

DNS (PVT) LTD
versus
ZIMBABWE REVENUE AUTHORITY

SPECIAL COURT FOR INCOME TAX APPEALS
KUDYA J
HARARE 3 October 2017 & 7 November 2019

Income Tax Appeal

AP de Bourbon, for the appellant
T Magwaliba, for the respondent

KUDYA J: This is an appeal lodged in the Special Court for Income Tax Appeals¹ against the propriety of the disallowance of deductions made by the appellant in respect of target bonus, leave bonus, gratuities and leave pay for the tax years ended 31 December 2009 to 31 December 2012.

The time lines

The respondent commenced investigations on the income tax obligations of the appellant in September 2013 for the tax years 2009 to 2012. The investigation revealed that the salaries and wages recorded in the appellant's financial statements were higher than the figures in the ITF 16 returns that were submitted to the respondent by the appellant in each of these tax years. It was common ground that the variances were occasioned by the different treatment that the appellant accorded to target bonuses, leave bonuses, gratuities and leave pay for accounting purposes and tax purposes, respectively. The investigation culminated in the issuance of income tax amended assessments number 2/001320 for the 2009 tax year, 2/001321 for the 2010 tax year, 2/001322 for the 2011 tax year and 2/001323 for the 2012 tax year on 23 October 2014.

On 5 November 2014, the appellant objected to the amended assessments in question. The appellant further accorded the respondent extensions of time in excess of the three months

¹ Last para of notice of appeal dated 15 August 2016 as corrected by para 1 the order by consent of 3 October 2017, in which additionally the notice of appeal by letter of 15 August 2016 and its sequel of 2 September 2016 were declared valid while the filing of the Commissioner's case out of time was condoned.

provided in s 62 (4) of the Income Tax Act [*Chapter 23:06*] within which to determine the objection². The determination was eventually made on 1 August 2016. The appellant filed its notice of appeal on 15 August 2016 and its case on 10 October 2016. In response, the respondent filed its case on 12 December 2016.

The facts

The appellant company was incorporated in 2002 and operates in the mining industry. It employed both contract and permanent workers the majority of whom were contracted to two established mining companies that are based in the Midlands and Mashonaland West Provinces of Zimbabwe. The appellant undertakes service repairs and maintenance of mining equipment, plant and machinery and also supplies both surface and underground personnel and equipment to these mining companies. Its operations were governed by the provisions of the Collective Bargaining Agreement, CBA, (Mining Industry) General Regulations SI 152/1990 as amended by the Collective Bargaining Agreement (Mining Industry) SI 109 of 1993. In terms of s 2 (1) the CBA was binding on all employers and employees in the industry. The conditions of service of its employees were governed by these two statutory instruments and the respective contracts concluded with each employee.

The conditions of service covered, amongst others, target and leave bonuses, gratuities and leave pay. The leave bonus was synonymous with a 13th cheque while target bonuses were incentive bonuses that accrued to each employee on meeting either individual or collective production targets set by management. Gratuities were statutory decreed payments that accrued to each contract employee during the life of his contract but which were payable on the termination of that employment contract. Leave pay was the amount that was payable to an employee on accumulating the number of days per annum prescribed in the contract of employment and underpinned by the collective bargaining agreements.

In each of the four tax years in question, the appellant deducted the amounts relating to each of these four heads as expenses incurred in the course of trade or the production of income under the general deduction formula, s 15 (2) (a) of the Income Tax Act. The effect of the deductions was that they reduced the appellant's taxable income and the amount of tax due to the respondent in each tax year. The effect of the disallowance was to add back those amounts to the taxable income with the concomitant corresponding increase of the amount of tax

² P 6 letter of from Commissioner to appellant dated 22 April 2015 of r 11 documents and p 38 of the Commissioner's case

payable to the respondent. In terms of the general deduction formula, any amount not incurred for the purposes of trade or production of income in the course of the tax year is not deductible in that year while any amount so incurred for that purpose or production of income is deductible.

It was common ground that provisions are amounts that are set aside for future anticipated expenses that may be incurred in the tax years subsequent to the tax year in which they are set aside or reserved. Ordinarily, such amounts are not used in the course of trade or for the production of income in the tax year in which they are set aside. They are therefore not deductible in the tax year in which they are reserved.

