DELTA BEVERAGES (PVT) LTD
versus
ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 13 June 2023

Date of judgment: 25 October 2023

Opposed application

M. Tshuma, for the applicant
S. Bhebhe, for the respondent

MAFUSIRE J

[1] The applicant seeks a declaration of invalidity in respect of additional income tax assessments for the tax years ended 2019 and 2020. It also seeks another declaration of invalidity of the additional value added tax [VAT] assessments issued against it by the respondent for the period March 2019 to October 2021. It claims costs of suit on an attorney and client scale against the respondent.

[2] The applicant is an integrated manufacturer, seller and distributor of a wide range of products, including alcoholic and non-alcoholic beverages. It is a registered taxpayer. It earns revenue in both local and foreign currency, principally United States dollars [USD]. Likewise, its expenditure is incurred in both local and foreign currency. The respondent is a central collector of revenue for Government through the various pieces of the tax legislation, principally the Income Tax Act [*Chapter 23:06*] and the Value Added Tax Act [*Chapter 23:12*] ("the VAT Act"). The system of taxation involves the compilation by the taxpayers of self-assessments of their tax liabilities and the submission of tax returns to the respondent in respect of any year of assessment. The respondent can adjust these assessments for any anomalies it may pick during its own audit processes.

[3] The matter before the court is largely one of law, more precisely, the interpretation of the relevant provisions of the tax statutes, the facts being largely common cause and useful only as background material. These facts are as follows. Following a tax audit on the applicant's tax affairs for the period 1 January 2019 to 31 October 2021, the respondent concluded that the applicant had improperly computed its income tax in the sense that despite having received foreign currency for some of its sales in the relevant period, it had neglected or omitted to remit its income tax in respect thereon in foreign currency, but had purported to pay it all off in the local currency. The respondent further concluded that the applicant had improperly deducted certain expenses from its taxable income.

[4] Perceiving the applicant's conduct to be a violation of the tax statutes, the respondent disallowed the expenses which it considered to have been improperly deducted. Further, it proceeded to re-compute the applicant's tax liability and issued it with amended tax returns, apportioning the tax payable by the applicant in the proportion of the ratio of its turnover in foreign currency to local currency. In effect, it required the applicant to pay its taxes in foreign currency in respect of the applicant's revenue received in foreign currency, and in local currency in respect of the revenue received in local currency.

[5] The respondent conducted a similar audit and a re-assessment of the applicant's VAT obligation. It concluded that the applicant had paid its foreign currency component of the VAT all in the local currency, contrary to law. Furthermore, the respondent considered that the applicant had not properly completed the VAT returns in that it had left out a whole section altogether. This is the section that separates the foreign currency input and output taxes from the local currency input and output taxes. Generally, and in very simple terms, output tax is the tax charged and received by a registered operator for subsequent transmission to the respondent. Input tax is the tax that the operator pays on imports. Input tax is deducted from the output tax and the balance is what is remitted to the respondent.

[6] In its amended notices of assessment, the respondent required that the foreign currency input and output taxes be separated from the local currency input and output taxes so that there would be no cross-currency deductions. In other words, the respondent required that only foreign currency input tax be deductible from the foreign currency output tax and

similarly, that only local currency input tax be deductible from the local currency output tax. According to it, that is the correct interpretation of the relevant tax provisions.

[7] The applicant objected to the respondent's re-assessments on multiple grounds. The case was argued on several fronts. Severely truncated, the case before the court crystallized into five areas as laid out below. I proceed to deal with each one of them in turn, summarizing the arguments for and against, and immediately afterwards pronouncing my decision on each.

i/ *Assessments invalid*

[8] As a preliminary point, the applicant argues that the amended assessments by the respondent are invalid in that they refer to 'gross tax' when such term or concept is alien to the tax statutes. It further argues that the amended assessments by the respondent did not compute the applicant's taxable income and that as such, they are invalid for want of compliance with the requirements of a valid tax assessment as previously pronounced upon by the courts.

[9] The respondent's counter argument is that 'gross tax' is an administrative term used by it in the computation of the tax payable to denote an amount of the taxable income that will still be subject to some further consideration before finally arriving at the net tax amount due by a taxpayer. The respondent argues further that the use of this term is harmless and that the amended tax returns computed by it had all the requirements of an assessment as prescribed by law. It maintains that it did properly compute the applicant's correct taxable income for the years in question and that nothing done by it violated the law.

