

JK MOTORS (PRIVATE) LIMITED
versus
ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
DUBE JP
HARARE, 16 June & 28 October 2022

Ruling on Preliminary Points

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

DUBE JP:

Introduction

1. This case concerns the validity of tax assessments.
2. The applicant is a company registered in accordance with the laws of Zimbabwe. The respondent is the Zimbabwe Revenue Authority [ZIMRA], a statutory body established in terms of s 3 of the Revenue Authority Act [*Chapter 23:11*], tasked with the administration and collection of revenues due in terms of various taxing statutes including the Income Tax Act [*Chapter 23:06*], [the Act]. The applicant approached the court on an urgent basis seeking an order on the following terms:

“FINAL ORDER SOUGHT

That you show cause why an order should not be made as follows:

The provisional order be and is hereby confirmed.

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

INTERIM RELIEF SOUGHT

Pending final determination by this honourable court on the validity of the assessments under reference numbers 1225192 and 1225193, the respondent be and is hereby interdicted from instituting any and all collection measures under the aforesaid assessments.”

3. The relevant facts for the determination of this ruling are as follows: The respondent made tax assessments for payment of tax concerning the applicant. The applicant lodged

objections to the assessments in terms of s62 (1) (a) of the Act. A determination of the objections was made by the Commissioner of Taxes and were turned down. Following this, the applicant brought an urgent chamber application to stop collection measures by the respondent by way of garnishee orders. The application was deemed not urgent, removed from the roll and re-enrolled as an ordinary application for determination of the final order in terms of the rules. It is this application that has been placed before me for determination.

4. According to the applicant, the impugned assessments are not correct and proper tax assessments in that, the assessments did not reflect the taxable income for which the assessments were made. In addition, it averred that it is unlawful for the respondent to issue out an assessment just for penalties, making the assessments unlawful and invalid. It contended that because the assessments are not valid, there cannot be a valid objection or appeal. It seeks an order declaring the assessments invalid and that they be set aside.
5. At the hearing of this application, the respondent took two points *in limine*. Its position is that the applicant cannot apply to this court to set aside a tax assessment. It submitted that the consequential relief sought has the effect of setting aside the assessments of the respondent and that this is incompetent as it is not permissible in terms of the Act. It submitted that if the assessments are set aside, this would enable the applicant to circumvent the statutory procedure for the resolution of tax disputes contrary to s 62 (1) (a) of the Act which lays out the procedure which the applicant ought to have followed once aggrieved by the assessments. It contended that the relief sought is consequential in nature and that the applicant cannot seek an implied declaratur as there is no declaratur sought by the applicant.
6. The second point is related to exhaustion of domestic remedies. It submitted that if the applicant is aggrieved by the determination of its objections by the Commissioner, it ought to have appealed it in terms of s 65(1) of the Act to the Special Court of Income Tax Appeals, the Special Court. It submitted that if the suggestion is that the assessments are unlawful, then s62 (1) (a) comes in as the section refers to ‘any assessment’ and does not say what the reason for the aggrievement should be. It maintained that having lodged its objections with the Commissioner and obtained a determination, the applicant ought to have appealed against the determination to the Special Court or the High Court in terms of s65 (1) of the Act. It contended that the applicant failed to exhaust domestic remedies available to it in terms of the law and urged the court to decline to deal with this application.

7. In response, the applicant maintained that it has made an application for a declaratur and that it has an entitlement to seek a declaratur and consequential relief. Essentially what the court is being asked to resolve is whether the application is properly before the court.

How is an assessment challenged?

8. The Act provides two ways in which an assessment may be challenged. A taxpayer who is aggrieved by an assessment may lodge an “objection” with the Commissioner of Taxes against the assessment in terms of s 62(1) (a) or file an appeal in terms of s 65(1) of the Act. Section 62(1) (a) of the Act stipulates as follows:

“Time and manner of lodging objections

(1) Any taxpayer who is aggrieved by-

- (a) any assessment made upon him under this Act; or
- (b) any decision of the Commissioner mentioned in the Eleventh Schedule; or
- (c) the determination of a reduction of tax in terms of section ninety-two, ninety-three, ninety-four, ninety-five or ninety-six; may, unless it is otherwise provided in this Act, object to such assessment, decision or determination within thirty days after the date of the notice of assessment or of the written notification of the decision or determination in the manner and under the terms prescribed by this Act.”