The effect of the admissions made in the appellant's case and the evidence of each of the two witnesses who adduced evidence on its behalf that the amounts relating to the four heads were provisions, was that they were not incurred in the respective years in which they were set aside and were therefore not deductible in those years. The result of such an admission would be that the appellant wrongly deducted them from its income and that the respondent correctly added them back to such income.

The contention advanced by the appellant was that the "provisions" nomenclature used in the pleadings and evidence and submissions by counsel belied the substance of these amounts. In other words, the appellant contended that it wrongly described these expenses as provisions when in truth and fact, these amounts were incurred in the financial year to which they related. The appellant's financial year ended on 30 September of each year, which in terms of the Income Tax Act was deemed to coincide with its tax year. The appellant contended that it incurred the "provisions" before or on 30 September of each year and paid them in the following financial year in either November or December. On the other hand, the respondent contended that the appellant reserved these amount in each financial year in question but incurred the liability to pay in the subsequent financial year.

The issues

A pre-trial hearing was held on 4 April 2017 and the following five issues were referred for determination on appeal.

- 1.1: Whether or not the amounts claimed as deductions by the appellant in respect of pay *in lieu* of leave, bonuses and gratuities due to its employees were mere provisions or accruals

1.2 Whether or not the amounts claimed by the appellant in respect of pay *in lieu* of leave bonuses and gratuities due to employees had, in the tax years 2009 to 2012 been incurred (in the sense of the appellant's liability to make payment becoming absolute) at the time a deduction of these expenses were claimed by appellant in terms of s 15 (2) (a) of the Income Tax Act

1.3: If they were provisions, whether or not they could be deducted on the basis of a generally prevailing practice allowing deductions of provisions at the time the assessments were made

1.4 If they were accruals, whether appellant was liable to pay PAYE on such amounts

1.5 Whether or not it was appropriate to impose a penalty and if so, the quantum thereof

I determine each issue in turn.

Whether or not the amounts claimed as deductions by the appellant in respect of pay in lieu of leave, bonuses and gratuity due to its employees were mere provisions or accruals

The appellant averred in paras 12, 13, 16, 17, 20 and 21 of its case that the deducted amounts were provisions. The point was reinforced by each of the two witnesses called by the appellant and by Mr *de Bourbon*, for the appellant, as he led each witness in evidence and in his oral submissions. I agree with Mr *Magwaliba*, for the respondent, that in terms of s 36 (1) of the Civil Evidence Act [*Chapter 8:01*] the admission made in pleadings by a litigant is binding on that litigant. Section 36 provides:

“36 Admissions

- (1) An admission as to any fact in issue in civil proceedings, made by or on behalf of a party to those proceedings, shall be admissible in evidence as proof of that fact, whether the admission was made orally or in writing or otherwise.
- (2) Subject to subsection (3), in determining whether or not any fact in issue in civil proceedings has been proved, the court shall give such weight to any admission proved to have been made in respect of that fact as the court considers appropriate, bearing in mind the circumstances and manner in which the admission was made.
- (3) It shall not be necessary for any party to civil proceedings to prove any fact admitted on the record of the proceedings.
- (4) It shall not be competent for any party to civil proceedings to disprove any fact admitted by him on the record of the proceedings:

Provided that this subsection shall not prevent any such admission being withdrawn with leave of the court, in which event the fact that the admission was made may be proved in evidence and the court may give such weight to the admission as the court considers appropriate, bearing in mind the circumstances in which it was made and withdrawn.

In terms of the above cited subs (4) of s 36, the appellant is precluded from disproving the concession unless it successfully withdraws it with the leave of the court. The appellant did

not seek to withdraw the “judicial admissions”³ at any stage after filing its case or even after the issues for appeal had been determined at the pre-trial hearing. Instead, in oral evidence by its witnesses and in oral submissions by counsel, the amounts in issue were liberally categorised as provisions. It was only in reply to Mr *Magwaliba*’s written and oral submissions that counsel for the appellant made the feeble but startling submission that the admission had been amended by the evidence led by both parties on appeal. He was wrong. The two witnesses continued to refer to the amounts as provisions. In any event, *DD Transport (Pvt) Ltd v Abbot* 1988 (2) ZLR 92 (S) at 98A-B negates the submission made by Mr *de Bourbon* in this regard. In that case GUBBAY JA, as he then was, approved as had done MACDONALD ACJ in *Moresby-White v Moresby-White* 1972 (1) ZLR 199 (AD) at 203E-H the *dicta* of DAVIS AJA in *Gordon v Tarnow* 1947 (3) SA 525 (AD) at 532 that:

“It does not seem to me that such a discretion could be exercised, in a case where the admission has been made in a pleading, in any other way than by granting an amendment of that pleading.”

