "[A]n assessment is not a piece of paper; it is an official act or operation; it is the Commissioners' ascertainment, on consideration of all relevant circumstances

> including sometimes his own opinion, of the amount of tax chargeable to a taxpayer ….neither the paper sent nor the notification it gives is the assessment."

15. The word assessment has been defined as a process comprised of different steps undertaken by the Commissioner in coming up with a computation of the tax due and notification thereof. In *Deputy Commissioner of Taxation v Anglo American Investments Pty Ltd,* (2016)103ATR 649 at 657 the court held that an assessment is a process and that the 'process of assessment' is not, *prima facie,* merely "the final arithmetical exercise that leads to the computation of the assessment'' but that one ought to look to the acts carried out leading to the issuing and service of the notice of assessment as well .The court went on to add that an assessment extends to the process of investigation that precedes the notice of assessment and informed its preparation.
16. The word, "determination" as used in the definition of assessment in s2 given its grammatical meaning is a process of establishing something either by research or calculation. The word determination has more or less the same meaning as the word ascertainment used in the Australian Income Tax Act. Equally, a determination in similar vein as the word ascertainment is as put in *Batagol,* is, when together with other steps taken by the Commissioner, a process. A tax computation or determination on its own has no legal consequences. The legal consequences only flow when the Commissioner has completed all the required steps and gives a notice of assessment. The notice constitutes notification of the assessment and once it is given to the taxpayer, the tax becomes due and payable. This view point will become clearer later.
17. Taken in a proper context, all administrative acts and steps performed in the Commissioner's office which include the processes of determination of taxable income, followed by service of the notice of assessment on the taxpayer constitute one assessment process with the consequence that a specified amount will become due and payable as tax. The process of assessment begins with the taxpayer filing his income tax returns with the respondent in the prescribed form. The return is then processed and examined for correctness leading to a determination of taxable income. The determination of the tax payer's liability precedes the issuance of a notice of assessment issued in terms of s 51 of the Act. An assessment is not the final mathematical exercise that leads to the computation of the tax liability. Any investigation carried out to determine the taxpayer's liability forms part of the assessment process. Clearly

therefore, an assessment is a process constituted of the determination of tax liability by the tax authority as defined in the Act together with the administrative steps taken by the Commissioner, the notice of assessment being one such step.

18. The following analysis considers in detail the provisions of s51 of the Act which empower the respondent to issue notices of assessment to the taxpayer. Section 51 stipulates as follows:

> "51 **Assessments and recording thereof**
> (1) ……
> (2) Notice of assessment and of the amount of tax payable, where tax is payable, shall be given to the taxpayer assessed.
> (3) The Commissioner shall, in the notice of assessment, give notice to the taxpayer that any objection to the assessment must be sent to him within thirty days after the date of such notice.''

19. Section 51 does not lay out the statutory requirements of a notice of assessment nor is its form specified. A notice of assessment is not defined. A notice of assessment relates to an assessment and is a statement that details or gives a summary of the taxes payable on taxable income as determined by the assessment. The notice of assessment records the fact of an assessment, the findings of the assessment and figures employed in the assessment. Reference to "assessments and recording thereof" in the heading to s51 discloses the clear intention of the legislature, being that the notice of assessment serve as the record of the assessment. In terms of s79 of the Act, production of any document by the respondent purporting to be a copy of an extract from any notice of assessment shall be conclusive evidence of the making of such an assessment and that the amount and all the particulars of such an assessment appearing in such a document are correct. A notice of assessment is merely a document that records the fact of an assessment and is part of the assessment process.

20. In practice, it shows among other things, the taxable income for the year one was assessed on, the tax payable on the taxable income, any credits that are applied to the tax payable and the deductions and reliefs that have been taken into account to arrive at the amount of tax due. The notice of assessment does not usually show the different sources of income. Once a determination of the tax payable has been made, notice of the assessment is given to the taxpayer advising it of the fact of an assessment and constitutes notice of the amount of tax payable where tax is payable. The tax assessed is

only due and payable after this stage has been fulfilled. The notice of assessment amounts to the levying of a tax. Section 51 does not support any opposing view.

21. Section 51 envisages that notification of an assessment is an essential part of the assessment process. Nevertheless, a notice of assessment remains an administrative step and merely constitutes the means by which a taxpayer is advised of his tax obligation. The remarks of Kitto J in *Batagol* are pertinent where he said:

> "nothing done in the Commissioner's office can amount to more than steps which will form part of an assessment if, but only if, they lead to and are followed by the service of a notice of assessment''

22. The assessment process being a combination of a number of steps, no one step constitutes an assessment. The notice of assessment given after a determination of tax due does not constitute the assessment. Regardless of the fact that these two steps are different, the notice of assessment and process of determination of tax obligations are part of a single assessment process, albeit the notice of assessment being a smaller component of the process.