9. The first step that a taxpayer who is aggrieved by “any assessment” of the tax authority is entitled to take in terms of the Act is to lodge an objection against the assessment. An objection is an internal review mechanism for resolving disputes between the taxpayer and taxing authority. Section 62 (1) (a) does not stipulate the possible reasons for the aggrievement. Section 62 (1) (a) of the Act deals with challenges done by way of objection to assessments which the taxpayer considers to be valid and not assessments which the taxpayer challenges on the basis that they are invalid or unlawful.
10. Whilst s62 (1) (a) does not stipulate what the reasons for the aggrievement should be, for a taxpayer to lodge an objection, the assessment impugned must be valid. An assessment should be done in accordance with the law. The use of the word “any assessment” in s62 (1) (a) implies that there must be an assessment and a valid one made by the respondent before any challenge can be raised by way of an objection. The courts have already pronounced that an assessment must be issued in terms of the law and that where it is a nullity, it cannot create any obligation to pay tax, its existence being paramount before it can be challenged by way of objection or appeal, see the *Nestle v ZIMRA* SC 148-21; *TL v ZIMRA* HH 413-20, *Barclays Bank of Zimbabwe v ZIMRA* HH 2004 (2) ZLR 151 (H).

11. A taxpayer is entitled to file an appeal after his objection has been filed, determined and turned down by the Commissioner and may do so in terms of s 65(1) of the Act which stipulates as follows:

“65 Appeals from decision of Commissioner to High Court or Special Court
(1) Any taxpayer entitled to object and who is dissatisfied with the decision or deemed decision of the Commissioner in terms of subsection (4) of section sixty-two, may, in accordance with the rules set out in the Twelfth Schedule, appeal therefrom either—
(a) to the High Court; or
(b) to the Special Court.”

Whether a taxpayer has an entitlement to lodge an objection or appeal to the Special Court depends on the nature of the grievance of the taxpayer. Nonetheless, an appeal can only be lodged where there is a valid assessment, see *Nestle Zimbabwe v ZIMRA* SC 148-21.

Exhaustion of domestic remedies.

A litigant must exhaust domestic remedies available to it, see *Girjac Services Pvt Ltd v Mudzingwa 1999 (1) ZLR 88(H)* where the court remarked thus:

“In *Tutani v Minister of Labour and Ors 1987 (2) ZLR 88 (H) MTAMBANENGWE J* at 95D observed that where domestic remedies are capable of providing effective redress in respect of the complaint and, secondly, where the unlawfulness alleged has not been undermined by the domestic remedies themselves, a litigant should exhaust his domestic remedies before approaching the courts unless there are good reasons for not doing so. The same approach was applied by SMITH J in *Musandu v Chairperson Cresta Lodge Disciplinary and Grievance Committee* HH-115-94 (not reported); and was referred to with approval by MALABA J in *Moyo v Forestry Commission 1996 (1) ZLR 173 (H)* at 191D-192B. I respectfully endorse it.”

12. Pertinent to this discussion is *Qingsham Investments (Pvt) Ltd v ZIMRA* HH 207 /17, where the court said the following of the duty to exhaust domestic remedies in tax cases:

“The applicant is obliged to exhaust domestic remedies by seeing the appeal process through, the Commissioner General is currently seized with the matter and has not given a substantive decision as to the misclassification of the goods, their alleged miscalculation of duty, and the propriety of the embargo and seizure. The need to exhaust domestic remedies was set out in the case of *Girjac Services Private Limited v Mudzingwa*.”

13. The duty to exhaust domestic remedies compels a person challenging the conduct of an administrative body to pursue first the available judicial or administrative procedures available to him to their final conclusion before he resorts to other mechanisms of resolving the dispute. This general requirement has exceptions. There must be good reason why a litigant cannot exhaust the domestic remedies available to him. A litigant is not expected or required to pursue domestic remedies where the domestic remedies available are

incapable of affording effective redress, are unfair, cause undue delay. He cannot be expected to exhaust domestic remedies where no remedy exists in terms of the legal framework available. The duty to exhaust domestic remedies applies equally to tax cases. It is only in cases where a dispute is capable of resolution by way of an objection and appeal that the taxpayer is required to exhaust the domestic remedies prescribed in the Act. Where a court is not satisfied that a litigant has exhausted internal remedies available to him, it may decline to adjudicate the matter.