[10] My judgment is this. The term 'assessment' in s 2 of the Income Tax Act at the relevant time before the amendment in 2022[1] was defined to mean the determination of taxable income and of the credits to which a person is entitled, or the determination of an assessed loss ranking for deduction. A self-assessment was included in the definition.

[11] Section 51(2) of the Income Tax Act provides that a notice of assessment and of the amount of tax payable, where it is payable, shall be given to the taxpayer. Part of the *ratio*

[1] By the Finance [No 8] Act of 2022

decidendi of cases such as *Barclays Bank of Zimbabwe Ltd v ZRA* 2004 (2) ZLR 151 (H) and *Nestle Zimbabwe (Pvt) Ltd v ZRA* SC 148-21 SC 148-21 which the applicant strongly relies on, was that an assessment issued to a taxpayer must comply with the requirements of s 2 and s 51(2) of the Act. Such an assessment must always show the taxable income or credits to which the taxpayer is entitled. It must show any assessed loss ranking for deductions. It must give the taxpayer a notice that any objection to the assessment shall be lodged with the Commissioner of the respondent within the prescribed 30-day time frame. A document which does not comply with these requirements is not an assessment.

[12] In regards to VAT in terms of the VAT Act, where it makes an assessment in terms of s 31, the respondent is obliged to give the person liable for the tax a written notice of such assessment stating the amount upon which tax is payable, the amount of tax payable, the amount of any additional tax payable, if any, and the tax period. These are the specific requirements of s 31(5) of that Act. The wording is plain.

[13] The applicant's challenge that the respondent's amended assessments are invalid hinges on the allegation that by making reference to an alien concept called 'gross tax' the respondent computed an amount of tax alien to law and thereby lost sight of the fact that what it was obliged by statute to compute was the taxable income of the applicant. The argument is that those assessments do not show the applicant's taxable income. However, this argument cannot succeed. If an assessment for income tax contains the requirements of s 2 as it was then worded, as read with s 51(2) of the Income Tax Act, and for VAT the requirement of s 31(5) of the VAT Act, then they cannot be set aside merely because they contained some term of description which may not be provided for in those Acts. As long as those assessments contained the minimum requirements of the Acts, they cannot be held invalid merely because of the use of the term 'gross tax'.

[14] The respondent explains that 'gross tax' was an administrative reference to a provisional amount arrived at in the computation process from which statutory deductions would eventually be made. This makes sense. The term 'gross tax' as used by the respondent in its assessments was simply a reference to some provisional figure obtained during the computation process, which would still be subjected to further consideration. The applicant has shown no prejudice as might have been suffered by it, or any violation of its rights as

might have been occasioned by the respondent's use of the term 'gross tax'. This objection is fanciful. It is hereby dismissed.

ii/ *Respondent obliged to accept all taxes in RTGS as the sole legal tender*

[15] In the main, the applicant's ground of objection, severely truncated, was that the respondent's refusal to accept the payment of all the applicant's taxes in the local currency is unlawful because the new Zimbabwe currency has, by statute, been made the sole legal tender. As such, the discharge of tax obligations using the medium of exchange which is the sole legal tender should be regarded as good payment. The respondent is obliged to accept. The respondent has completely misconstrued the *non-obstante* clauses of s 4A of the Finance Act [*Chapter 23:04*] and s 38(4) of the Income Tax Act to improperly require that tax on foreign currency receipts be paid in foreign currency. Should it be found that there exists a conflict between s 4A of the Finance Act, as read with s 38(4) of the Income Tax Act and the subsequent Finance [No 2] Act of 2019 which introduced the new Zimbabwean currency and made it the sole legal tender, then the latter legislation must take precedence and prevail over the older provisions, an approach allegedly in line with the rules of statutory interpretation.

[16] The respondent's counter argument is that the applicant has manifestly misunderstood and misconceived the relevant provisions of the law because the payment of taxes in foreign currency on income received in foreign currency is one of the exceptions to the concept of sole legal tender introduced by s 23 of the Finance [No 2] Act of 2019. It argues that the legislation, properly construed, requires that tax on receipts in foreign currency be paid in foreign currency.

