C R S (PVT) LTD
versus
ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
KUDYA J
HARARE, 14 September 2015 and 31 October 2017

Income Tax Appeal

A.P de Bourbon, for the appellant
S Bhebhe, for the respondent

KUDYA J: This is an appeal against the four amended assessments issued by the respondent against the appellant on 23 June 2014 in respect of the four consecutive tax years ended 31 December 2009, 2010, 2011 and 2012. The real issue for determination posed by these assessments is whether the respondent can tax non-existent income through the deeming provisions of s 98 of the Income Tax Act [*Chapter 23:06*].

At the commencement of the hearing, Mr *de Bourbon,* for the appellant moved in accordance with the notice filed of record on 24 August 2015 and served on the respondent on the same date for the non-suiting of the respondent for failure to file r 11 documents. Mr *Bhebhe,* for the respondent conceded the failure and sought the Court's indulgence for the respondent to participate in the appeal without the r 11 documents. He contended that the failure was not prejudicial to the appellant and in the alternative promised to file the documents by the end of business on Friday 18 September 2015 failing which the Court would disregard all the evidence, contentions and submissions made by the respondent at the appeal hearing.

Rule 11 is found in Part I of the Twelfth Schedule to the Income Tax Act [*Chapter 23:06*], the rules regulating Income Tax Appeals that are applied in the determination of an appeal under s 65 or any proceedings incidental thereto or connected therewith. It stipulates that:

> "The Commissioner shall transmit to the Special Court, together with the agreed case, or with the appellant's case and the Commissioner's case, a certified copy or extract of the assessment in so far as it relates to the assessment made upon the appellant, and also the

notice of objection lodged and the notice of appeal, together with any material correspondence related thereto, unless the same have already been included in the statement of facts. A copy of the decision appealed from and of the reasons for the same shall accompany the documents above mentioned." (Underlining my own for emphasis)

In the present case, the parties did not agree on a statement of facts. Rather each party filed with the Registrar its respective case devoid of any attachments. In this regard, it was mandatory for the respondent to file a certified copy or extract of each assessment raised against the appellant, the notice of objection, the decision appealed against and the reasons thereof, the notice of appeal and any material correspondence relating to each assessment together with the Commissioner's case. There was and would be no need for the respondent to file the appellant's case with these documents as it was and would always be filed with the Registrar and served on the respondent prior to the filing of the Commissioner's case and its addendums. In the same vein, it would serve no useful purpose for the respondent to file those rule 11 documents which would have been attached to either the Appellant's case or the Commissioner's case together with the Commissioner's case. The rule 11 documents provide the contextual background to the objection and appeal and represent a "court record of sorts" from which the appeal court is able to derive important and material contentions of fact and law. The failure to file the rule 11 documents at the required time is not only contemptuous of the rules of Court but is prejudicial to the appellant in that it deprives the appeal court of the material information on which the dispute between the parties is grounded. In the present appeal Mr *de Bourbon* acceded to the submission made by Mr *Bhebhe* in the alternative. The appeal hearing proceeded in the normal way and true to his promise, Mr *Bhebhe* filed the r 11 documents before the end of business on 18 September 2015.

The respondent is directed to abide by the mandatory requirements of r 11 in all future income tax appeals.

On 28 October 1996, the appellant concluded a lease agreement and a separate logistical agreement with a South African company, hereinafter referred to as the related party, for the lease of its mechanical trucks, trailers and tankers for a fixed rental. The agreements took effect from the date of signature. The lease agreement was further renewed on 8 October 2003, 16 August 2006 and 6 July 2009.

In February 2013, the respondent commenced a tax compliance investigation on the appellant. It was triggered by the shared common ancestry, logo, name and managing director between the two companies. The Commissioner identified 5 areas of dispute, which resulted in the exchange of a number of e-mails with the appellant between 8 August and 8 October

2013. Only two areas of dispute remained unresolved by 8 October 2013. The first concerned the payment by the appellant of the salaries and wages of the local drivers used by the related party while the second was in respect of under invoicing. The issue relating to the drivers was resolved on 23 April 2014. The failure to reach agreement on the second issue prompted the respondent to raise the disputed amended assessments on 23 June 2014. The appellant objected to these amended assessments on 22 July 2014. The respondent disallowed the objection on 14 November 2014. The appellant gave notice of its intention to appeal on 18 November 2014 and filed its notice of appeal on 28 November 2014 and case on 18 December 2014. The respondent duly filed the Commissioner's case on 30 March 2015.

The appellant contended that the rentals in the agreements were fair and reasonable while the respondent contended that they were outrageously low so as to constitute under invoicing and therefore tax avoidance. The respondent compared the local charges imposed by the appellant on 3 local tobacco companies on pp 1.1 to 3.2 of exh 2 against the Currency Declaration Form, CD3 income received from the related party on pp 4.1 to 9.2 of exh 2. The income earned from local operations and from CD 3 rentals was conveniently summarised by the appellant in tabular form on p 66 of the exh 1, which I reproduce below as Table 1.

Table 1

	2009	**2010**	**2011**	**2012**
CD3-revenue R	2 579 685.00	2 429 399.00	1 815 806.00	1 795 380.00
CD3 revenue USD	298 658.98	336 530.44	257 329.12	224 855.18
Other local income USD	144 730.00	245 493.00	321 525.47	298 391.98
Total US$ in FSs	443 388.98	582 023.44	578 854.59	523 247.16
Av exchange rate	**8.64**	**7.22**	**7.06**	**7.98**

Notwithstanding the absorption of running costs by the related party the respondent maintained that the rentals were outrageously low and unrealistic in comparison with the charges imposed by local cross border hauliers. It applied the related party's 2013 rate of R

22.47 on the distance covered in each year to compute the taxable income set out on page 50.2 of exh 1, which formed part of the amended assessments. It was common cause that the rate was in tandem with the market rates charged by third parties in 2013.

At the appeal hearing, the appellant relied on the evidence of one of its directors and public officer and nephew to its 80 year old founder and managing director, who has stood in the position of a general manager since 1995 and has been a member of the executive committee of the Transport Operators Association of Zimbabwe, one HJR and the 374 paged lever arch file exh 1 and one paged exh 4. The respondent called the evidence of two of its chief investigations officers, one of whom was a purported transfer pricing specialist and relied on the 32 paged exh 2 and 6 paged exh 3A, 3B and 3C in addition to the r 11 documents filed of record.

At the pre-trial hearing of 1 June 2015, the following six issues were referred on appeal for determination.

1. Did the appellant in fact receive the additional income assessed by the respondent and if so what was the source of the income
2. Whether or not the transactions between the appellant and the related party resulted in the appellant being deemed to have received additional income for tax purposes
3. Whether or not the transactions that were being carried out by the appellant with its related company fall within the ambit of s 98 of the Income Tax Act [*Chapter 23:06*] and if not whether the respondent was entitled as a matter of law to utilise s 98 of the Income Tax Act.
4. In the event of any such additional income or deemed income having been correctly assessed by the respondent, whether the respondent was obligated to deduct from that income the expenses which would have been incurred had the appellant undertaken such transactions, in particular the cost of the diesel that would have been expended in conducting such transactions
5. Whether or not SI 163 of 2014 is applicable in casu.
6. The appropriate penalty.

