

NESTLE ZIMBABWE (PVT) LTD

APPLICANT

versus

ZIMBABWE REVENUE AUTHORITY

RESPONDENT

HIGH COURT OF ZIMBABWE

NDLOVU J

HARARE, 25 October 2022 & 24 May 2023

## **DECLARATUR**

*Adv. T. Mpofo*, for the Applicant

*Mr. S. Bhebhe*, for the Respondents

NDLOVU J

## **INTRODUCTION**

**NDLOVU J:** This is an application for a *Declaratur*. Its subject matter are the assessments issued by Respondent to Applicant on 17 January 2022 in respect of Applicant's tax years, 2009, 2010, 2011, 2012 and 2013. In the Respondent's eyes this application seeks to invalidate Notices of Assessment issued to the Applicant in January 2022 in terms of the Income Tax Act [*Chapter 23:06*] [*the ITA*]. The Assessments or Notices of Assessment in question were the result of an objection and Appeal processes which was determined to be invalid at law by the Supreme Court under judgment number **SC148/21** refers delivered on 23 November 2021.

## **BACKGROUND FACTS**

The Respondent is the administrative body in this country tasked with assessment, collection and enforcement of the payment of taxes levilable under the ITA. The Applicant is a registered tax payer, registered for Income Tax purposes. The Applicant submitted to the Respondent self-assessment tax returns for the period 2009-2013 in terms of s 37A of ITA. They were in terms of

the law considered to be tax assessments by the Commissioner General. *TL v. ZIMRA HH 413/20 CF (Pvt) Ltd v ZIMRA HH 99/18*.

Sometime in 2016 the Respondent carried out an investigation and audit into the Applicant's affairs. That process led to the Respondent raising additional assessments and issued the same by way of notices filed of record. The Applicant objected to the additional assessments. The Special Court for Income Tax Appeals decided against the Applicant. Dissatisfied with that outcome, the Applicant noted an appeal to the Supreme Court. Fortunes improved for the Applicant and was successful at the Supreme Court. The Supreme Court held that the additional assessments were invalid. On page 11 of the cyclostyled judgment the Supreme Court stated as follows: -

*“In view of the above, the assessments are null and void as they were issued contrary to the requirements of the Act. They were a nullity and cannot create any obligation to pay tax. What this means is that there were no proper assessments for the court a quo to relate to...”*

## **MEANING OF THE SUPREME COURT JUDGMENT**

Having found that the 2016 assessments were null and void, the self-assessments by the Applicant were resuscitated, as the only assessments done in accordance with the law and endowed with the power to create an obligation to pay tax on the part of the Applicant.

## **EVENTS AFTER THE SUPREME COURT JUDGMENT**

The Respondent did not relent. On 17 January 2022 the Respondent through its functionaries wrote to the Applicant. The essential parts of that letter reads as follows: -

*“RE: REPLACEMENT OF INCOME TAX ASSESSMENTS ISSUED ON 31 MAY 2016*

*Following the Supreme Court judgment in the case Nestle v ZIMRA of 2021, kindly find attached assessments which comply with the relevant provisions of the Income Tax Act, Chapter 23:06*

*These assessments replace the ones issued to you on 31 May 2016. Considering that the tax was paid already on the assessed amounts, there is no obligation to pay on the newly issued assessments.”*

Those attached assessments were individually headed:

***“Zimbabwe Revenue Authority Manual Notice of Assessment for Income Tax year Ended: 31 December 20....This is an Amended Assessment”.***

Applicant’s legal practitioners replied to the Respondent and in paragraph 5 of their letter dated 08 February 2022 wrote: -

*“In order that we can advise our client properly, we ask you to ... indicate to us ... in writing the basis and legal justification for these assessments as we have been unable to find this either in the Income Tax Act [Chapter 23:06] or the Supreme Court Judgment in the Nestle Zimbabwe (Pvt) Ltd and Zimbabwe Revenue Authority Case Number SC290/2020, handed down on 23 November 2021”.*

In its reply dated 18 February 2022 the Respondent stated that it was a regrettable error that the 17 January 2022 letter referred to ***“notices of assessments”*** as ***“assessments”***. It went on say that the 2016 notices of assessments were replaced with the 2022 ones. To that end, the assessment or determination of the taxpayer’s tax liability that was done in 2016 was not tampered with, replaced nor varied. The new notices are therefore in respect of the same old determination or assessment of 2016.

So, on the basis of that letter, these were notices of assessments replacing the 2016 ones in respect of the 2016 determination or assessments of the Applicant’s tax liability already done in 2016.

In another letter to the Applicant dated 04 March 2022, the Respondent said in part thereof;

*“...what carries the day is what notices of assessments documents themselves state what they are as opposed to what the accompanying letters claim them to be....*

*The tax liability itself, which is however fully paid, remained intact. The justification is therefore that your client is entitled to proper notices of assessments in line with section 51 of the Act. The basis of the assessed tax liability was fully explained to your client during the tax review exercise in 2016 and your client is fully aware of this...”*

## **ISSUE**

In issue is the legality of the 17 January 2022 notices of assessments.

## **DISPOSITION**

The Applicant's tax obligation was based at law on the self-assessments for the periods in question after the Supreme Court judgment and that obligation was paid and cleared. The additional assessments by the Respondent done in 2016 were declared null and void by the Supreme Court and had therefore been illegally or invalidly paid because they could not create a legal obligation to pay tax. In essence, that sealed the matter. At law, the Respondent had no assessments to amend or replace, it had no legal basis entitling it to issue the notices of assessments it purported to issue post the Supreme Court judgment. The Supreme Court had spoken and spoken clearly.

This court has no power to review the Supreme Court. The Respondent has no power to circumvent the Supreme Court judgment by attempting to validate an invalidity.

The application succeeds.

**IT IS HEREBY ORDERED THAT:**

1. The assessments issued by the Respondent to Applicant on 17 January 2022 in respect of Applicant's tax years 2009, 2010, 2011, 2012 and 2013 be and are hereby declare to be invalid.
2. Respondents shall pay Applicant's costs of suit.

*Gill, Godlonton & Gerrans Legal Practitioners, Applicant's Legal Practitioners.*

*Kantor & Immerman, Respondent's Legal Practitioners.*

**NDLOVU J.**

**22/05/2023**