Any evidence led by the witnesses, which was inconsistent with the admissions would simply lack probative value. The answer to the first issue was provided by the appellant. The amounts were provisions and not accruals. Again, as I will demonstrate in answer to the third issue, the fact that the appellant did not deduct PAYE from these amounts demonstrated that it treated them as provisions. Had they been expenses incurred it would have deducted the PAYE on these amounts.

Notwithstanding, the admission, the underlying question sought for determination by the parties was whether the amounts under each head in each year were incurred in the financial year to which they related or in the subsequent year.

The law

The meaning of “incurred” has been set out in many judgments. The word is synonymous with “an unconditional legal obligation to pay.” See *G Bank Zimbabwe Ltd v Zimbabwe Revenue Authority* 2015 (1) ZLR 348 (H) at 354E-355A and the case cited therein. The sentiments of CORBETT CJ in *Edgars Stores Ltd v Commissioner of Inland Revenue* 1988 (3) SA 876 (A) at 889A-D (not 899A-C, as recorded in *G Bank, supra*) are worth repeating.

“Thus it is clear that only expenditure (otherwise qualifying for deduction) in respect of which the taxpayer has incurred an unconditional legal obligation during the year of assessment in question may be deducted in terms of s 11 (a) from income returned for that year. The obligation may be unconditional *ab initio* or, though initially conditional, may become unconditional by fulfilment of the condition during the year of assessment; in either case the relative expenditure is deductible in that year. But if the obligation is initially incurred as a conditional one during

³ *DD Transport (Pvt) Ltd* at 97G

a particular year of assessment and the condition is fulfilled only in the following year of assessment (the other requirements of deductibility being satisfied). It is, of course, important in this context to distinguish between (i) expenditure in respect of which the obligation is conditional and remains so during the year of assessment, and (ii) expenditure in respect of which the obligation is or during the year of assessment becomes unconditional, but cannot be quantified until the after the termination of the year of assessment.”

The application of the law to the facts

Cash in lieu of leave, CILL

It was common cause that the employees accrue leave days every month. In terms of clause 18 (1) of the CBA every employee is entitled to annual leave calculated in accordance with Schedule D paid at the employee’s basic earnings. In terms of clause 18 (3) the payment shall be made at the time when leave is taken while annual leave shall be paid before the employee proceeds on leave, provided the leave is in excess of 7 consecutive days. Sub clause (5) and (6) of clause 18 provides that “all annual leave shall be taken at the convenience of the employer, and shall be on 14 days’ notice” and is granted by the employer. In terms of sub clause (7) thereof, the employee may accumulate twice as many days of the total due under Schedule D, or thrice if going on extended leave and may not forfeit excess days if failure to take leave is at the employer’s request. In terms of sub clause (8) any employee who has completed not less than 6 months continuous service shall receive cash *in lieu* of annual leave on termination of employment, such payment being in respect of that portion of the annual leave which has been earned to the date of termination. And lastly sub clause 11 states that “any payment *in lieu* of annual leave may be made by mutual arrangement between employer and employee.”

The provisions not paid in the particular tax year for CILL were highlighted in exhibit 2, which was produced in evidence by the first witness called by the appellant, in the blue columns, while the amounts actually paid were in white columns. The provisions in blue against the actual figures in white were US\$ 213 602.04 and US\$ 40 459.40 in 2009, US\$ 8 455.09 and US\$ 28 641.23 in 2010, US\$ 107 904.34 and US\$199 585.42 in 2011 and US\$146 290.12 and US\$198 685.04 in 2012, respectively.

The three criteria that must be met before the employer incurs an unconditional obligation to pay are prescribed in clause 18 (3) and (5) of the CBA. The first is that all annual leave must be taken at the convenience of the employer on 14 days’ notice from the employee and the second is that payment shall be paid before the employee proceeds on such leave. The third, is that all leave other than sick leave shall be paid at the time the leave is taken. The convenience of the employer entails the approval of the employer and is analogous to the sole

discretion of management in clause 6.4 of the sample contract dated 11 November 2015 but commencing on 4 August 2012⁴, which was attached to the appellant's case. These three criteria must take place contemporaneously with the leave. The setting aside of payments for use in the future as was done by the appellant in respect of cash *in lieu* of leave constituted a provision. The amounts in white appear to be the only amounts that were paid contemporaneously with the taking of leave or its encashment. For the appellant to have incurred the amounts in the blue columns in the particular tax years in which the deductions were claimed, the actual leave or encashment should have taken place in that particular year. Again, clause 5 of the contract of employment of 4 August 2012 in the appellant's case prescribes the accumulation of leave to a maximum of 90 days. This clause together with the three criteria underpins the employer's convenience and constitutes conditions which eschew the claimed deductions.