At the commencement of the appeal hearing on 14 September 2015, Mr *de Bourbon* abandoned the fourth issue and persisted with the remaining five issues.

The evidence was mostly common cause. The appellant was incorporated on 12 June 1960 under a different name and adopted its present name on 10 June 1983. The major

shareholders of the appellant were the 80 year old managing director and a registered trust. The managing director also held the same position in the related party, a company he promoted in 1978. It was common cause that even though the two entities did not have common shareholders, they were related parties[1].

The appellant operated in the local and regional transport industry with a complement of 24 mechanical horses, 83 trailers and 11 tankers. A common recurring statement in the director's report in each of the four tax years under consideration was that it was "engaged in transport and operated principally in Africa." The operations were manned by 7 head office staff, 10 workshop employees and 110 local, highly skilled articulated truck and trailer internationally certified drivers with mostly over 10 years' driving experience.

The transport business is dependent on the availability of imported fuel, spare parts and tyres. In 1996 the appellant had difficulties in sourcing scarce foreign currency locally to service its cross-border operations. In the aftermath of the demise of apartheid in South Africa in 1994, the South African economy became more integrated with other regional economies. The appellant alleged that it starved off the spectre of liquidation by concluding the 1996 rental agreement with the related party through which the related party used the appellant's equipment to carry goods by road between South Africa and the designated countries to the north. The agreement was executed on 28 October 1996 and renewed for three years on 8 October 2003 and then extended for a further 3 years on 16 August 2006. On 6 July 2009, in deference to the introduction of the multicurrency regime in Zimbabwe, the agreement was infused with an indefinite lifespan.

The 2003 agreement was signed by the uncle and nephew on behalf of the related party and the appellant respectively. The 2006 and 2009 agreements were signed by other representatives of the related party with the nephew. The notable terms and conditions of the agreements were that the related party used the appellant's excess fleet based on an agreed fixed fee per leg per trip and not on the distance covered. With effect from 1 July 2009, the rental was fixed at ZAR 1 000 per journey for the use by the related party of any locally registered trailer drawn by a South African registered horse. The rental for a horse and a horse and trailer were indicated on pages 15 and 16 of exh 1. These rentals were all increased annually by 10%. In addition, the related party was responsible at its own cost for running maintenance and repairs of the equipment comprising of the cost of insurance, tyres, rims,

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1 Para 8 appellant's case and concession made in oral submissions by appellant's counsel

spare parts and fuel and regulatory requirements such as road toll fees, environmental and port health fees attached to the equipment but not to any damage attributable to the negligence of the appellant's drivers or third parties. The appellant employed and remunerated the local drivers seconded to the related party and did not receive any compensation from the related party. However, the appellant invoiced the related party for any maintenance and repairs carried out in Zimbabwe on all equipment used by the related party.

It was the uncontroverted testimony of the nephew that a portion of the fee was surrendered to the Reserve Bank of Zimbabwe and another used to purchase the requirements of the appellant's local fleet while the balance was sold on the inter-bank market to meet local expenses and staff salaries and wages. This situation continued until hyperinflation adversely affected the viability and pricing of the domestic transport services in 2008. The appellant however, deliberately failed to disclose the 2003 agreed rentals in appendices C1, C2 and C3 to that agreement that were adopted by both the 2006 and 2009 agreements and the logistical and rental agreements of 1996 but elected to reveal the escalation clause set out on page 12.29 of exh 1. However, the agreed rentals for the rented horses were indicated on page 15 and 16 of the exh 1 for each of the 4 tax years and for each of the routes covered. The southbound trip to Harare and Kwekwe in Zimbabwe from Lusaka, the Copperbelt, Blantyre and Lilongwe accrued different rentals, denominated in South African rands from the north bound trips as indicated in the following table 2:

Table 2

	2009	**2010**	**2011**	**2012**	**2013**
LSK-HRE	1420	1 562	1 800	2 050	2 260
HRE-LSK	2 310	2 541	3 000	3 420	3 760
CPBLT-HRE	1 970	2 167	2 500	2 850	3 140
HRE-CPBLT	3 930	4 323	5 000	5 700	6 270
BLA-KWE	NIL	NIL	NIL	NIL	NIL
KWE-BLA	3 110	3 421	4 000	4 560	5 020

BLA-HRE HRE-BLA	1620 2 910	1 782 3 201	2 050 3 680	2 330 4 200	2 570 4 620
LLE-HRE HRE-LLE	2 080 3 370	2 288 3 707	2 630 4 300	3 000 4 900	3 300 5 400

Transit rates

LSK-HRE – JBG JBH-HRE-LSK	1 320 2 950	1 452 3 245	1670 3 730	1 900 4 200	2 100 4 620
CBLT-HRE-JBG JBG-HRE-CBLT	1 570 3 650	1 727 4 015	2 000 4 620	2280 5 200	2 500 5 720
	2009	**2010**	**2011**	**2012**	**2013**
BLA-HRE-JBG JBG-HRE-BLA	1 560 3 470	1 716 3 817	2 025 4 390	2 300 5 000	2 530 5 500
LLE-HRE-JHB JHG-HRE-LLE	1 740 3 930	1 914 4 323	2 200 4 970	2 500 5 600	2 750 6 160

The northbound routes to Zimbabwe consisted of the Johannesburg to Harare, Johannesburg to Bulawayo, Johannesburg to Midlands, and Johannesburg to Livingstone routes. The rental was the same for each route in each of the 4 years, respectively. In 2009 it was R 5 050, in 2010 it was R 5 555, in 2011 it was R 6 400 and in 2012 it was R 7 300. The

north bound routes from Zimbabwe were the Harare-Lusaka, Harare-Copperbelt, Kwekwe-Blantyre, Harare-Blantyre and Harare- Lilongwe routes. The rentals were different on each route and in each year. The cheapest was the Harare to Lusaka route ranging between R 2 310 in 2009 and R 3 420 in 2012. The most expensive was the Harare to Copperbelt route, which ranged between R 3 930 in 2009 and R 5 700 in 2012. The transit routes were the Johannesburg to Livingstone and Johannesburg to Harare destined for Lusaka route, for which the related party paid between R 2 950 in 2009 and R 4 200 in 2012 and the Johannesburg to Harare destined for Copperbelt for which the related party paid R 3 650 in 2009 and R 5 200 in 2012 to the appellant. The last transit route was from Johannesburg to Harare destined for Blantyre and from Johannesburg to Harare destined for Lilongwe. The related party paid the appellant between R 3 470 in 2009 and R 5 000 in 2012 for the route to Blantyre and between R 3 930 in 2009 and R 5 600 in 2012 for the route to Lilongwe. The rental for the trailer only was R 1 270 in 2011 and R 1 450 in 2012. The south bound journeys were the exact opposite of the north bound ones. The rates from the Zimbabwe centres to Johannesburg were the same in each year. The rentals were R 2 810 in 2009, and R 3 091 in 2010 and R 3 560 in 2011 and R 4 060 in 2012. The south bound transit rates were Lusaka to Johannesburg via Harare that ranged between R 1 320 in 2009 and R 1 900 in 2012 while the Copperbelt to Johannesburg via Harare route ranged between R 1 570 in 2009 and R 2 280 in 2012. And lastly the transit rate between Blantyre and Johannesburg via Harare ranged between R 1 560 in 2009 and R 2 300 in 2012 while the Lilongwe to Johannesburg via Harare route ranged between R 1 740 in 2009 and R 2 500 in 2012. The related party paid R 1 270 for the trailer per leg per trip on each of these routes. In 2012 the north bound trailer rental was R 1 450.

