LDC LIMITED
versus
ZIMBABWE REVENUE AUTHORITY

FISCAL APPEAL COURT
MAFUSIRE J
HARARE, 22 March 2022

Date of written judgment: 24 August 2022

VAT appeal

E.T. Moyo, for the appellant
C. Malaba, for the respondent

MAFUSIRE J

[a] *Introduction*

[1] This is a determination *de novo*. Since February 2019 the appellant has been fighting against the payment of certain value added taxes levied against it by the respondent for the period 2009 to 2017 ["***the VAT***" or "***the taxes***"]. The appellant alleges that the taxes are not due. The respondent alleges that they are. The first determination over the issue by this court was in July 2020, per MTSHIYA AJ. By judgment no HH 433-20, it was held that the taxes are due. The appellant appealed. By an order of the Supreme Court in March 2021, the appeal succeeded. Judgment no HH 433-20 aforesaid was set aside. The matter was remitted back to this court to be heard *de novo* before a different judge. The Supreme Court issued no written judgment.

[2] After several false starts, I finally heard the matter in March 2022. It was not a trial in the strict sense. The parties agreed that whatever evidence needed to be led, whatever witnesses needed to be called, whatever submissions needed to be made, and so on, were all on record. They agreed to tender the entire record of proceedings in the previous sitting. They filed a statement of agreed facts and closing submissions. Despite my initial misgivings on the propriety of such an approach, I eventually endorsed the parties' agreement.

[b] *Introductory facts*

[3] The brief and introductory facts of this case are these. The appellant is a private company. It owns a certain piece of land in the Lowveld area of Zimbabwe. This is predominantly a sugarcane-growing region. The applicant is wholly owned by another company, TL. The appellant leases the land to TL. TL pays rentals for the lease. The respondent is the central collector of taxes for government. It is established in terms of s 3 of the Revenue Authority Act [*Chapter 23:12*]. In the exercise of its functions, and for the effective collection of taxes, the respondent is reposed with a vast array of powers and overarching authority by the Revenue Authority Act aforesaid and several other pieces of tax legislation. One such piece of tax legislation is the Value Added Tax Act [*Chapter 23:12*] ["***the VAT Act***"]. Among other things, and very broadly, the respondent is empowered to carry out audits on taxpayers to determine their tax compliance. These audits may be carried out even several years after the tax payment due dates. The general prescription period in this regard is six years. The respondent cannot recover tax debts that are six or more years old unless certain circumstances exist. Tax payers are required to register with the respondent for VAT purposes. They must remit to the respondent on due dates all the taxes that they are liable for. The respondent is empowered to compulsorily register defaulting taxpayers and to recover any outstanding VAT from them. Invariably the respondent levies interest and penalties on all overdue or outstanding taxes.

[c] *The main issue for determination*

[4] The facts germane to the issues for determination are predominantly common cause. The point of difference is so subtle that it could easily be overlooked. Indeed, it was overlooked in the first determination by this court. The parties have agreed and advised that this subtle difference was one of the points on appeal. They have further agreed and advised that it was solely for the reason that this subtle difference had not been adjudicated upon by this court in the first instance that the appeal succeeded, resulting in the matter being remitted. The point assumes so much importance to the determination of the present dispute. In very simple prose this point is this: is the piece of land that the appellant leases to TL

'farm land' or merely 'agricultural land'? At first glance, the difference seems innocuous. But the terms 'farm land' and 'agricultural land' have been assigned special and different meanings. The dichotomy boils down to this: if the land in question is farm land, then the appellant is not liable for those taxes. In this regard the appellant will escape paying a princely, $1 370 007-08. But if the land is agricultural land, then the appellant will be liable. In argument, the parties may have strayed to haggle on extraneous issues, or to put emphasis on peripheral matters, or simply to major on minors. However, in their joint pre-trial hearing minute, it was this subtle point that they put forward as the very first issue for determination. It was captured as follows:

> "1.1 Is the land let by the Appellant farm land as defined by section 2 of the Vat Act?"

[5] The object of this judgment is to unpack whether the land in question is farm land or agricultural land. The appellant says it is farm land. The respondent says it is agricultural land. In this regard, the onus to prove that the land is farm land lies on the appellant. This is in accordance with s 15 of the Fiscal Appeal Court Act [*Chapter 23:05*]. It provides that in an appeal like this one, the burden of proof that any amount is exempt from, or not liable to tax, or is subject to any refund, rebate, remission or deduction, lies upon the person claiming that. It is also in accordance with s 37 of the VAT Act. It provides that the burden of proof that, *inter alia*, any supply is exempt from, or not liable to any tax chargeable under the Act, or that any amount of tax chargeable under the Act is subject to, *inter alia*, any deduction, shall be upon the person making such a claim. This provision further prohibits the reversal or alteration of the decision of the respondent's Commissioner on appeal unless the appellant shows that the decision was wrong.