Again, in regards to cash *in lieu* of leave on termination under clause 18 (8), it is clear to me that the unconditional obligation to pay takes place on termination and not at any time prior to the termination. The statutorily prescribed date on which the unconditional obligation to pay takes place is the date of termination and not, as submitted by Mr *de Bourbon*, on the 6 month anniversary of the contract of employment. In any event, the two witnesses called by the appellant did not lead any evidence pertaining to the number of employees whose contracts terminated on or prior to the financial year end who would have met the unconditional obligation to payment statutorily prescribed in clause 18 (8).

Bonuses

The first witness called by the appellant, who was its administrator and company secretary, identified six types of bonuses to which the appellant's employees were entitled to. These were the incentive bonus, the production target bonus, the maintenance and safety bonus, the leave pay bonus and the 13th cheque bonus. She produced exhibit 2, which enumerated in white columns the amounts of bonuses actual paid during the tax years in question and in blue columns the amounts payable in the following tax year. The amounts in blue and white were US\$ 401 527.44 and US\$ 71 484.50 in 2009, US\$ 151 710.55 and US\$277 361.05 in 2010, US\$ 243 017.78 and US\$691 434.88 in 2011 and US\$ 216 438.50 and US\$876 235.06 in 2012, respectively.

⁴ Clause 3 of that agreement

She conceded under cross examination that the various bonuses were not in writing nor were copies of such schemes provided to the employees affected by them as required by clause 19 (7) of the CBA. All she could say was that bonuses were fixed in the year of assessment but paid in the following year. Critically, Mr *de Bourbon* led her thus in examination in chief:

“Q. And therefore you also make provision for the amount of that bonus even though it might only be paid after 30 September A. Yes, in 2009 the provision was made based on historical occurrences “

This is one of the many instances in which counsel and the witnesses treated the deductions as provisions. The statutory period within which all bonuses must be paid is prescribed in clause 19 (5) (a) (iii) of the CBA. It states that:

“(a) Except when his employment has been terminated-
 (iii) all bonus payments or like benefits due to an employee shall be paid within 14 working days of the end of the period to which such bonus payments relate.”

However, payment is dependent on ascertainable prior conduct of the parties which includes the setting of the key performance indicators by management, the performance by the employee and the monitoring and evaluation of such performance by management followed by the authorisation and approval to make payment, which constitute the necessary steps that must be taken before payment becomes due. It seems to me that the unconditional obligation to pay takes place at the authorisation and approval stage, which in compliance with clause 19 (5) (a) (iii) must take place within 14 working days from the end of the period for which the bonus is payable. I proceed to apply this principle to the types of bonuses the first witness identified in exhibit 2.

Target and leave bonus

The first witness testified that a leave bonus was unique to the mining industry. It was a benefit paid to the employee for either proceeding on leave or encashing his leave days, which was in the equivalent amount to the leave value taken or encashed. She ascribed it to some unidentified mining industry labour regulations and averred that it formed part of the employment contract of every employee. Contrary to this averment, the employee contracts produced for the tax years in question did not have such a clause. She also included in the expenses for each tax year the monetary values of the leave bonuses for leave not taken or encashed merely on the basis of accrual. In regards to a target bonus, she averred that management set quarterly targets for employees. Once these targets were attained, the employees were entitled to a target bonus, which however was paid in the following year that

of assessment. However the production and safety bonuses were paid throughout the year quarterly or every 60 days because both production and safety are critical issues in the mining industry. The amounts in blue which in part constituted target and leave bonuses did not represent approved payments for completed targets nor for leave taken or encashed but represented targets that were pending and leave that was to be taken or encashed. It is clear to me that when the amounts were deducted in the tax years in which they were made the appellant did not have an unconditional obligation to pay.