The journey from Johannesburg to Harare and back consisted of two trips while the journey from Johannesburg to any of the destinations outside Zimbabwe and back consisted of 4 trips.

The maintenance and running expenses incurred by the related party in respect of 21 mechanical horses between 1 January 2009 and 31 December 2012 amounted to R 1 854 841 for spares and maintenance [listed on p23 to 23.53 of exh 1], US$436 983 for labour on repairs and maintenance. In the same period tyres worth R 1 151 777 were purchased by the related party and R 536 021.51 was expensed on 69 trailers. The related party also spent the sum of R 9 128 122 on fuel, US$ 1 809 460 on insurance and US$40 992 on lubricants. The mechanical horses traversed 1 771 964 km [p22 of exh 1] during the four year period in

question. The distance covered by each identified mechanical horse and the cost of maintenance and running expenses, tyres and fuel in each year was listed on pages 23 to 24.6 of exh 1. The yearly amounts expensed on each line item by the related party on the leased equipment was conveniently summarised by the appellant on pp 24 and 42.5 of exh 1. I reproduce the essential costs in table 3 below.

Table 3: Expenses paid by related party on leased equipment

	2009	**2010**	**2011**	**2012**	**Total**
Km travelled	359 478	505 748	456 664	450 074	**1 771 964**
Spares in R	684 101	282 918	413 281	474 541	**1 854 841**
Labour in R	161 168	66 653	97 365	111 797	**436 983**
Tyres in R	233 661	328 736	296 832	292 548	**1 151 777**
Fuel in R	1 406 193	2 198 516	2 484 789	3 039 323	**9 128 822**
Insurance in R	489 000	489 000	440 100	391 360	**1 809 460**
Lubricants in R	15 119	6 252	9 134	10 487	**40 992**
Total cost in R	**2 989 241**	**3 372 076**	**3 741 501**	**4 320 058**	**14 422 875**
Average cost per km in R	**8.32**	**6.67**	**8.19**	**9.60**	**8.14**

The respondent derived the gross charges of cross-border transactions from the third party verification exercise that it conducted on three local cross-border hauliers, TCS, CT and CCC. It wrote exhibits 3A, 3B and 3C between 2 July 2013 and 16 September 2013 seeking the gross rates in both United States dollars and South African rands charged in respect of each tax year under investigation on 19 regional routes traversed by the related party. The responses, on pp 13 to 15 of exh 2, were received between 5 August and 19 September 2013. These parties did not offer a separate truck and trailer service. They factored into the freight rates the operational costs of fuel, vehicle inspection, toll and environmental management fees, insurances and driver's allowances, the distance covered, the nature of the cargo and competition. The freight rates ranged between US$1.60 per km and US$2.30 per km for both south and north bound routes during the period to the end of the 2012 tax year. In respect of the 2013 tax year the average rate was US$2.50 per km. One of the local hauliers supplied very detailed information on the freight rates. It used the cost plus mark-up model where the mark-up ranged between 7% and 12%. It charged between US$750 and US$1 300 for the south bound routes and between US$1 300 and US$2 500 for the north bound routes. While

it charged per trip like the related party, it translated these charges to between US$1.60 and US$2.30 per km.

The nephew listed 11 advantages that accrued to the appellant from the rental agreement. The appellant was *inter alia* assured of prompt and steady flow of income and a regular foreign currency supply accounted through the Reserve Bank of Zimbabwe CD 3 forms to meet local expenses from a single client, it's fleet was maintained at no cost to it and prevented from deteriorating from disuse, it was able to offer limited local transport services, it did not incur marketing and clearing and depot expenses in South Africa, Zimbabwe, Zambia and Malawi, it had a guaranteed free source of fuel at its depot in Zimbabwe for local use and lastly it was able to retain a pool of experienced internationally certified drivers starving it off liquidation and heavy retrenchment costs. On the other hand, the related party benefited from the use of authorised equipment on Zambian, Malawian, Batswana and Mozambican public roads and highly skilled drivers who were unable and unwilling to secure work permits in South Africa.

It was common cause that the respondent treated the appellant as a cross-border haulier and applied the 2013 freight rate charged by the related party of R22.47 per km retrospectively to each of the tax years in dispute. It ignored the aggregate expenses of R21.20 per km incurred in raising this amount. It computed the gross revenue earned from the leased equipment by multiplying this amount by the number of kilometres travelled in each year and converted the total to United States dollars using the uniform and inaccurate cross rate of 1US$ to R10. The respondent further calculated the yearly running maintenance and repair costs expensed on the leased trucks and converted it to United States dollars using the inaccurate exchange rate of 1US$ to R10 and added the figure to the transport services income in the annual financial statements derived from the CD3 forms. It then deducted the aggregate amount from the gross revenue earned from the leased equipment aggregate figure from the CD3 revenue and running maintenance and repair costs. The variance whether positive or negative was added to income in the computation of taxable income.

The appellant gave contrary evidence in two respects. The first was on whether it operated a transport service in Zimbabwe only or whether it also operated across our borders. The second was on whether it charged per trip or per km in respect of the local transport services. The sole witness called by the appellant testified that the appellant operated a transport service in Zimbabwe only. In each of the tax years in issue the same witness signed

the director's report in which he proclaimed that the appellant operated principally in Africa. In regards to the second aspect, he averred in para 39 of his statement, which he adopted in his evidence in chief, that the appellant charged a United States dollar denominated daily rate. At p 50.1 para 12 of exhibit 1, the appellant's South African based external accountants wrote that "the appellant does operate its own vehicles locally within Zimbabwe and in those instances it charges a US$ rate per km." In fact, under cross examination the witness maintained that the local expenses were based on operational overheads comprised of running costs, lubricants, fuels, salaries and wages and not on the distance or the nature of the load. He maintained that the dominant intention behind these charges was to cover overheads and remain viable and not the avoidance or reduction of tax. He was adamant that even though the appellant was a perpetual loss maker before, during and after the tax years in question, the rentals were market based. He sought to demonstrate by reference to a random selection of charges on p 31.3 to 31.5 of exh 1 that the CD3 income constituted 42% of the related party's group profit.2

It was common cause that the fees charged on north bound routes were higher than those on south bound routes because the former carried finished products while the latter conveyed raw materials. It was common cause that the exchange rate used in the computation of the disputed income tax of 1US$ to R10 was inaccurate in respect of each of the tax years under consideration.