[17] For this particular point, the relevant provisions of the legislation and the parties' intrinsic arguments are these. By s 44C of the Reserve Bank of Zimbabwe Act [*Chapter 22:15*], an amendment introduced in 2019[2], the Reserve Bank of Zimbabwe ("the RBZ") was empowered to issue an electronic currency in Zimbabwe, but only after the Minister [of Finance] had, through a statutory instrument, given such electronic currency a name. As a

[2] By s 2 of the Finance [No 2] Act, No 7 of 2019 following the publication of SI 33 of 2019 [Presidential Powers (Temporary Measures) (Amendment of Reserve Bank of Zimbabwe Act and Issue of Real Time Gross Settlement Electronic Dollars) (RTGS Dollars) Regulations, 2019].

matter of historical fact, the Minister, by SI 33 of 2019[3], gave the electronic currency a name. He called it the Real Time Gross Settlement dollar, or RTGS. It would be legal tender in Zimbabwe at par with the USD at a rate of one-to-one. Its effective date was 22 February 2019. From 24 June 2019 that new currency was made the sole legal tender in Zimbabwe. By s 23(1) of the Finance (No. 2) Act, No. 7 of 2019, itself an amendment introduced via SI 142 of 2009[4] the use of foreign currencies, including the USD, was outlawed as legal tender in Zimbabwe. The RTGS was made the sole legal tender.

[18] By s 41 of the RBZ Act, the old banknotes and coins which have not been demonetized are legal tender in Zimbabwe. Historically, these banknotes and coins had been introduced by the RBZ in 2016, through SI 133 of 2016,[5] signalling the return of the local currency after it had been demonetized in 2015, through SI 70 of 2015,[6] to usher in a multi-currency dispensation. The applicant says it is aware of the provisions of s 4A(1)(c) of the Finance Act, particularly the *non-obstante* provision in relation to s 41 of the RBZ Act. This provision reads:

> "Notwithstanding section 41 of the Reserve Bank of Zimbabwe Act [*Chapter 22: 15*] and the Exchange Control Act [*Chapter 22:05*]—
>
> (a) … …
>
> (b) … …
>
> (c) a company, trust, pension fund or other juristic person whose taxable income is earned, received or accrued in whole or in part in a foreign currency shall pay tax in the same or another specified foreign currency on so much of that income as is earned, received or accrued in that currency;"

[19] The applicant further says that it is also aware of the provisions of s 38(4) of the VAT Act which also have a *non-obstante* clause, also in relation to s 41 of the RBZ Act before an amendment in 2022[7] to extend that *non-obstante* clause to include s 44C of the RBZ Act. At the relevant time, s 38(4) read as follows:

[3] *Ibid*
[4] Reserve Bank of Zimbabwe (Legal Tender) Regulations, 2019.
[5] Presidential Powers (Temporary Measures) (Amendment of Reserve Bank of Zimbabwe Act and Issue of Bond Notes) Regulations, 2016.
[6] Reserve Bank of Zimbabwe (Demonetisation of Notes and Coins) Notice, 2015, SI 70 of 2015.
[7] By the aforesaid Finance (No 8) Act of 2022.

> "4. Notwithstanding section 41 of the Reserve Bank of Zimbabwe Act [*Chapter 22: 15*] and the Exchange Control Act [*Chapter 22:05*] where a registered operator—
>
> (a) receives payment of any amount of tax in foreign currency in respect of the supply of goods or services, that operator shall pay that amount to the Commissioner in foreign currency;
>
> (b) imports or is deemed … … to have imported goods into Zimbabwe, that operator shall pay any tax thereon to the Commissioner in foreign currency."

[20] Both parties agree that a *non-obstante* clause in a statutory provision overrides the other provisions it refers to. The point of departure between them is that, according to the applicant, the *non-obstante* clauses of s 4A(1)(c) of the Finance Act and s 38(4) of the VAT Act, before the amendment, both refer to s 41 of the RBZ Act, and exclude s 44C of that Act. The applicant's intrinsic argument in this regard is that the overriding effect of these *non-obstante* clauses should be restricted to the old bondnotes and coins to which s 41 of the RBZ Act refers, and should never be extended to the new RTGS currency to which s 44C of that Act refers. The applicant adds that both s 4A(1)(c) of the Finance Act and s 38(4) of the VAT Act predate s 44C of the RBZ Act which made the new RTGS currency the sole legal tender in Zimbabwe and which must now be accepted if offered in payment.