Procedure where an assessment is impugned on the basis that there is no valid assessment

14. The Act does not make provision for an interlocutory application relating to an objection or appeal or make specific provision for a challenge to validity of an assessment. In the case of a challenge to the validity of an assessment, it is legally accepted that the remedy of an objection and appeal may not be the appropriate course to follow, entitling the taxpayer an election to challenge the assessment by way of a declaratur.
15. The courts have already pronounced that where a taxpayer cites that there is no valid assessment or that an assessment is unlawful and invalid, a tax payer's recourse lies with the High Court for a declaration of the law. In *Nestle Zimbabwe (Pvt) Ltd v ZIMRA* (supra), the court laid out the requirements of a valid assessment and endorsed remarks made by Mr *Bhebhe* representing the respondent in that matter raising similar considerations as this case as follows:

“Mr Bhebhe started by pointing out that the issues being raised by Mr Mpofu were being raised for the first time in this court. They were not raised in the objection to the commissioner neither were they raised in the court a quo. He however submitted that for a taxpayer to object in terms of s 62 and to appeal in terms of s 65 of the Act there would have to be an assessment. Where there is no assessment, there can be no valid objection or appeal. If the appellant felt that there were no valid assessments, it should have approached the High Court seeking a declaratur to that effect”

Although Mr *Bhebhe* now seeks to distance himself from these submissions, he aptly summarised the law. The Supreme Court acknowledged his submissions and held that there were no proper assessments for the appeal court to relate to and that there cannot be a valid appeal.

16. Where there is no valid assessment, there can be no valid objection or appeal. In the case of a challenge to the validity of an assessment, it is legally accepted that the remedy of an objection and appeal is not be the appropriate course to follow entitling the taxpayer to elect to challenge the assessment by way of a declaratur.

17. The court's inherent power to make a declaratory order derives from s14 of the High Court Act [*Chapter 7:06*] which confers on the court discretionary power to grant a declaratur. Declaratory relief is a statement of a legal position made by the court at the request of a party to litigation. It is trite that a declaratory order is an order by which a dispute over the existence of some legal right or obligation is resolved. It is used where there is a clear legal dispute or legal uncertainty regarding administrative, executive action or constitutional rights. Declaratory relief is not specifically provided for in the Income Tax Act. This legal position needed not be provided for in the tax legislation as any litigant who desires to have his rights and obligations determined generally has an entitlement to approach the High Court for a declaratur in any area of the law. In terms of s14, an applicant for a declaratur has an entitlement to seek consequential relief
18. In *Barclays Bank*, the validity of an assessment was challenged by way of a declaratur in the High Court and the court held that the application was properly before the court. Clearly therefore, where a taxpayer cites that there is no proper assessment or that an assessment is unlawful and invalid, a tax payer's recourse lies with the High Court for a declaration on its validity. If the applicant's argument that there are no valid assessments is correct, the remedy of an appeal in terms of the Act is incapable of affording effective redress to it. The domestic remedies available in ss 62(1) (a) and 65(1) are incapable of affording redress to a taxpayer who challenges the validity of an assessment.
19. Consequently, ss 62 and 65 of the Act provides a statutory framework and remedies for taxpayers aggrieved by tax assessments but does not extend to invalid assessments. The remedies available are not the only means by which a tax assessment may be challenged. Evidently, the Act does not stipulate what should happen where an assessment is challenged on the basis that an assessment is invalid or unlawful. Accordingly, a tax payer who challenges an assessment on the basis that it is invalid has an alternative avenue and has an entitlement to approach the High Court for a declaratur in terms of s14 of the High Court Act.
20. Notably, a tax payer aggrieved by the conduct of the tax authority in an assessment must first decide whether it considers that there was an assessment. Where it is of the view that there is a valid assessment, it ought to take the objection route. Where it challenges the existence of an assessment or its validity, it has no entitlement to lodge an objection and must approach the High Court for a declaratur from the outset.