The sole witness applied the "correct rates" used by the related party in each of these tax years to the formula invoked by the respondent including the use of the wrong exchange rate and produced different results in exh 4. The correct gross revenue rates per km were ZAR 16.55 in 2009, ZAR 17.52 in 2010, ZAR 19.45 in 2011 and ZAR 20.04 in 2012. The appellant would have incurred a loss of US$ 129 377 instead of a profit of US$65 433.97 in 2009, a loss of US$ 33 160 instead of a profit of US$ 217 185.16 in 2010, a loss of US$ 64 793 instead of a profit of US$ 73 119.91 in 2011 and a loss of US$ 53 304 and not a profit of US$ 56 063.46 in 2012. The formula and workings of the respondent were shown on page 38.6 of exh 1.

The respondent did not use these comparative rates but the 2013 figure suggested by the appellant's South African based external accountants as acknowledged by the

2 See letter of objection para 4.11 and 4.12 on p 31.1 of exh 1

Commissioner-General in her determination of 14 November 2014 at p 27.2 of exh 1. She wrote that:

> "The basis or rate of R22.47 that was used to determine the taxable income on estimated assessments was the rate that was used by yourselves in the tax year 2013. In the absence of information on other companies that could be compared with the appellant dealings when they were determining taxable income, this rate becomes the only basis for estimating income. Please note that if you have information pertaining to the actual and correct rates that were used in the tax years under contention, you are free to submit it for consideration."

I turn to determine the issues that were referred on appeal.

Determination of the issues

1. *Did the appellant in fact receive the additional income assessed by the respondent and if so what was the source of the income*

It was common cause that the appellant did not receive the additional income that was assessed by the respondent. Rather, the respondent imputed notional income to the appellant by invoking the provisions of s 98 of the Income Tax Act. I hold as a matter of hard fact that the appellant did not receive the assessed income.

2. *Whether or not the transactions between the appellant and the related party resulted in the appellant being deemed to have received additional income for tax purposes*

It seems to me that the second issue requires some recasting to reflect the real dispute between the parties. The issue contemplated by the parties was whether or not the respondent was entitled to deem additional income from the nature of the transactions between the two related parties. The respondent did not in any way suggest that these undertakings constituted simulated transactions. Accordingly, the sentiments pronounced in *Inland Revenue Commissioners* v *Duke of Westminister* [1936] AC 1 (HL) at 19-20 and 25 and adopted by the Federal Supreme Court in *The Master* v *Thompson's Estate* 1961 (2) SA 20 (FSC) at 22 and *Barnett* v *Commissioner of Taxes* 1959 (2) SA 713 (FSC) at 717 and the South African cases of *Commissioner for Inland Revenue* v *Estate Kohler* 1953 (2) SA 584 (A) at 592 and *MacKay* v *Fey NO and Anor* 2006 (3) SA 182 (SCA) at 196 para [26] have no application in the present matter. While the respondent did not challenge the genuineness of the agreements it compared the rates charged by the appellant with the charges imposed by the related party to its own clients and the charges of some of the local trans-border hauliers and

determined that the charges were deliberately designed to avoid the payment of income tax from the leased equipment. The respondent accordingly invoked the provisions of s 98 to bring the appellant to book.

3. *Whether or not the transactions that were being carried out by the appellant with its related company fall within the ambit of s 98 of the Income Tax Act [Chapter 23:06] and if not whether the respondent was entitled as a matter of law to utilise s 98 of the Income Tax Act.*

Mr *de Bourbon* submitted that the provisions of s 98 were not applicable to the transactions between the appellant and the related party both from a factual and legal perspective while Mr *Bhebhe* made contrary submissions.

The onus

Before dealing with the provisions of s 98, it is necessary that I resolve the issue of onus. I discussed the issue in *H Bank Zim Ltd* v *Zimbabwe Revenue Authority* 2015 (1) ZLR 1007 (H) at 1020B-1022C. I concluded my analysis at 1022C thus:

> "The onus, therefore rests on the taxpayer to establish on a balance of probabilities that the opinion formed by the Commissioner was wrong. I therefore agree with Mr *Magwaliba* that the Commissioner bears no onus to establish on a balance of probabilities that his opinion was correct."

Mr *de Bourbon* relied on two South African Supreme Court of Appeal cases for the submission that the onus lies on the Commissioner to show that the effect of the transaction was to avoid, postpone or reduce the tax liability. In *Commissioner for Inland Revenue* v *Conhage (Pty) Ltd (formerly Tycon (Pty) Ltd* 1999 (4) SA 1149 (SCA) at 1159-1160 paras [11] and [12]; 61 SATC 391 (SCA) at 397 HEFER JA stated that:

> "The onus is on the Commissioner to prove that its effect was to avoid or postpone the liability for tax or reduce the amount thereof. Upon proof that this was the case it is presumed in terms of ss (4) that the effect of the transaction was also its sole and main purpose."

Again, HEHER JA in *Commissioner, South African Revenue Services* v *LG Electronics SA (Pty) Ltd 2012* (5) SA 439(SCA) para [25] said:

> "Affording due weight to those of the grounds relied on by the appellant which were either common cause or not seriously denied by the respondent, the conclusion of the learned judge that the Commissioner had proved no stratagem on the part of the respondent in regard to the importation of the screens appear to have been justified. There was no evidence to suggest

that the respondent manipulated the design or manufacturing or the importation process to avoid payment of duties. This seems clearly to fall within that category of cases where a man may legitimately order his affairs so that the tax is less than it otherwise would be." (Underlining mine for emphasis)

The views of the South African Court of Appeal in these two cases, are at variance with the sentiments of MacDonald JP in *Commissioner* v *F* 1976 (1) RLR 106 (A) at 115F-116A that:

> "The next point is that the Commissioner is obliged to exercise his powers under the section if the transaction, operation or scheme has the stipulated "effect", if he is of the "opinion" that the requisite abnormality is present and if he is further of the "opinion" that the taxpayer's purpose was as stated in the section. Here again there is a clear indication that it is the intention of the Legislature to cast the net in such a way as to block every possible avenue of escape. This intention is also manifest by the further provision that when the stipulated effect is present and the requisite opinions are held the onus rests on the taxpayer (under the Eleventh Schedule to the Act) to establish on a balance of probabilities that he did not have the purpose set out in the section. Moreover the section strikes not only at avoidance but also at mere postponement and reduction. This is a further indication of the Legislature's intention to make the section all-embracing. In short, the Legislature, by every conceivable means, has endeavoured to make it extremely difficult for a taxpayer to avoid the payment of tax which, in the normal course of his business and but for his desire to avoid, postpone, or reduce such payment, would fall due."