[21] The respondent's core argument on the point is that the applicant is manifestly mistaken to think that it was s 44C of the RBZ Act that introduced the new RTGS currency. It says that this provision merely empowers the central bank to do so. As such, s 44C would not be relevant to any consideration whether or not any tax is payable in foreign currency.

[22] I find the applicant's approach rather flawed. Its argument is fragmented and selective. In regards to the *non-obstante* clauses of s 4A of the Finance Act and s 38(4) of the VAT Act, I find the distinction the applicant seeks to draw rather artificial in suggesting that the sole legal tender concept applies only in relation to the old bondnotes and coins issued by RBZ, but not to the electronic currency introduced by the RBZ following the insertion of s 44C into the RBZ Act. The scheme of the RBZ Act in Part VI is this. By s 40 the RBZ is empowered to issue banknotes. By s 41 these banknotes, if not demonetized, are legal tender. By s 43 the bank is empowered to issue coins which are legal tender if not demonetized. By s 44B both the bondnotes and coins are legal tender. By s 44A the Minister is empowered to make any foreign currency legal tender in Zimbabwe. By s 44C the bank can issue an electronic currency as legal tender in Zimbabwe.

[23] The banknotes, the bondnotes and the bondcoins have not as yet been demonetized. They are as much legal tender in Zimbabwe as the RTGS currency. In terms of s 44B(2) of the RBZ Act, the Minister can prescribe that the bondnotes and coins are exchangeable at par value with any specified currency other than the Zimbabwean currency. The RBZ Act makes no such distinction as the applicant seeks to make between the raft of what constitutes the local currency of Zimbabwe comprising the banknotes, the bondnotes and coins, on the one hand, and the electronic RTGS currency, on the other. They are all legal tender.

[24] The applicant's purported differentiation is on the basis of the dates of issue of the currencies. Yet SI 142 of 2019 that introduced the sole legal tender concept did not single out the electronic currency. It simply referred to the "*Zimbabwe dollar*". The heading to s 2 reads: "*Zimbabwe dollar to be the sole currency for legal tender purposes*." In the operative part of that provision, the currencies of the specified countries, including Britain and the United States, are outlawed and would not be legal tender in Zimbabwe "… *alongside the Zimbabwe dollar in any transactions* …" Plainly, the reference to the "Zimbabwean dollar" was a reference to the banknotes, the bondnotes and coins and the electronic currency, without distinction.

[25] The applicant's argument is ill-conceived in another respect. As pointed out above, the sole legal tender concept in relation to the Zimbabwe dollar was introduced by SI 142 of 2019 whose provisions were subsequently incorporated in the Finance [No 2] Act of 2019. This instrument, despite making the Zimbabwe dollar the sole legal tender, made exceptions in certain regards. Examples of those exceptions were the operation of Nostro accounts, the payment of customs duty and the payment of VAT on imports.

[26] Further exceptions to the sole legal tender concept were subsequently introduced in September 2019 when SI 212 of 2019[8] was promulgated. By this instrument, all domestic transactions would be payable in Zimbabwean dollars. But certain categories were excluded from the meaning of domestic transactions. They included the payment of carbon tax for foreign registered vehicles, third party insurance payments for foreign registered vehicles, payments to local insurance companies for bond guarantees or bonds for designated goods, payments of duty at ports of entry by individuals opting to pay in foreign currency, and so on.

[8] Exchange Control (Exclusive Use of Zimbabwe Dollar for Domestic Transactions) Regulations, 2019.

The applicant argues that the exclusion of taxes in SI 212 of 2019 means that the legislator intended that it is only in respect of those listed transactions that the sole legal tender concept would not apply.