The 13th cheque

The witness indicated that this was a benefit paid once a year to an employee, in November-December but expensed in the 30 September financial statements. It was common cause that this was not an obligatory payment but one which depended on the sole discretion of management. The witness testified that by convention the 13th cheque was paid in the November-December period in Zimbabwe and in accordance with this tradition, the appellant approved payment before its financial year end for payment at the calendar year end. Obviously such a position did not accord with the requirements of clause 19 (5) (a) (iii) of the CBA. As the administrator and company secretary, the first witness would have been better placed to testify when and by whom the payment of the 13th cheque was authorised. She could only say it was the responsibility of management but was unclear how and by whom the decision to avail the 13th cheque was taken.

I agree with the suggestion postulated by Mr *Magwaliba* and confirmed in passing by the appellant's second witness that such a decision would ordinarily have been made by the directors of the company and communicated to management for implementation. As the company Secretary she would have been privy to the manner in which the appellant was managed and produced either the minutes of the meeting or the resolution of the directors authorising such payment. Such a document would have established when the company approved the payment of the 13th cheque. She was simply unable to establish that any such approval was ever granted in the financial year in which the deductions were made. The respondent's investigators requested the minutes of the company on 26 September 2013 and followed this up with a reminder on 7 October 2013. The response provided by the appellant through its tax consultant on 28 October 2013 was that the appellant "keeps no record of

minutes but files resolutions of any such meetings as is deemed critical.”⁵ The absence of such documentary evidence precluded the appellant from establishing that it had an unconditional obligation to pay the 13th cheque before the end of its financial year. It failed to show that the decision to pay the 13th cheque was not made after the financial year end; in which case the payment of the 13th cheque, payable as it was in November-December, would have been incurred in the subsequent tax year and not in the year in which the deductions were made.

Gratuity

She further testified that a gratuity was prescribed in clause 34 of the CBA by the 1993 amendment. Again, she supplied the figures for gratuities in each of the tax years in issue in exhibit 2. The gratuity accruals that were in blue amounted to US\$ 9 084.37 against the actual payments in white of US\$ 43 061.84 in 2009, US\$ 943.47 against actual payments of US\$74 885.06 in 2010, US\$14 749.94 against actual payments of US\$ 113 276.42 in 2011 and US\$ 4 444.35 against actual payment of US\$145 528.32 in 2012, respectively. The gratuity was payable to a temporary employee, who had served at least 3 months, at the end of his employment period as a percentage of his basic salary and based on the period served. In terms of clause 34, “contract worker means an employee who is engaged for a period of fixed duration or for the performance of a specific task which excluded normal production underground”. In terms of sub clause (2) of clause 34, a contract worker who is employed for a period of less than one year is precluded from taking leave but will be paid the cash equivalent of any leave due at the terminating date. And clause 34 (4) prescribes that:

“At the discretion of the employer a contract worker who is employed for a continuous period of more than 3 months, shall participate in the Mining Industry Pension Fund, MIPF, in accordance with the rules of the Fund or be paid a gratuity of 5% of the employee’s total basic earnings during the duration of the contract in lieu of the employer’s contribution to the MIPF.”

It is clear from the above cited sub clause that gratuities were not paid to a potentially qualifying employee who joined the MIPF but to the one who did not join the Fund. The gratuity was payable during the subsistence of the employment contract at 5% of the employee’s total basic earnings. Basic earnings is defined in clause 1 of the CBA, as the wages or salaries earned by an employee and excludes bonuses, allowances, commissions and other extra payments. The payslips produced on appeal by the appellant demonstrated that the employees were paid monthly in arrears but I suppose it was not precluded by law to pay its contract employees per shift, daily or weekly. It seems to me that the appellant had an

⁵ P43 of r 11 documents responding to letters of 26 September 2013 and 7 October 2013 on pp 44 r 11 documents

unconditional obligation to pay the gratuities during the subsistence of contract on the basis of whatever period it paid the basic earnings. But whatever that period was clause 34 (4) imposed by operation of law an unconditional obligation to pay the gratuity due to the contract employee during the course of each financial year by 30 September. Any payments allocated outside the financial year end would constitute provisions which would be payable in future once the employee fulfilled the implicit and underlying contractual condition of rendering service to the appellant in the future. I therefore hold that the amounts in the blue columns of exhibit 2, which were described as “year-end accruals” had not been incurred in the respective tax years to which they were made. Indeed clause 18 of appellant’s case constitutes a concession that the legal obligation to pay the gratuities took place at the end of each financial year. I agree with Mr *Magwaliba* that they were mere provisions made for a future eventuality.