Can a taxpayer file a declaratur after an objection has been filed and determined?

21. It is trite that a point of law may be raised at any stage of proceedings. The fact that a taxpayer has objected to an assessment resulting in it being turned down by the Commissioner does not imply the existence of a valid assessment nor is a taxpayer bound to that course. The taxpayer is not barred from seeking a declaratur at the High Court for a determination of the validity of an assessment which is a point of law. In *Nestle* a taxpayer whose objection had been disallowed lodged an appeal with the Special Court. In a further appeal to the Supreme Court, it took a preliminary point challenging the validity of an assessment. The court remarked as follows:

“It is trite and requires no authority that a point of law can be raised at any time provided that there is no prejudice to the other party. Mr Bhebhe did not seriously contest the point. He also did not argue that the respondent would be prejudiced in any way”

22. The court held that there were no proper assessments to relate to in that the assessments were null and void as they were issued contrary to the requirements of the law and cannot create any obligation to pay tax. In addition, the court held that there was no proper appeal before the court. The *Nestle* case makes it clear that even in a case where the taxpayer has lodged an objection and follows the appeal route, if a legal contention questioning the validity of the assessment and whether the assessments create an obligation to pay tax arises, these questions ought to be resolved first. The best course to resolve a challenge to the validity of an assessment is a declaratur. Even if the applicant pursues an appeal as suggested by the respondent, the parties will still end up in a scenario similar to the one in the *Nestle* case. One wants to avoid such pitfalls.

23. The respondent has not refuted that the applicant is raising the correctness and validity of the assessments in this application and that this is a legal issue. The domestic remedies of an objection and appeal available to a taxpayer are incapable of providing effective redress in respect of the complaint raised. The Special Court on an appeal brought in terms of s65 (1) of the Act can only sit and deal with the correctness of the assessment. It cannot resolve the dispute over the validity of the assessments and is not the best course to take in this instance.

24. The facts disclose a glaring need for a declaration regarding the validity of the assessments impugned. The issue raised by the applicant being a point of law can be raised at any stage. This course is permissible for as long as the raising of the challenge does not result in prejudice to the other party. I am not convinced that there is any prejudice that the respondent will suffer as a result of the course taken. This legal challenge cannot be ignored.

It favours the respondent if the challenge can be resolved at this early stage. No useful purpose will be served by insisting on the matter proceeding to the appeal stage where it is very clear that there is a contentious issue. The resolution of this dispute by way of a declaratory application will enable a holistic resolution of the dispute. It is the only effective way of resolving the dispute over the validity of the assessment. Notwithstanding the merits of this application, the applicant has shown an entitlement to bring an application for declaratory relief.

25. The facts of this case are distinguishable from those in *Delta Beverages v ZIMRA* HH 811-16 where after an objection was determined, the taxpayer filed an urgent chamber application seeking to interdict recovery of taxes due pending an appeal it had noted. The taxpayer challenged the legal standing of the respondent to carry out an assessment. The court took issue with what it termed attempts to prevent lawful recovery measures of the tax authority on an urgent basis. The case had nothing to do with challenges to validity of assessments by way of a declaratur or the propriety of an order setting aside an assessment.
26. The declaratory relief sought is accompanied by consequential relief. In its interim relief, the applicant sought a determination on the validity of the assessments. Because this is one of those applications re-enrolled after the application was deemed not urgent, there was no amendment of the papers, the interim relief ought to be read together with the final relief. The pleadings filed are supportive of a declaratory application. The applicant impugned the assessments and sought a determination on the validity of the assessments. Declaratory relief is not constrained by the form in which a declaratory application is brought nor its substantive content. All that an applicant must show is that it is an interested party, has a direct and substantial interest in the subject matter and an interest concerning existing, future or contingent rights. The enquiry into the interest of the applicant is for another day, save to say that there are real legal issues between the parties meriting the filing of a declaratory application.
27. In the event that the court invalidates the assessments, the assessments will have been deemed a nullity resulting in there being no proper assessments to relate to and without legal consequences rendering the need to set them aside nugatory. The respondent has been partly successful albeit for different reasons. I see no reason to apportion costs.

In the result it is ordered as follows:

1. The application is properly before the court.

2. Costs shall be in the cause.

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