[27] But all relevant legislation has to be considered together to arrive at the true intention of the legislature. Plainly, it is the intention of the legislature that companies whose income comprise a component in foreign currency should pay tax in foreign currency on any such foreign currency component. The applicant ignores the omnibus provision of s 4 of SI 212 of 2019 which extended the list of transactions exempted from the meaning of domestic transactions. It reads:

> "4. The following transactions are not within the scope of the definition of 'domestic transaction' in subsection (1) for the purposes of these regulations—
>
> (a) … …
>
> (b) … …
>
> (c) … …
>
> (d) … …
>
> (e) transactions in respect of which any other law expressly mandates or allows for payment to be made in any or a specified foreign currency."

[28] Undoubtedly, the '*any other law*' which expressly mandates or allows '*for payment to be made in any or a specified foreign currency*' is s 4A of the Finance Act and s 38(4) of the VAT Act. The absurdity of the applicant's position becomes clearer with regards to VAT on receipts in foreign currency. What it would mean, if its argument were to prevail, would be that it would have the liberty to unilaterally convert the foreign currency VAT income from its customers into local currency at some unspecified rate of exchange before remitting to the respondent. That is untenable. In fact, this court has since settled the position. In *Prosperous Days Investment v ZRA* HH 24-21 it was held that where any output value added tax is received in foreign currency it should be paid in foreign currency.

[29] The conflict of statutes alleged by the applicant that one set requires payment of taxes on receipts in foreign currency and another prescribes the payment of all taxes only in the local currency as the sole legal tender does not exist. As shown above, it is only a

misconception that there may be such a conflict. The applicant's objection under this head has no merit.

iii/ *No jurisdictional facts present to issue assessments*

[30] The next ground of objection by the applicant, again summarized, was that before the respondent issued the assessments in contention, no jurisdictional facts existed for it to do so. The applicant explains 'jurisdictional facts' as preconditions prescribed by law that must be satisfied before the respondent could have taken the administrative steps that it did. The applicant argues that unless there was an amount either of gross income or allowable deductions that ought to have been considered by the applicant in its self-assessments but had not, then the necessary jurisdictional factors to trigger the action taken by the respondent were absent. As such, such action was invalid and should therefore be set aside.

[31] The respondent's counter argument is that the jurisdictional facts warranting the action that it took were present because by law what prompts it to issue an additional tax assessment to a taxpayer are findings by it during the audit process that, among other things, some taxable income was not subjected to tax, or that in determining an alleged loss by a taxpayer there was some income which ought to have been taken into account that was not, or a deduction which was made that was not, or that there was credit that was granted but which ought not to have been granted. It is argued that all these factors and more were present in the present situation.

[32] Plainly, and as per the applicant's own explanation, the 'jurisdictional facts' existed before the respondent issued the amended assessments. With regards to income tax, and in terms of s 47 of the Income Tax Act, what triggers the additional assessments, is <u>the consideration</u> by the respondent's Commissioner that an amount of taxable income which should have been charged to tax was not charged to tax, or that an amount which should have been taken into account in the determination of an assessed loss was not, or that an amount was incorrectly allowed as a deduction. If the Commissioner comes to such conclusion, the respondent is obliged to adjust the assessment.

[33] The respondent has explained that what prompted scrutiny of the applicant's self-assessments for 2019 and 2020 was the computation of all taxes in the local currency when,

as a matter of fact, part of its income for the tax years in question had been received in foreign currency. Furthermore, for the year 2020, the applicant had improperly made some deductions to the taxable income. The respondent pointed them out to the applicant. The applicant reacted by correcting its assessments. But these are enough 'jurisdictional facts'.

[34] Regarding VAT, s 31(3) of the VAT Act, in paraphrase, provides in part that where the Commissioner is not satisfied with any return or declaration furnished by a taxpayer, or where he [or she] has reason to believe that any person has become liable for the payment of any amount of tax but has not paid it, the Commissioner may make an assessment of the amount of tax payable by that person who shall have to pay it. Furthermore, in terms of s 28(1) of the Act, every registered operator is required to submit returns <u>in the prescribed form</u>, reflecting such information as may be required for the purpose of the calculation of tax.