The sentiments expressed by MACDONALD JP are binding on me and override the expressions of the South African Supreme Court of Appeal which merely constitute persuasive authority. Again, it seems to me that s 63 of our Income Tax Act casts an overarching shadow over the construction of s 98. The Commissioner employs s 98 to impute income to the taxpayer and raises assessments against which a dissatisfied taxpayer objects and appeals. Such an objection and appeal challenges the assessment raised by the Commissioner and thus falls squarely into the provisions of s 63. Accordingly, I maintain that the onus remains on the taxpayer to establish that the first and second opinions of the Commissioner were wrong. The attempt to render the s 63 onus subservient to s 98 based on South African authority is contrary to our law.

> **"98 Tax avoidance generally**
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> Where any transaction, operation or scheme (including a transaction, operation or scheme involving the alienation of property) has been entered into or carried out, which has the effect of avoiding or postponing liability for any tax or of reducing the amount of such liability, and which in the opinion of the Commissioner, having regard to the circumstances under which the transaction, operation or scheme was entered into or carried out—

(*a*) was entered into or carried out by means or in a manner which would not normally be employed in the entering into or carrying out of a transaction, operation or scheme of the nature of the transaction, operation or scheme in question; or

(*b*) has created rights or obligations which would not normally be created between persons dealing at arm's length under a transaction, operation or scheme of the nature of the transaction, operation or scheme in question;

and the Commissioner is of the opinion that the avoidance or postponement of such liability or the reduction of the amount of such liability was the sole purpose or one of the main purposes of the transaction, operation or scheme, the Commissioner shall determine the liability for any tax and the amount thereof as if the transaction, operation or scheme had not been entered into or carried out, or in such manner as in the circumstances of the case he considers appropriate for the prevention or diminution of such avoidance, postponement or reduction."

The requisite elements that must all be fulfilled before the Commissioner can invoke the section were set out in *Secretary for Inland Revenue* v *Geustyn, Forsyth and Joubert* 1971 (3) SA 567 (A) at 571E-H thus:

(a) A transaction, operation or scheme entered into or carried out
(b) Which has the effect of avoiding or postponing liability for tax on income or reducing the amount thereof and which
(c) In the opinion of the Secretary, having regard of the circumstances under which the transaction, operation or scheme was entered into or carried out was entered into or carried out,
   (i) Was entered into or carried out by means or in a manner which would not normally be employed in the entering into or carrying out of a transaction operation or scheme of the nature of the transaction, operation or scheme in question
   (ii) Has created rights or obligations which would not normally be created between persons dealing at arm's length under a transaction, operation or scheme of the nature of the transaction, operation or scheme in question and that
(d) The avoidance, postponement or reduction of the amount of such liability was, in the opinion of the Secretary, the sole or one of the main purposes of the transaction, operation or scheme.

See *ITC 1631* (1997) 60 SATC 63 (Z) at 69, *Commissioner of Taxes* v *F, supra* at 115E-116A, *A* v *Commissioner of Taxes* 1985 (2) ZLR 223 (H) at 232F-233B. *G Bank Zimbabwe Ltd* v *Zimbabwe Revenue Authority* 2015 (1) ZLR 348 (H) at 364C-D, *H Bank Zimbabwe Ltd* v *Zimbabwe Revenue Authority* 2015 (2) ZLR 1007 (H) at 1022 D-G

(a) Whether or not the agreement constituted a transaction, operation or scheme

It was common ground that the agreements between the related parties fell into the category of a transaction, operation or scheme.

(b) Whether the agreement had the effect of avoiding, postponing or reducing the income tax liability of the appellant

Mr *de Bourbon* contended that the transactions were conceived in circumstances that precluded the contemplated effect of avoiding, postponing or reducing the appellant's taxable income. Mr *Bhebhe* argued that they had such an effect. In *Commissioner of Taxes* v *F*, *supra*, at 115F MACDONALD JP described it as the "stipulated effect" and held that the Commissioner was obliged to exercise his powers under the section if the transaction, operation or scheme had the stipulated effect.

The practical results of the agreements were captured in the unaudited financial statements of the appellant in respect of each tax year. It made losses of US$ 41 675 in 2009, US$115 920 in 2010, US$138 663 in 2011 and US$ 94 535 in 2012. It was common cause that the appellant made assessed losses before, during and after the period covered by the assessments. The appellant never declared dividends despite the bullish going concern annual reports. In 2010, 2011 and 2012 it procured loans from the related party of US$36 412, US$82 559 and US$114 346, respectively. That Zimbabwe taxes were in the related parties' contemplation when they executed the 2003 agreement was apparent from the note on p 12.29 of exh 1 which reads:

> "the rates set out above may be adjusted from time to time to provide for any taxes or other charges levied by Central Government or any local authority in Zimbabwe, as the case may be, which may directly or indirectly effect the said rates, provided such increase will only be effective on the first day of the calendar month following the month in which the related party has received written notice thereof from the appellant"

Accordingly, I agree with Mr *Bhebhe* that the agreements had the stipulated effect of avoiding or reducing the appellant's liability for income tax.

The circumstances prevailing at the time the agreement was entered into or carried out

In the hyperinflationary era, the appellant averred that it could not secure local contracts that would enable it to fully utilize all its assets. The local currency lost value at an alarming rate. The pricing of transport services became a nightmare. The income derived from transport services could not sustain the local operations. It was faced with the spectre of liquidation and staff retrenchments. The effect of which was that its loyal and skilled manpower mainly consisting of approximately 110 drivers would lose their only source of livelihood for themselves and their families while the company mechanical horses and trailers would deteriorate through disuse. The appellant could not access the foreign currency

required to purchase spare parts and fuel necessary to keep the local operations running. Hyperinflation had a negative effect on its ability to meet local overheads such as salaries and wages and repairs and maintenance of the vehicles. It was saved from this predicament by the related party, an international haulier operating from South Africa to an array of destinations in sub Saharan Africa. It required the excess capacity held by the appellant to meet its own contracts and the experienced, skilled and responsible pool of drivers in the employ of the appellant who could not secure work permits in South Africa. The appellant held road permits for the use of these assets on the routes desired by the related party.

The comparative advantages for the appellant were listed by the general manager in charge of local operations. The appellant was *inter alia* assured of prompt and steady flow of income and a regular foreign currency supply accounted through the Reserve Bank of Zimbabwe CD 3 forms to meet local expenses from a single client, it's fleet was maintained at no cost to it and prevented from deteriorating from disuse, it was able to offer limited local transport services, it did not incur marketing and clearing and depot expenses in South Africa, Zimbabwe, Zambia and Malawi, it had a guaranteed free source of fuel at its depot in Zimbabwe for local use and lastly it was able to retain the pool of experienced internationally certified drivers starving it off from liquidation and heavy retrenchment costs. The parties agreed on charges per route rather than per kilometre.