[6] Whether the land in question is farm land or agricultural land is a question of fact, not law. I have to decipher the answer from the record that has been placed before me, the statement of agreed facts and the parties' closing submissions. The record of the previous proceedings contains the transcript of the evidence of a single witness that was called in those proceedings. It is all the *viva voce* evidence that there is on the matter. But more about this later. After unpacking whether the land is farm land or agricultural land, it is necessary to determine further whether the land is '**goods**' or '**services**' for the purposes of the VAT Act. This is because in terms of s 6 of this Act, VAT is levied on, *inter alia*, the value of the

supply of **goods** or **services** in the course or furtherance of any trade carried on by any registered operator.

[d] *Detailed background facts*

[7] The facts that are common cause are these. The only trade carried on by the appellant relevant to this dispute is its letting out to TL of the disputed land. It is TL that utilises the land beneficially. The appellant receives a rental income for the lease. The lease is verbal. The rent is calculated on the basis of a formula that takes account of the area under sugar cane, and the entire sugarcane revenue earned by TL. This state of affairs endured for a number of years. The appellant was routinely submitting income tax returns and dutifully remitting income tax to the respondent on the rental income received from TL. But it was not calculating or withholding and remitting any VAT in respect of that rent. At some stage the respondent carried out a tax audit and an investigation on the appellant. Among other things, it called for a number of documents, including the relevant financial statements, the minutes of certain meetings and the lease agreement between the appellant and TL over the letting of the land. The relevant documents were submitted except the lease. The respondent determined that the appellant was liable for VAT on the rental income but noted that it was not registered as an operator. It proceeded to compulsorily register the appellant for VAT. It proceeded further to issue assessments on what it considered to be the unpaid VAT for the period in question. With interest and a penalty at 20%, the amount demanded by the respondent from the appellant as outstanding VAT for the period in question was in the sum of $1 370 007-08 aforesaid.

[8] The appellant objected to the respondent's assessments. Distilled, the appellant's grounds of objection were that it does not carry on a trade as defined by the VAT Act and that therefore it is not liable for VAT registration and the payment of any VAT on the rental income from TL. The objection letter also dealt with issues pertaining to the propriety of the respondent's assessments every one of which was for a twelve-month tax period. The appellant said the assessment on the basis of a twelve-month tax period was not supported by the Act. The appellant further challenged the propriety of the respondent attempting to

recover tax obligations for the period 2009 to January 2014 which it said had become prescribed. Finally, the appellant questioned the justification for the respondent levying any penalty in the circumstances of the case, particularly given that it had neither deliberately evaded paying those taxes nor had it been careless or inadvertent in failing to remit them. The appellant went on to support its argument by quoting the relevant provisions of the VAT Act.

[9] The respondent disallowed all the objections by the appellant. In summary, the respondent's grounds were that the appellant was carrying on a trade within the meaning of the VAT Act because its leasing of the land to TL was a continuous and regular activity and was therefore taxable; that given the absence of any information from the appellant on the frequency of the rental payments by TL, the assessment of the VAT for the period in question on the basis of a twelve-month tax period was the proper one; that the appellant was not entitled to the benefit of the six-year prescription period because it had failed to show that there had been no intent on its part to evade the tax, that it had failed to show that it had acted in good faith and that it had also failed to show that it had not been negligent. The respondent stuck to its 20% penalty on the basis that it could not be overlooked that an offence had been committed.

[10] There was an impasse. Efforts to resolve it internally with the respondent did not succeed. The dispute escalated to this court. During trial, the appellant called a single witness, Ms M. The respondent did not lead any evidence. The summary of the evidence by Ms M germane to the particular point for determination was this. She was the appellant's company secretary. Her previous position was that of finance planning manager. She was the one who had actually been involved in the preparation of the financial statements for the appellant. Among the documents referred to in court was an asset register for the appellant. Ms M testified that TL uses the land largely for the growing of sugar cane. There are irrigation works and a centre pivot on the land. But there is a portion that TL also uses as an abattoir. Other portions of the land have a commercial feedlot, comprising grazing land, dip tanks and a dairy unit. There is no equipment that is being leased together with the land. The lease is only for the fixed property upon which are improvements such as canals, boreholes and their equipment, and pump stations as big as the court room. The equipment is owned by TL but on land owned by the appellant. Any movables on the land would not be reflected in the

appellant's books, but in those for TL. The rental payments are calculated on the basis of the cane produced on the leased land and prorated to the rest of the cane actually produced by TL as a percentage of the total revenue earned by TL.