[35] The respondent has explained that the applicant did not submit the VAT returns in the prescribed form. The prescribed form has Part I to IV for the calculation of VAT in the local currency, and Part V for the calculation of VAT in foreign currency. The applicant did not complete Part V. Thus the necessary information required for the calculation of VAT in foreign currency was missing. None of all this has been refuted by the applicant. Yet these are the relevant 'jurisdictional facts' necessary to trigger the amended assessments by the respondent. The applicant's objection under this head equally has no merit.

iv/ *Refusal to deduct local currency input tax from foreign currency output tax*

[36] The next objection by the applicant, again much distilled, was that the respondent's insistence that the applicant could not deduct the input tax paid by it in local currency from the output tax received by it in foreign currency in effect violated the applicant's right to deduct input tax from output tax as enshrined in s 15(3) of the VAT Act which provision sets out the formula for the calculation of VAT as being output tax less input tax. The applicant further argues that none of the provisions of the tax statutes gives the respondent the power to deal with the input and output taxes disjunctively and to deny a taxpayer's right to cross-currency deductions in situations where input tax is paid in local currency and the output tax is received in foreign currency.

[37] Still on the respondent's treatment of foreign currency input and output taxes separately from the local currency ones, and the respondent's insistence that taxes on receipts in foreign currency should be paid in foreign currency, the applicant has condemned the respondent's Public Notice No 26 of 2019 which set out the manner of computation of such taxes as an unlawful and irrational attempt by the respondent to legislate to cover up for a possible lacuna in the law.

[38] In response, the respondent insists on the separation of deductions of input taxes from output taxes according to currencies and argues that the law does not permit that local currency input tax be deducted from foreign currency output tax as the applicant had done. The respondent denies that its Public Notice No 26 of 2019 was an attempt by it to bridge some gap in the law and avers that the document was released for advice and information purposes to assist taxpayers whose receipts from trade are in both local and foreign currencies.

[39] My decision is this. In terms of s 6 of the VAT Act, VAT, referred to simply as 'a tax', is payable on, among other things, the supply by any registered operator of goods or services, and the importation of any goods into Zimbabwe by any person. The rates are fixed in terms of the Finance Act. In terms of s 15 of the VAT Act, the amount of VAT payable is arrived at by deducting from the output tax, the amount of, among other things, input tax. Section 38(9) of the Act declares that for the avoidance of doubt, all the provisions of the Act shall apply with such changes as may be necessary to the payment of tax in foreign currency in the same way as they apply to the payment of tax in the Zimbabwean currency.

[40] The question whether local currency input tax can be deducted from foreign currency output tax has since been settled by this court. In *Inamo Investments (Pvt) Ltd v ZRA* HH 672-22 the court was moved to issue a declaratory order to the effect that a taxpayer is entitled to set off the local currency input tax against the foreign currency output tax. This was rejected. On page 3 of the cyclostyled judgment, the court stated:

> "Significantly, there is no provision which entitles a registered operator to convert to foreign currency deductions of input tax denominated in the local currency from output tax which is denominated in foreign currency. In other words, the applicant's case is that because there is no provision which explicitly prohibits that conversion then it is entitled to offset the input tax

> paid in the local currency against output tax denominated in the United States dollar. This is a classic case of seeking relief based upon a non-existent cause of action. … …
>
> The effect of the relief that is being sought by the applicant is that the applicant would be paying output tax in local currency where it would have received same in foreign currency. This defeats the purpose of s 38(4) of the Act."

[41] The applicant argues that *Inamo Investments (Pvt) Ltd* was wrongly decided for the reason that the argument it is presenting in the present case was not brought up in that case and that as such, the court could not have applied its mind properly to the issue of the right of a taxpayer to deduct local currency input tax from foreign currency output tax. The applicant, in its heads of argument, then delves into some tortuous but largely irrelevant excursion about consumption taxes, cascading taxes and what triggers refunds on taxes. The argument is irrelevant and misplaced because on a proper construction of the relevant provisions of the VAT Act above, especially s 38(4) and (9), it is plain that the legislature has not sanctioned a cross-currency deduction of input tax from output tax. The applicant's argument under this head cannot succeed. The respondent's Public Notice No 26 of 2019 was merely advisory on the state of the law and not legislative.

v/ *Respondent not entitled to levy penalties in foreign currency*

[42] The respondent's amended assessments of the applicant's foreign currency tax liabilities carried some penalties expressed as a percentage of the tax due. The applicant has objected to them on the basis that penalties are not recoverable in foreign currency as there is no such obligation in law. It is argued that in terms of the tax legislation, tax is payable on taxable income 'earned, received or accrued', that as a matter of fact, penalties are not levied on any income 'earned, received or accrued' and that therefore, there is no basis for charging civil penalties on tax in foreign currency.