The amounts actually paid in the tax year and those provided for the subsequent year

All the disputed amounts were summarised in exhibit 2 by the first witness called by the appellant. I have already indicated what the white and blue columns represented. These amounts were extrapolated by the first witness from the journals on pp 48 to 72 of the r 11 documents, which documents were supplied by the appellant to the respondent’s Regional Manager on 1 July 2015. There are 9 rows in exhibit 2 covering gratuities, bonus and leave bonus, cash *in lieu* of leave, CILL, actual pay roll, actual accruals, PAYE, Aids levy, totals paid to the respondent and the approximate number of employees of the appellant in each financial year under consideration. The total accruals in blue in 2009 were US\$624 213.85 against the amount actually paid in white of US\$155 005.74. The respective blue and white figures in 2010 were US\$ 161 109.11 and US\$380 887.34, in 2011 were US\$ 365 672.06 and US\$1 004 296.72 and lastly, in 2012 were US\$ 367 172.97 and US\$ 365 672.06. The approximate number of employees was 316 in 2009, and 314 in 2010 and 352 and 387 in 2011 and 2012, respectively. The total of the PAYE and AIDS levy paid to the respondent in each year was US\$ 433 061.83, US\$ 696 951.56, US\$ 1 166 167.47 and US\$ 1 265 726.17 respectively.

Conclusion on the first issue

I would have found the deductions in blue columns in exhibit 2 claimed in each of the tax years in question to have been provisions even if the appellant had not made the admissions it did in its pleadings. I, therefore answer the first issue in favour of the Commissioner.

Whether or not the amounts claimed by the appellant in respect of pay in lieu of leave bonuses and gratuity due to employees had, in the tax years 2009 to 2012 been incurred

(in the sense of the appellant's liability to make payment becoming absolute) at the time a deduction of these expenses were claimed by appellant in terms of s 15 (2) (a) of the Income Tax Act

The appellant failed to establish that these items were incurred in the particular tax years in which the deductions were claimed. Mr *Magwaliba* also relied on s 16 (1) (e) of the Act to dispute the deductibility of the provisions under consideration. I agree with his submission that the claimed deductions were in substance analogous to provisions carried into reserve, which could not be deducted from income in terms of s 16 (1) (e) of the Income Tax Act.

If they were provisions whether or not they could be deducted on the basis of a generally prevailing practice allowing deductions of provisions at the time the assessments were made

The appellant contended in the alternative that if the court found the deductions to have been provisions, then it should also hold that the provisions were deducted in accordance with a practice generally prevailing in the respondent's office at the time the original assessments were made. It relied on proviso (i) to s 47 (1) of the Income Tax Act. It precludes the Commissioner from making adjustments or a call upon the taxpayer to pay the correct tax if the original assessment was made in accordance with the practice generally prevailing at the time the assessment was made. The appellant contended that at the time each self-assessment was filed there was a practice generally prevailing of accepting deductions pertaining to provisions. The respondent disputed the existence of the practice post 1 January 2010. I have already held in a *CUT (Pvt) Ltd v ZIMRA* HH 664/2019 at page 7 of the cyclostyled judgment that self-assessments are deemed to be assessments issued by the Commissioner. This is clear from the definition of an assessment set out in s 2 of the Income Tax Act and the clear and unambiguous wording of s 37A (11) of the same Act. I, therefore, dismiss the alternative argument raised by Mr *Magwaliba* that a self-assessment falls outside the contemplation of s 47 (1) of the Income Tax Act.

Mr *de Bourbon* submitted in both his oral and written legal arguments that the respondent conceded the existence of a practice generally prevailing in his office of treating provisions as deductible in the tax year in which they were made. In para 5 of his written submissions Mr *de Bourbon* relied on the interpretation of this section rendered by the Commissioner in para [145] at page 113-114 of the Commissioner's Handbook and its applicability to leave pay, directors' fees, bonuses and the like. The Handbook is quoted as providing that:

“The deduction not allowed are-

- (e) Income taken to a reserve fund or capitalized in any way. In practice this paragraph is not applied to specific reserves created in respect of leave pay, director’s fees, bonuses and the like. Such reserves and provisions will be allowable deductions if –
 - (i) the amounts are voted on or before the date of the relative amounts or the annual general meeting at which they were considered; and
 - (ii) the income is taxable in the year of assessment in which it is allowed as a deduction.”