[11] Ms M was subjected to moderate cross-examination. Among other things, she could not recall off-hand the size of the area that is under the feed lot. She conceded that there were no documents that she had produced before the court to confirm that there are any pastures on the land. But she denied categorically that there is any movable equipment that the appellant was leasing out to TL. She referred to a tour that the respondent's officials had carried out on the land during investigations. She said that during that tour, the respondent's officials had specifically asked whether there had been any cattle present on the land. They had been told that the cattle actually grazed on some of the pieces of the land, especially the graze areas because of the presence of water there. Although she conceded that no documentary evidence had been produced, she however, stressed that an asset register had been produced as part of the additional documents and that the same had also been produced before the respondent's Commissioner.

[12] It was also common cause during the trial that the land had been listed by government for compulsory acquisition. As such, legal ownership of it vested with the State. However, the appellant had remained on the land and had continued to possess and use it as before. In re-examination, Ms M stated that during the tour, the respondent's officials had never questioned the use of the land. All that they had ever wanted was to understand the cane farming operations even though a question had arisen at some point regarding the pastoral activities and the grazing on the land. She said since the respondent's officials had not requested to be shown where the cattle grazed, her own team did not "indulge". She explained that the feedlots were in the various corners of the land such that unless one went out looking for them specifically, one might not see them altogether owing to the vastness of the land under sugar cane production.

[13] Both parties closed their cases after Ms M's evidence. After written closing submissions, the aforesaid judgment no HH 433-20 was delivered. As mentioned before, it was upset on appeal and the matter remitted. Before me, apart from the aforesaid first issue

for determination set out above, the other issues that were agreed upon by the parties are as follows:

> "1.1 ……
>
> 1.2 Whether or not therefore in the circumstances of this case, there was supply of goods by the Appellant to [TL] which was liable to VAT.
>
> 1.3 If 1.1 above is answered in the affirmative, whether Appellant is entitled to relief under section 41(d) for amounts of tax for periods that were more than six years from the date of assessment?
>
> 1.4 Whether the penalty of 20% imposed by the Respondent was appropriate and justified?"

[e] *Details of the dispute*

[14] The respondent's allegations and conclusions on the perceived dispute of facts are these. During the investigation carried out by its officials into the appellant's tax affairs, the appellant failed to produce the lease between itself and TL. As such, the appellant has failed to prove the nature of the arrangement between TL and itself. The respondent had relied on the appellant's financial statements. The appellant produced no documentary evidence such as a map of the land, or any other evidence to independently show that there are pastoral activities on the land. The asset register that was presented in court could not be independently verified. It is neither an audited document nor one verified by a third party. During the tour by the respondent's officials, there had been no mention by the appellant that there was any livestock on the land. Despite Ms M being the company secretary for both the appellant and TL and therefore, one with access to all the relevant documentation, she could not explain how the documents proving TL's pastoral activities could not be produced. Ms M's evidence is of no assistance in discharging the onus on the appellant to prove that the respondent had been wrong and ultimately, that no VAT is due.

[f] *The law*

[15] In terms of s 6 of the VAT Act, there shall be charged, and levied and collected, for the benefit of the Consolidated Revenue Fund, a tax at such rates as may be fixed by the Charging Act on the value of, among other things, **the supply** by any registered operator of **goods or services** supplied by him on or after the 1st January, 2004, in the course or furtherance of any trade carried on by him. It is the highlighted words or phrases the interpretation of which are at the centre of the dispute. There is no question that its sole business being the letting of land to TL in return for rentals, the appellant is carrying on a trade. There is also no question that because of such a relationship the appellant supplies goods or services.

[16] Section 7(10) of the VAT Act provides that for the purposes of the Act, a supply of the use, or right to use, or the grant of permission to use **any goods**, whether with a driver, pilot, crew or operator, under any rental agreement, instalment credit agreement, etc., under which such use, or permission to use is granted, shall be deemed to be **a supply of goods**. There is no question that the appellant supplies to TL the use, or right to use, or grants its permission for TL to use the land in question under the rental agreement within the general meaning of the Act. Its arrangement with TL is deemed to be a supply. But is it a supply of goods? That is the question. With all due respect, all others are not the question. The respondent has delved into them quite extensively. But the crisp issue for determination is whether the appellant's letting out of the land is a supply of goods or services within the contemplation of the VAT Act.