[43] In response, the respondent argues that a penalty is a tax. It is treated in the same way as any tax. Therefore, a penalty on any outstanding foreign currency tax is payable in foreign currency and a penalty on any outstanding local currency tax is payable in local currency.

[44] In my judgment, the answer lies in s 4A of the Finance Act aforesaid. It provides for the payment of certain taxes in foreign currency. In a nutshell, a company, trust or other juristic person is obliged to pay tax in the currency in which the income is earned, received or

accrued. Of course, a penalty levied by the respondent on a taxpayer on failure to pay a tax is not, in ordinary parlance, an income 'earned, received or accrued'. But in terms of the tax legislation, a penalty is a tax. Section 46 of the Income Tax Act provides for additional tax in the event of a default or omission by a taxpayer in an amount equal to the tax chargeable. In terms of ss (1)(a)(i) additional tax is payable if the taxpayer makes default in rendering a return. In terms of ss (1)(b) it is payable in the event of an omission from a return of any amount which ought to have been included. In respect paras (c), (d), (e) and (f) it is payable in respect of any incorrect statement on a return, any failure to disclose required information on a return, the making of a statement resulting in the granting of greater credit than would be warranted and the failure to disclose prescribed particulars, respectively.

[45] Significantly, the Income Tax Act uses the term 'additional tax' and not 'penalty'. Section 2 defines 'tax' as any tax or levy leviable under the Act. Admittedly, s 39 of the VAT Act provides that a person who is liable for the payment of tax but fails to do so as prescribed, he (or she or it) shall be liable, in addition to such amount of tax, to pay a <u>penalty</u> of an amount equal to the said amount of tax. Furthermore, Counsel for the applicant has drawn attention to the *dicta* in *Commissioner for Inland Revenue v McNeil* 1959 (1) SA 481 (A), in relation to the word 'penalty' in a tax legislation. The *dicta* was this:

> "But when its true nature is examined it becomes difficult to regard it as a form of tax on income. It is not a part of the taxpayer's 'receipts or accruals', taken by the State in order to meet the expenses of government. It is 'in essence a penalty' … …; it is there to ensure, if possible, that returns shall be honest and accurate."

[46] However, none of what the applicant says changes the character of the levy or penalty from being anything but a tax. It is manifestly the intention of the legislature that penalties or additional taxes levied on tax payable in foreign currency are also payable in foreign currency. Section 4A(7) of the Finance Act, in paraphrase, declares that for the avoidance of doubt the provisions of the Taxes Act shall apply, with such necessary changes as may be necessary, to the payment in foreign currency of the taxes in the same way as they apply to the payment of such taxes in Zimbabwean currency.

[47] The South African case of *McNeil* above is not relevant because, firstly, the language of the tax legislation that the court was considering in that case was subtly different from the language of the tax legislation presently under consideration. In regards to the additional tax

payable for a default, the legislation in that case simply referred to "… an amount equal to …", whereas our legislation specifically refers to "… an amount ***of tax*** equal to …" Undoubtedly, this is to stress the fact that the additional tax is a tax. Secondly, Counsel is guilty of selective quoting. The court in that judgment started from the premise of accepting that additional tax is a tax, albeit of an unusual kind. Thirdly, the focus of the court in that case was completely different from the focus in the present case. The focus in the present case is whether penalties on default of a tax chargeable in foreign currency are also chargeable in foreign currency or local currency. In that case the focus was the examination of whether or not a penalty is a tax. Our legislature deems a penalty on an outstanding tax as a tax, admittedly, of an unusual kind.

[48] All the objections by the applicant to the additional assessments by the respondent in respect of the tax years in question lack merit. The application is hereby dismissed with costs.

25 October 2023

Gill, Godlonton & Gerrans, applicant's legal practitioners
ZIMRA Legal Services Division, respondent's legal practitioners