In the bulk of the correspondence exchanged between the parties prior to the filing of the Commissioner’s case, the respondent’s officials disputed the existence of such a practice. In para 37 to 42 of the respondent’s case, the respondent confessed and avoided the existence of the alleged practice of accepting a provision of leave pay as deductible against income prior to 1 January 2010. The Commissioner linked the practice to the treatment provided by legislation to doubtful debts before the repeal of s 15 (2) (g) (ii) of the Income Tax Act by s 14 of the Finance Act Number 10 of 2009, which took effect on 1 January 2010. Section 15 (2) (g) (ii) allowed the Commissioner to approve deductions in respect of doubtful debts claimed against a taxpayer’s income in the year of assessment provided that such a claim would be added back to income the following tax year. In the Commissioner’s opinion, there was no law at the time, which dealt with leave pay provisions, so he extended the principle applicable to doubtful debts to leave pay, directors’ fees, bonuses and the like. Like doubtful debts, the practice was in two parts. The first was that the Commissioner allowed the claim in the year of assessment. The second was that the taxpayer had to add the deductions back to income in the following year tax year. It was common cause that the practice in relation to doubtful debts was abandoned by the repeal of s 15 (2) (g) (ii) with effect from 1 January 2010.

The Commissioner averred that he also abandoned the practice in so far as it related to leave pay provisions because it lacked the philosophical grounding provided by doubtful debts. Notwithstanding Mr *de Bourbon*’s contention in para 6 of his written submissions that the provision relating to doubtful debts had nothing in common with the practice relating to leave provisions, I am satisfied from a reading of the para [117] at page 98-99 quoted in full in his heads that the two were treated in the same way by the Commissioner. The appellant, through the evidence of its tax consultant, did not dispute that the practice was abandoned in 2010 but contended that such an abandonment was never communicated to it by the Commissioner until sometime in 2012 or 2013 when the respondent’s auditors advised the tax consultant of the new position. In his oral submissions, Mr *de Bourbon* politely contended that his witness had basically been tricked into conceding that as a matter of hard fact, the practice of allowing the

deduction of leave pay provisions ceased with effect from 1 January 2010. The only damage control that Mr *de Bourbon* managed to do in re-examination was to extract from the witness that the change in practice was communicated to him after all the tax returns we are dealing with had been filed with the Commissioner. It is from this turn of the evidence that I am satisfied that the practice was indeed abandoned with effect from 1 January 2010. I therefore find as a matter of hard fact that the practice fell away as from that date. In the result, when the four assessments were filed the practice that the appellant relied upon was no longer in existence.

But even if the practice was still in existence at the time the appellant filed the tax returns that were subsequently amended, the appellant had to satisfy the appeal court by hard credible evidence that it complied with both sub-para ((i) and (ii) in para [145] of the Handbook. It had to show that the amounts relating to the four items were voted on or before the date of the relative accounts or annual general meeting at which they were considered and the income was taxed in the year following that in which it was allowed as a deduction. Neither of the two witnesses called by the appellant testified in regards to the first requirement. While both averred that the amounts were reversed in the following year, neither the original returns nor the reconciliations and journals availed to respondent by the appellant and produced in this court in r 11 documents nor even the bundle of documents filed by the appellant in preparation of the appeal on 27 September 2017 ever attempted to demonstrate such a reversal. Indeed during cross examination the tax consultant admitted that there were no subsisting documents confirming the reversals. The mere *ipse dixit* of these witnesses was insufficient to discharge the onus on the appellant to show on a balance of probabilities that it complied with the conditions set out in the alleged practice. That the appellant could not have complied with the second requirement was demonstrated by the absence of provisions in its financial statements for the period to which the appeal relates. In any event, such reversals could not have taken place in view of the fact that the self-assessments were submitted on the basis that the provisions had actually been incurred.

I must off course hasten to point out that, other than the concession made by the respondent; the appellant could not rely on the contents of the Assessor's Handbook in any appeal before this Court. I dealt with the issue of the inadmissibility of evidence relating to the contents of the Commissioner's Assessors Handbook in *LFCZ Ltd v Zimbabwe Revenue Authority* HH 164/2019 at pp 13-15 of the cyclostyled judgment. I held specifically at p 15 of that judgment that in terms of para 5 (3) of the Fourth Schedule to the Revenue Authority Act

[Chapter 23:11] such a Handbook constituted a written statement issued by the Commissioner-General which had the effect of a non-binding private opinion. In the present case the appellant could not use its contents without first establishing whether or not it was issued after 1st January 2007. Thus irrespective of the concession made by the respondent in its case, I am satisfied that even if I were to find that the practice was in existence at the time the self-assessments were issued, the appellant failed to establish that it abided by the conditions to which the practice related.