With the introduction of the multicurrency economic regime in Zimbabwe in 2009, hyperinflation vanished. The parties renegotiated the original agreement and introduced a 10% annual escalation clause of the charge per route.

Whether the transaction was entered into or carried out in a manner which would not be normally employed for such a transaction

In *Hicklin* v *Secretary for Inland Revenue* 1980 (1) SA 481 (A) at 494H-495D, 41 SATC 179 at 195 TROLLIP JA set out the practical way of applying the normality and arm's tests. He stated that:

> "When the "transaction, operation or scheme" is an agreement, as in the present case, it is important I think, to determine first whether it was concluded at arms' length. That is the criterion postulated in para (ii). For 'dealing at arms' length' is a useful and often easily determinable premise from which to start the enquiry. It connotes that each party is independent of the other and, in so dealing, will strive to get the outmost possible advantage out of the transaction for himself..... Hence, in an at arms' length agreement the rights and obligations it creates are more likely to be regarded as normal than abnormal in the sense envisaged by para (ii). And the means or manner employed in entering into it or carrying it out are also more likely to be normal than abnormal in the sense envisaged by para (i). The next observation is that, when considering the normality of the right or obligations so created

> or of the means or manner so employed, due regard has to be paid to the surrounding circumstances. As already pointed out s 103 (1) itself postulates that. Thus what may be normal because of the presence of circumstances surrounding the entering into or carrying out of an agreement in one case, may be abnormal in an agreement of the same nature in another case because of the absence of such circumstances. The last observation is that the problem of normality or abnormality of such matters is mainly a factual one. The Court hearing the case may resolve it by taking judicial notice of the relevant norms or standards or by means of the expert or other evidence adduced there anent by either party."

See also the sentiments of HEFER JA in *Commissioner for Inland Revenue* v *Conhage (Pty) Ltd (formerly Tycon (Pty) Ltd, supra* at 1159 para [11].

It is a notorious fact of commercial life that related parties enter into contractual arrangements. I did not discern any abnormalities in the nature of the agreements nor in the identities of the signatories. There was however an admixture of the normal and abnormal in the manner in which the agreements were carried out. For starters, the appellant overemphasized the indisputable uniqueness of the manner in which the agreements were carried out. In the letter of 24 October 2013 at p 50.1 para 11 the external accountants for the appellant wrote that "the appellant's position is unique in the transport regime of Zimbabwe and there is no other haulier which provides a similar service." The same point was repeated in the letter of 6 December 2013 at p 45.1 in para 1.2 where the same accountants indicated that they "were unaware of any Zimbabwean company which operates in the same unique situation as the appellant."

The fixed rental fee with all maintenance and running costs for the account of the tenant model was unique to the related parties and therefore abnormal. Other hauliers including the related party conducted the haulage business for their own account. The charge per trip and not per kilometre was normal as demonstrated by two of the three local cross-border hauliers engaged by the respondent for comparative purposes. However the charge per leg per trip was abnormal. In charging per trip, the comparative cross-border hauliers took into account a variety of factors such as overheads, distance and the nature of the load. What emerged from the comparative correspondence was that the normal charging method was the cost plus mark-up model. The ingredients that went into the charging model of the appellant and the related party were not disclosed. That in my view was abnormal. In addition, the appellant was not candid with both the Commissioner and the Court in regards to the pre-2009 charges. The 2009 agreement recorded that "the change in currency from the Zimbabwean Dollar to United States Dollar which took effect in February 2009 did not have

any effect on the agreed rates as set out in the [8 October 2003] October Agreement."3 These were in South African rands, which remained and still remain the currency of account of the agreement. Such disclosure would have assisted in ascertaining whether the advent of the multicurrency era resulted in an increase or a decrease of the rental charged in each of the four tax years under consideration. I add for good measure that the payment of the remuneration of the drivers used by the related party without any form of compensation was abnormal as was the drawing of the related party's fuel in Zimbabwe for free.

In assessing the information availed to the Commissioner by the appellant and to this Court by both the appellant and the Commissioner, I am satisfied the agreements were carried out in a manner which would not normally be employed in such transactions. In the light of the formulation of Trollip JA in *Hicklin* v *Secretary for Inland Revenue, supra,* it appears to me that the two parties were not acting at arm's length.

Whether the agreement created rights or obligations which would not normally be created between persons dealing at arm's length under such a transaction.

It was clear that each party derived tangible benefits from the agreements. The related party had the right to lease the equipment and the obligation to pay rentals and maintain the equipment. The appellant received a fixed rental. The obligation to meet the maintenance and running expenses was unique and abnormal. The fixed rentals which negated the cost plus mark-up principle was abnormal and would not have been concluded by parties dealing at arm's length. Again the use of the drivers by the related party for no compensation just like the drawing of its fuel by the appellant for free were rights that would not have been created by parties acting at arm's length. I hold that the appellant did not act at arm's length with the related party and concluded and executed an agreement that was inimical to its bottom line.

Whether the avoidance or reduction of tax was the sole or one of the main purposes of the agreement

The appellant established that other economic considerations informed its decision to enter into this agreement. It sought to avoid liquidation and attendant costly retrenchments. These purposes were achieved. The financial statements showed that it was in each year "audited" as "a going concern". It seems trite to me that the purpose of a private company is to make a profit. The appellant is not a non-profit making organisation. The appellant was content with the untenable situation in which it made and continues to make losses without

3 Clause 2.2 to 6 July 2009 amendment

any prospects of ever making a profit. It seems to me that the fixed rental was deliberately designed to ensure that the appellant would remain viable enough to survive liquidation and costly retrenchments and at the same avoid or reduce its income tax liability. That the spectre of income tax and indeed other imposts were contemplated by the parties was apparent from the note on p 12.29 of exhibit 1 cited above where the parties agreed to adjust and revise the fixed rental in tandem with "any taxes or other charges levied by Central Government or any local authority in Zimbabwe, as the case may be, which may directly or indirectly effect the said rates". As it turned out the rate was merely increased in tandem with inflation and not taxes because the appellant continued to make losses. I am satisfied that the avoidance or reduction of income tax liability was one of the main purposes of the agreement (s).

In *Partington* v *Attorney-General* (1869) LR 4 HL 100 at 122 Lord Cairns stated that:

> "As I understand the principle of all fiscal legislation, it is this: if the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be."

And in *CIR* v *IHB King; CIR* v *AH King* 1947 (2) SA 196 (A) at 209 WATERMEYER CJ made the poignant observation that:

> "If a transaction is covered by the terms of the section its provisions come into operation, if it is not then its provisions cannot be applied."

In my view, the transactions undertaken by the appellant fell into the all-embracing provisions of s 98. The respondent correctly invoked this provision in assessing the appellant to income tax in each of the four tax years in question.