[17] Section 2 of the VAT Act defines "**goods**" to mean corporeal movable things, **fixed property** and any real right in any such thing or **fixed property**, but excluding certain items such as money or rights under a mortgage bond. The exclusions are not relevant to the issues herein. "**Services**" is defined to mean anything done, or to be done, including the granting, assignment, cession or surrender of any right, or the making available of any facility or advantage, **but excludes the supply of goods**, money or any stamp, etc. Unquestionably, the land in question and the fixed equipment on it, are all fixed property. But fixed property is specially defined in the Act. It is land other than farm land, together with improvements affixed thereto. The other facets of fixed property such as shares or units in a company that

the Act refers to are not relevant to the issues herein. Ordinarily, farm land is fixed property. This is elementary. But the VAT Acts excludes farm land from the ambit of fixed property. So, what is farm land?

[18] The VAT Act defines farm land to mean **land used for agricultural *and* pastoral activities** but does not include various types of lands such as communal land, or land for local authorities like municipalities and towns which are not relevant to the issues herein. **State land** is also excluded from the definition of farm land. But this also is not relevant despite some misguided argument by the respondent that it is. The State land that is excluded from the definition of farm land is State land **the layout of which has been approved in terms of s 43 the Regional, Town and Country Act [*Chapter 24:20*]**. That provision is in relation to a proposed layout for the subdivision of State land or communal land for industrial, commercial or residential purposes. The appellant did not have to go further and prove that the land in question, despite its designation by government for compulsory acquisition, was not State land as defined. This is because it was common cause throughout, and crucially, accepted by the respondent that, in spite of that designation, no further steps had been taken by government to expropriate it. Among other things, the appellant had continued to occupy and use it as before. Nothing had changed.

[19] The respondent is correct to argue that it is not enough for the appellant to prove only that the land in question is used for agricultural activities. It must go further and prove that it is used for both agricultural **and** pastoral activities conjunctively. That the land is used for agricultural activities is given. It is accepted. That accounts for the massive cane fields and the extensive irrigation equipment such as dams, canals, boreholes, pump stations, centre pivots and the like, that Ms M adverted to. What is disputed is whether the land is also used for pastoral activities. That is essentially the whole case. As alluded to earlier, this is a question of fact. Therefore, resort has to be had to the evidence.

[g] *Synthesis of the law and the evidence*

[20] From the transcript of Ms M's evidence in the previous proceedings that the parties placed before me, I determine that the appellant managed to show and prove that the land in

question is used for both agricultural and pastoral activities. The VAT Act does not define what 'agricultural or pastoral activities' are. That must mean that the legislature left these terms to carry their ordinary grammatical meanings. The online dictionary by Wikipedia defines 'pastoral farming' as being aimed at producing livestock, rather than the growing of crops. Examples given include dairy farming, the raising of beef cattle and of sheep for wool. 'Agriculture' or 'farming' is defined as the practice of cultivating plants and livestock.

[21] Undoubtedly, according to the VAT Act, the term 'goods or services', in relation to 'farm land', is not understood in terms of the registered operator, who is the taxpayer. It is understood in terms of the use to which the land is put, rather than who puts it to that use. In this regard, in order for VAT to be avoided, it is immaterial who between the appellant and TL uses the land in question as farm land. If the land is farm land, it is not 'goods' that are tradable. Therefore, it would not be vatable. But if it is merely agricultural land, then it will be 'goods' and therefore, vatable.

[22] Ms M was clear in her evidence that the land is extensively used for sugar cane growing, but also that there are pastoral activities being carried out there by TL. The respondent's major argument is that there were no documents produced, or independent evidence led, to back up her evidence that the land was also used as a feedlot. I have traced the chain of events from when the dispute arose to the narrative in this court. I am satisfied that the point was proved. The standard of proof required is on a balance of probabilities. The respondent seems to want absolute proof. That is not the law. Ms M testified that, among other things, when the respondent's officials called for the tour of the land, it was not drawn to the appellant's attention that the issue of the pastoral activities was the reason for the investigation. To the appellant, the purpose of the tour was the sugarcane plantation. The issue of grazing cattle seems to have been raised incidentally. But significantly, when it was raised, the respondent's officials were informed that indeed TL reared cattle on the land. The transcription of her evidence, evidently unedited, goes like this:

> "Okay, so it is the pastoral activities we did go round on a tour and I am sure when we started this we did have a tour with the respondent's employees where they had actually asked if they (*sic*) were any cattle that were present **and they were told that the cattle were actually grazed on some of the pieces of land especially around the graze because of the presence of water and actual grazing**." (*Emphasis added*)