I therefore hold that the appellant could not rely on the alleged practice generally prevailing to claim the deductions it sought in the self-assessments. They were properly disallowed by the respondent.

If they were accruals, whether appellant was liable to pay PAYE on such amounts

It is unnecessary to determine this issue in view of my findings above. However, for what is worth, I would have held, had the amounts been incurred in the year of assessment in which they were deducted, the appellant liable for PAYE in terms of s 73 (1) as read with para 1 and 3 of the 13th Schedule to the Income Tax Act. Para 1 thereof defines remuneration as any amount which is “paid or payable to any person by way of (*inter alia*) leave pay, bonus, gratuity”, while para 3 obliges every employer who pays or becomes liable to pay any amount by way of remuneration to withhold the appropriate PAYE and remit it to the Commissioner. In my view, the terms “payable” and “becomes liable to pay” are synonymous with incurred. I would, therefore have found the appellant liable for PAYE on the deductions in dispute.

Whether or not it was appropriate to impose a penalty and if so the quantum thereof

The case of *PL Mines (Pvt) Ltd v Zimbabwe Revenue Authority* 2015 (1) ZLR 708 (H) at 730B-D sets out the principles governing the imposition of a penalty and emphasizes the point that the appeal court is not bound by the Commissioner’s considerations of penalty. I had the uncanny feeling that Mr *de Bourbon* sought to bind me to the finding by the Commissioner that the appellant in the words of s 46 (6) in rendering an incorrect return in each year did not intend to defraud the revenue or to postpone the payment of the tax as chargeable, or intend to evade tax. He sought to persuade me to waive the penalty in full on the basis of the opinion expressed by DAVIS J in *ITC 1725* (2000) 64 SATC 223 (C) at 235-236 to the effect that the application of legitimate tax planning mechanisms by a taxpayer with the help of professional advice, which did not amount to tax evasion but to tax avoidance, should not be punished at all. It seems to me that such a proposition is foreign to our approach where MACDONALD JP, as he then was, in *F v Commissioner of Taxes* 1976 (1) RLR 106 (A) at 113D described the

practice of tax avoidance as evil. It seems to me that such a practice deserves censure especially in regards to the present matter where the appellant disingenuously and pretentiously sought to rely on a “practice generally prevailing” which it failed to abide by.

Like the Commissioner I take into account the personal circumstances of the taxpayer. It is a first offender, which was always a law abiding corporate citizen that but for the present matter discharged its tax obligations diligently. In submitting incorrect returns, the appellant appeared genuinely unaware of the charge in practice. The failure to abide by the requirements of the purported practice obviously raised the appellant’s moral turpitude. It underpaid on the appropriate tax due. The amount was not an insignificant figure. I have agonised over whether the failure to abide by the requirements of the purported practice demonstrated an intention to defraud the revenue or even the lesser intention of postponing the payment of the proper tax chargeable. In submissions before me Mr *Magwaliba* conceded that the appellant did not intend to evade tax or defraud the revenue but submitted that the penalty imposed by the Commissioner was most appropriate. Without the benefit of argument on this issue, all I can say is that the conduct of the appellant came perilously close to defrauding revenue by seeking deductions which were obviously not due.

In these circumstances I would in the exercise of my own discretion impose the same penalty as did the Commissioner. According a penalty of 70% is most appropriate in this matter.

Costs

In line with the provisions of s 65 (12) of the Act I do not find the claim of the Commissioner to have been unreasonable or the appellant’s grounds of appeal to have been frivolous. In addition the request made by the appellant to invoke the provisions of ss 15 (2) (aa) of the Act cannot succeed. Accordingly, each party shall bear its own costs.

Disposition

Accordingly, it is ordered that:

1. The appeal be and is hereby dismissed in its entirety.
2. The four amended income tax assessments number 2/001320 for the 2009 tax year, 2/001321 for the 2010 tax year, 2/001322 for the 2011 tax year and 2/001323 for the 2012 tax year issued by the Commissioner on 23 October 2014 are hereby confirmed.
3. Each party shall bear its own costs.

Gill Godlonton and Gerrans, the appellant's legal practitioners