23. Tax legislation the world over makes distinct provisions for assessments and notices of assessment, see *Honig v Sarsfield (HMIT) TAX* [1986] BTC 205. Our Income Tax Act makes separate provisions for the making of an "assessment" and giving of notice of an assessment. This is not to mean that the two are separable. In *Khothari & Ors v Revenue and Customs (SDLT* [2019] UK FTT 423(TC) , the court said the following of the two steps:

> "While it is clear that the legislation draws a distinction between the making and notification of an assessment, ….. nevertheless both steps are part of a single assessing procedure so there must be some proximity or nexus between the two steps''.

The connection between the two steps lies in that the notice of assessment is the medium through which an assessment outcome is communicated to the taxpayer. In that sense, the making and notification of an assessment forms part of a single assessing procedure or process. There exists a connection between the two steps.

24. Clearly therefore, in considering whether an assessment meets the requirements of the law, one does not look to the notices of assessment alone but rather whether the Commissioner carried out all the steps and actions required to be carried out in accordance with the law. If any one step in the assessment process is not done in terms of the law, the entire assessment process falls. At the end of the day, what is liable to be

set aside is the assessment and not the notice of assessment. All the more so, where a notice of assessment is found to be invalid or not properly served, where it is required to be served, the entire assessment is set aside, see *CIR vs. Azucena vs. Reyes,* where the court held that in the case where there is invalid service of notice of assessment, the assessment is void.

25. Concerning the argument that the cases of *Barclays v Zimra* 2004 (2) ZLR151 (H); *TL v Zimra* HH 413/20 and *Nestle v Zimra* SC 148/21 conflate an assessment and a notice of assessment, I view that the Barclays case did not distinguish the notice of assessment as being outside the assessment process. In *TL* the court dealt with computation of figures in an assessment and found that the lumping up of figures did not meet the requirement of an assessment in terms of the Act. This led the court to set aside the amended assessment. There is nothing wrong in setting aside an amended assessment where an assessment is carried out in terms of s 47(1). The court did not set aside the notice of assessment.
26. Whilst the court may have come out with a correct decision, it did conflate the notices of assessments and the term assessment. The two were not distinguished. The problem maybe stemming from the presentation of the notice of assessment by the respondent. The practice by Zimra of endorsing on the notice of assessment words to the effect that, (this is an Original Amended Assessment) with an instruction to delete the inapplicable, is misleading. This gives the impression that the notice of assessment is in fact the assessment. The purpose of the endorsement seems to be to distinguish between notification arising from an original assessment and an additional assessment. My view is that the endorsement should have an option for one to indicate whether the notice of assessment relates to an original assessment or an amended assessment instead.
27. A tax payer challenging the validity of an assessment on the basis that it is wrong in principle effectively impugns the entire process of assessment. He cannot choose to request a court to set aside only one step of the assessment process. The fact that the notice of assessment is a record of the assessment does not justify it being singled out in such a challenge. As regards the relief to be granted where an assessment is impugned on the basis of invalidity, guidance in this jurisdiction is found in *Nestle*. Here, a taxpayer challenged validity of additional assessments on various grounds including computation of taxes reflected in notices of assessment and the respondent's authority to

raise additional assessments. The court held that the assessments were issued contrary to the Act and were a nullity. Although the court did not examine closely the nature of an assessment in relation to a notice of assessment, after holding that it was not satisfied with the contents of the notice of assessment it 1did not set the notices of assessment aside but the assessments instead.

28. In view of the existence of different steps in the assessment process, a taxpayer challenging an assessment must spell out with clarity, his cause of action leaving no doubt regarding what he is challenging. Challenges to assessments should distinctly and accurately speak to the challenges pursued by the taxpayer. As a consequence of the different steps in an assessment, a taxpayer challenging an assessment must make its challenge explicit in its objection or pleadings. The other party must know what case he is expected to respond to. It is trite that an application stands or falls on the facts stated its founding papers.
29. *Herbstein Van Winsen: The Civil Practice of the High Courts and the Supreme Courts of Appeal South Africa* 5th Edition at p 440-441 states thus:

> "The general rule which has been laid down repeatedly is that an applicant must stand or fall by the founding affidavit and the facts alleged in it; and that although sometimes it is permissible to supplement the allegations contained in that affidavit, still the main foundation of the application is the allegation of facts stated there, because these are the facts that the respondent is called up either to affirm or to deny. The Appellate Division has held that it is not permissible to make out new grounds for an application in a replying affidavit. In *Directors of Hospital Services v Misty* 1979 (1) SA 626 (A) at 635 H-636 B DIEMONT JA held that:
> "When, as in this case, the proceedings are launched by way of notice of motion, it is to the founding affidavit which a Judge will look to determine what the complaint is ……"

See also *Central African Building Society v Finormacg Consultancy (Pvt) Ltd & Anor* SC56\22 , *Magwiza v Ziumbe NO & Another* 2000 (2) ZLR 489 (S) at 492 D-F; *Hiltunen v Hiltunen* 2008 (2) ZLR 296 (H) 301 B where the court relied on sentiments expressed in *Austerlands Pvt Ltd v Trade & Investment Bank Ltd* SC 92/05 for this proposition.

30. A case is decided on the basis of the issues as defined in the pleadings of the parties. An applicant's case is required to be set out in his founding affidavit with such clarity as to inform the other party of the case he is required to meet. It is on the basis of the facts as pleaded that the respondent must either affirm or deny the allegations levelled against him. Pleadings function to make certain the requirement for procedural fairness. Rules

of fairness and transparency demand that a respondent be able to understand and answer to the allegations in pleadings and must not be taken by surprise at a subsequent stage. Not only does the applicant owe the other party a duty to ensure that his cause of action is properly pleaded, he must plead a proper and recognisable cause of action. A cause of action must be clear from the founding papers and correctly allege the facts upon which a cause of action is premised. The relief sought must be supported by the facts pleaded.

31. Whist the applicant challenges the validity of the additional assessments, it seeks to set aside notices of assessment instead of the assessments . In paragraphs 18 and 20 of its founding affidavit, it says that the respondent issued new assessments and that it is attaching copies of the assessment and goes on to attach the manual notices of assessment. These facts are factually incorrect. What this reveals is that it regarded the notices of assessment as assessments. The notice of assessment being a step in the assessment process, is not the assessments itself. An assessment being a process is not a document and is incapable of being attached in the manner suggested. The applicant incorrectly describes an assessment as a document. It is also incorrect to describe a notice of assessment as a statutory document because the Act does not specify its requirements.
32. In his submissions, Mr *Tshuma* who represented the applicant, submitted that "an assessment is a statutory document and therefore it must contain information as prescribed by statute." He just missed it. In his mind, an assessment is a document and it is the notice of assessment. The applicant impugns use of the term gross tax in the notices of assessment. Nowhere in its founding affidavit does it criticize use of the term. What the applicant did is to pick on the notices of assessment, ascribe to them a name that does not belong to them and criticize them on the basis that they do not comply with the definition of an assessment as defined in s2 of the Act. Section 2 applies to assessments and not specifically to notices of assessment. The applicant conflated the term assessment with notices of assessment. It missed the plot.
33. The applicant sought to set aside the wrong thing. This becomes even more apparent when one examines the order sought. The order sought is couched in the following terms:

> "The assessments issued by the respondent under reference numbers 1225192 and 1225193 against the applicant be and are hereby set aside."

The applicant seeks to set aside the notices of assessment. The cited reference numbers relate to manual notices assessments which are not the assessments. It seeks to invalidate documents they did not specifically mention in the founding affidavit. The basis for seeking to set aside a step in the assessment process eludes the court aside.

34. Having decided to challenge the legal authority for issuing the assessments, the applicant was required to focus on the entire assessment process and make it clear in its pleadings and order sought that its target was the assessment. In fact, because its challenge is on authority to issue additional assessments, the applicant should not be complaining about notices of assessment. As a result, the respondent responded to a cause of action based on a challenge to notices of assessment which are wrongly described as assessments to its prejudice.
35. The applicant's case was badly pleaded and this, through a lack of appreciation of the concept of an assessment. My conclusion is that applicant's pleadings do not explicitly express the correct factual basis upon which applicant's case is premised. Based on the aforesaid reasons, I find that the preliminary point raised is with merit and is tenable. The applicant is improperly before the court. Having made these findings, it will not be necessary for the court to delve into the merits of this application.

Consequently, the application is dismissed with costs.

Gill, Godlonton & Gerrans, applicant's legal practitioners
Kantor and Immerman, respondent's legal practitioners