It is well to distinguish the finding in the present case with the findings in *G Bank* and *H Bank, supra.* The conduct of the banks unlike in the present case passed the normality and arm's length tests. It is in such circumstances that the "apt reminder" is invoked against the Commissioner. In cases where these twin principles do not apply such as in *R Ltd & Anor* v *Commissioner of Taxes* 1983 (1) ZLR 157 (HC), 45 SATC 148 (ZH) at 176A-B and 178E and *Michau v Maize Board* 2003 (6) SA 459 para [40] and *Commissioner for Inland Revenue* v *Estate Kohler* 1953 (2) SA 584 (AD) at 591F the taxpayer is at liberty to reduce his tax liability by taking advantage of positive incentives prescribed in the Taxes Acts without attracting the stigma of tax avoidance.

Whether the respondent correctly assessed the appellant

Mr *de Bourbon* contended by reference to exh 4 that the assessment was wrong and submitted that it should be set aside. Mr *Bhebhe* contended that the determination contemplated by the concluding words of s 98 was based on estimated and not actual and correct rates. The concluding words of s 98 require the respondent to "determine the liability for any tax and the amount thereof as if the transaction, operation or scheme had not been entered into or carried out or in such a manner as in the circumstances of the case it considers appropriate for the prevention or diminution of such avoidance, postponement or reduction."

The appellant strongly argued against the alteration of the contract of lease concluded between the related parties by the respondent. While Mr *Bhebhe* conceded that the respondent did not have the legal authority to alter the contract of the related parties he forcefully argued that it had the power either to disregard the existence of the contract or to neutralise its perverse income tax consequences and assess a fair and reasonable tax. He contended that the respondent was empowered to make assessments based on notional rather than on received or accrued income.

It is correct that the respondent did not have the legal power to vary the contracts concluded by the related parties. However, while the sanctity of contracts is a fundamental and foundational principle of our law, it may be abridged by legislation. This point was made by Innes CJ in *Law Union and Rock Insurance Company Ltd* v *Carmichael's Executors* 1917 AD 593 at 598 when he stated that:

> "...public policy demands in general full freedom of contract; the right of men freely to bind themselves in respect of all legitimate subject matters. The general interest of the community may and does in certain cases require the abridgement of this right. But language enforcing such abridgement should be narrowly regarded and strictly construed. For it cannot be thought that the legislature would in the interests of the public infringe upon so fundamental a principle of public policy to a greater extent than would be required to obviate the mischief aimed at."

It is also correct that our income tax legislation is designed to tax created income as opposed to notional income. In this regard BEADLE CJ stated in *Commissioner of Taxes* v *Feldman & Others* 1968 (1) RLR 85 (AD) at 95A that:

> "The Act seeks to tax income and a taxpayer's income is arrived at after including in his gross income what had been "received by or accrued to" him during the year of assessment (see s 8 (1)).

He continued at 95G thus:

> "Whichever way the distribution is looked at, therefore, no "amount" has been received by or has accrued either to the partnership or to the individual partners as a result of the dissolution. To attempt to fix a notional value on an "amount" not received or accrued, so as to make it attract tax, is not I hope, the general purpose of the Act."

The learned Chief Justice however did acknowledge at p 94G of the same judgment that:

> "It is true that Income Tax Acts sometimes do strange things, and that taxing a notional profit is by no means unknown. But in such cases the language of the Act clearly indicates that this is the case."

I agree with Mr *Bhebhe* that the closing words of s 98 in unambiguous language empower the Commissioner to impute and tax notional income. However, the section does not provide the mechanism for determining such income but accords a wide discretion on the Commissioner to do so. In the exercise of his wide discretion the Commissioner elected to apply the rate per km model using the 2013 rate per kilometre supplied by the appellant in the computation of the notional income in respect of each of the four years of assessment. It was common cause that in the determination of 14 November 2014, the Commissioner recognised that the 2013 rate was not an accurate and correct rate. The sole witness called by the appellant proffered some figures that he alleged were the gross rates used by the related party in each of the respective years, which were lower than the 2013 rates applied by the respondent. His mere say so was inadequate to establish the veracity of those figures. They were not subjected to an accuracy test by the respondent as they were provided in the witness's written statement some 3 weeks before the appeal commenced. The correct application of these rates to the formula propounded by the respondent using the rates of exchange provided by the appellant in each year would not result in the negative variances computed by the appellant in exh 4 in all these years but would result in a negative variance of US$ 100 782.51 for 2009, and positive variances of US$ 187 174.47 in 2010, US$149 277.68 in 2011 and US$65 653.46 in 2012. Table 4 demonstrates how these variances arise and table 5 the tax due.

Table 4: computation of variances using the rates supplied in evidence by the appellant.

Year/item	2009	2010	2011	2012
Distance km	359 478	505 748	456 664	450 074
Acceptable rate	16.55	17.52	19.45	20.04

Expected revenue ZAR	4 759 488.72	8 860 704.96	8 882 114.80	9 019 482.96
Expected revenue average USD rate	8.64	7.22	7.06	7.98
Expected revenue in USD	**688 583.44**	**1 227 244.45**	**1 258 089.92**	**1 130 261.02**
Transport services income AFS	443 388.98	582 023.44	578 854.59	523 247.16
Expenses declared in Rands & USD at average yearly rates	2 989 241.00 **345 976.97**	3 372 076.00 **467 046.54**	3 741 501.00 **529 957.65**	4 320 056.00 **541 360.40**
Total AFS & expenses USD	789 365.95	1 049 069.98	1 108 812.24	1 064 607.56
variance	-100 782.51	178 174.47	149 277.68	65 653.46

Table 5: the computation of tax due from the appellant

The resultant tax computations from the above would be as follows:

Year/item	2009	2010	2011	2012
Appellant computations	-41 675.00	-75 497.00	-93 013.00	-20 652.00
Add: Provisions	10 520.00	28 982.00	17 416.00	312.00
Bad debts	-	-	18 783.00	-
Donations	-	-	100.00	-
Apportionment of drivers salaries	90 908.17	158 374.08	170 616.13	190 669.93
Freight rates adjustment	-100 782.51	178 174.47	149 277.68	65 653.46

(variance)					
Bank deposits anomaly	100.25	0.31	0.00	85.47	
Total	-40 929.09	290 033.86	263 179.81	236 068.86	
Taxable income	-40 929.09	290 033.86	263 179.81	236 068.86	
Tax at 25.75%	nil	74 683.72	67 768.80	60 787.73	

It seems to me that the appellant undermined its objection and appeal by failing to provide the respondent with information on the gross rate and the total operating costs of the related party as it did on page 50.2 of exh 1 in respect of 2013. There was neither reason nor logic in supplying 2013 figures when the investigation related to the period 2009 to 2012. I formed the distinct impression from the appellant's conduct that it was reluctant to supply the requisite information and to that extent was uncooperative with the respondent. In that regard, the appellant deprived itself of the opportunity to explore the eminently reasonable method of computing the acceptable rate that would constitute the imputed gross rate applicable to the appellant. The seeds of the suggested method were sown in annexure B to the letter of 13 June 2014 on page 43.3 of exh 1.