[23] In spite of the apparent lack of editing of the transcript, it is clear what Ms M meant. There are cattle on that land. She further testified that the asset register for TL contained all the details pertaining to TL's pastoral activities on the land. The asset register was subsequently produced as part of the additional documents. The respondent's major bone of contention in this regard seems to be that the asset register was not audited or verified by an independent person. But this aspect was covered in cross-examination. Among other things, Ms M maintained that the asset register formed part of the audit documents. The cross-examination went as follows, with relevant answers highlighted for emphasis:

> "Q. And as it is right now all we have before the court is your word that there is livestock on that land, there is a feed lot on that land, all we have is your word before the court?
>
> A. No and I disagree with that. So the asset register has been presented I think it is common knowledge even for our respondents who resides (*sic*) in the Low veld and the majority of the pastoral in [TL] are actually carried at that feed lot.
>
> Q. This is what [is] in the additional document, this is what you call the asset register?
>
> A. It is an asset register because it leases (*sic*) all the assets.
>
> Q. Was it produced before the Commissioner?
>
> A. **They were produced before the Commissioner**.
>
> Q. Or was it audited to show the truthfulness?
>
> A. This actual asset register will actually reconcile to the financial statements, **so it has been audited**."

[24] This court, on page 3 of its judgment on the previous proceedings, found Ms M to be a credible witness whose evidence on the activities / business being undertaken on the appellant's land had been of assistance to the court. The court also noted that the respondent had not led any evidence. I consider that even though the onus is on the appellant to prove that the land is being used for both agricultural and pastoral activities, it was not enough for the respondent just to make legal findings upon which its impugned assessments were computed and then simply lord it over to the appellant to disprove each and every aspect of those findings without the respondent itself having laid a proper basis for them. The respondent's findings of a tax payer's liability must have a factual foundation. It did not call its officials that went on the tour with the appellant's personnel to come and testify on what they had discovered during the tour. The evidence led from Ms M shifted the evidential

burden to the respondent. Other than mere legal arguments, the respondent has proffered nothing by way of facts to refute Ms M's evidence.

[25] The respondent further alleges that the appellant also leases to TL buildings, irrigation works and cane land improvements. It argues that the use of these items would not constitute either agricultural or pastoral activities. It further argues that these items are of a movable nature and would therefore constitute 'goods' within the meaning of the VAT Act. This is incredible and a foundational misconception. Improvements on land like buildings are not movable property. They are part of the land. The respondent seems bent on splitting hairs. The evidence before the court is that the appellant leases the land. All the fixed improvements on it and all the equipment for the agricultural and pastoral activities being undertaken on the land belong to TL. The rent paid for the lease of the land is calculated solely in accordance with a formula that takes account of the size of the land under sugarcane which is then prorated to the total sugarcane revenue received by TL. There is no evidence that supports the suggestion that a portion of the rent is computed in terms of the buildings, the equipment or any other assets on the land.

[h] *Disposition*

[26] By reason of the foregoing, the respondent was not entitled to make the assessments on the appellant for the VAT in question and to levy taxes for the period concerned. The land in question being 'farm land' within the meaning of that term as defined by s 2 of the VAT Act, is not such 'goods or services' as contemplated by the Act. As such, for the tax years concerned, namely 2009 to 2017, the appellant was not such an operator of goods or services supplied by it in the course or furtherance of any trade carried on by it as would fall within the contemplation of s 6 of the VAT Act. Because of the conclusion reached herein, it becomes unnecessary to determine the rest of the issues that the parties had tabled in their pre-trial hearing minute. The appellant sought no costs of the appeal. Accordingly, the following orders are hereby made:

i/ The decision by, or on behalf of the Commissioner of the respondent dated 31 July 2019 disallowing objections by the appellant on 8 April 2019 pertaining to certain taxes levied by the respondent in respect of the respondent's assessments against the

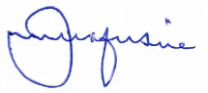
appellant for the period 2009 to 2017, and bearing the reference numbers below, is hereby set aside in its entirety:

010000728487 (2009), 030000717291 (2010), 010000728497 (2011), 060000217614 (2012), 010000728502 (2013), 030000717308 (2014), 030000717315 (2015), 020000728769 (2016) and 050000217920 (2017).

ii/ The penalty charged by the respondent against the appellant in relation to the taxes aforesaid is hereby set aside.

iii/ There shall be no order as to costs.

24 August 2022



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