If I had that information I would have marked down the total costs of the related party by at least its proven mark-up to calculate a more realistic gross rate for the appellant. It is apparent to me that the mark-up of the appellant would have been lower than that of the related party. The "acceptable rate" of R18.18 suggested a mark down of 19% from the gross rate of R22.47. The appellant failed to establish on a balance of probabilities that the same mark down rate pertained to the period under consideration. The examples set out in annexure A of the objection letter at p 31.3 to 31.5 of exh concerning 5 round trips in respect of each tax year indicated the gross earning and total expenses and profit earned per trip for the selected equipment and routes. These samples were too limited in scope and depth and were thus unable to provide credible information required to calculate the mark down rate. The use of the formula Mark-up= $\frac{A-(B+C)}{B+C} \times \frac{100}{1}$ where A represented the gross revenue, B the costs less CD3 expenses and C the CD3 expenses produced the average profit margin for the 5 trips in 2009 of 11%, 2010 of 5%, 2011 of 1.8% and 2012 of 21%. The range in 2009 was

between -2.3% and 55.8%; in 2010 it was between -3.2% and 19.4%, in 2011 it was between -27% and 35% while in 2010 it was between 3.5% and 32.3%. Faced with this difficulty, I adopted the gross rates the appellant supplied and applied them as outlined in table 4 and 5 above. I will set aside the amended assessments issued on 23 June 2014 and direct the Commissioner to issue further amended assessments that adopt the computations in Table 4 and 5 of this judgment.

The answer to the real question before me

The answer to the question whether the Commissioner is empowered by s 98 to impute notional income and proceed to tax it is answered in the affirmative. The closing words of s 98 direct the Commissioner to "determine the liability for any tax and the amount thereof as if the transaction, operation or scheme had not been entered into or carried out or in such a manner as in the circumstances of the case it considers appropriate for the prevention or diminution of such avoidance, postponement or reduction" once the transaction, operation or scheme has the stipulated effect and he firstly forms the opinion that it was entered into or executed in an abnormal manner or was not entered into or executed at arm's length and secondly, the further opinion that it was created and implement for the purpose of avoiding, reducing or postponing the payment of tax. I have found that the agreement had the stipulated effect and have upheld the Commissioner's opinion in both the aforementioned respects.

The concluding words of s 98 provide the Commissioner with a very wide discretion in computing the imputed notional tax. He would have been within his rights to treat the agreement as a partnership despite the disavowal of the related parties in clause 8 of the 2003 agreement. He would off course have required information on which to apportion the partnership shares based amongst other factors on the ratio of the appellant's equipment to that of the related party.

Whether or not SI 163 of 2014 is applicable in casu.

It was common cause that the Finance Act (Tax Amnesty) Regulations SI 163 of 2014 were promulgated in terms of s 23 of the Finance Act (No. 2) of 2014. They targeted tax defaulters and evaders. The period covered by the tax amnesty ran from 1 October 2014 to the 31 March 2015 and was further extended to 30 September 2015. The application was made on the prescribed form and full disclosure was required. All taxpayers who had made self-assessments, paid tax, were under investigation or audit or were challenging their

assessments were not eligible. The appellant fell into the excluded category of taxpayers. The eligible taxpayers were exempted from paying additional tax, penalties and interest once the application was granted.

Mr *de Bourbon* contended that the appellant as a law abiding citizen was being discriminated against by being asked to pay additional tax and interest in violation of s 56 (1) of the Constitution which required that all persons be treated equally before the law and have equal benefit of the law. He prayed for the extension of the benefits to the appellant. He submitted in the alternative that in exercising its discretion this Court exempts the appellant from payment of any additional tax and interest. Section 56 (1) and (6) stipulate that:

> (1) All persons are equal before the law and have the right to equal protection and benefit of the law.
> (6) The State must take reasonable legislative and other measures to promote the achievement of equality and to protect or advance people or classes of people who have been disadvantaged by unfair discrimination, and—
> (*a*) such measures must be taken to redress circumstances of genuine need;
> (*b*) no such measure is to be regarded as unfair for the purposes of subsection (3).

S 56 falls under the cluster of fundamental human rights and freedoms. In terms of s 45 (3) of the Constitution they apply to both natural and juristic persons and must be construed in terms of s 46 of the Constitution which amongst others requirements prescribes the promotion of the founding values and principles in s 3 of the Constitution that underlie a democratic society based on openness, justice, human dignity, equality and freedom by a Court of law. The right to equality before the law and equal benefit to the law are however not absolute rights. They are limited in extent and application by s 86 (2) of the Constitution which states that:

> (2) The fundamental rights and freedoms set out in this Chapter may be limited only in terms of a law of general application and to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom, taking into account all relevant factors, including—
> (*a*) the nature of the right or freedom concerned;
> (*b*) the purpose of the limitation, in particular whether it is necessary in the interests of defence, public safety, public order, public morality, public health, regional or town planning or the general public interest;
> (*c*) the nature and extent of the limitation;
> (*d*) the need to ensure that the enjoyment of rights and freedoms by any person does not prejudice the rights and freedoms of others;
> (*e*) the relationship between the limitation and its purpose, in particular whether it imposes greater restrictions on the right or freedom concerned than are necessary to achieve its purpose; and
> (*f*) whether there are any less restrictive means of achieving the purpose of the limitation.

The inarticulate major premise embodied in Mr *de Bourbon's* submission was that the tax amnesty provisions were to the extent that they discriminated against the appellant unconstitutional. He did not disclose how the Finance Act No 2 of 2014, on which these amnesty provisions are founded failed the test of constitutionality stipulated in s 86 (2) of the Constitution. I await proper and well-reasoned rather than bald and unsubstantiated legal submissions on the point that would serve justice to both the taxpayer and the Commissioner. The arguments advanced are inadequate to convince me on a balance of probabilities that the appellant should be accorded the same treatment by the Commissioner or this Court as the truant taxpayers contemplated in the tax amnesty provisions. The main and alternative submissions are devoid of depth and are accordingly dismissed. I therefore hold that the statutory instrument in question has no application in the present matter.

Penalties

In para 51 of his written submissions, Mr *de Bourbon* conceded that the Commissioner was authorised by s 64 (2) as read with para (m) to the Eleventh Schedule of the Income Tax Act to increase the level of penalties imposed during an assessment in his determination of an objection. In the present matter the penalties were increased from 90% to 100%. In terms of s 46 (6) of the Income Tax Act the Commissioner has discretion to remit or waive additional penalty where the tax payer did not intend to evade the payment of the tax due. Where the intention to evade, in any one of the three alternatives propounded in *ITC 1577,* 56 SATC 236 of direct intent, awareness of certainty and awareness of possibility is evinced, neither the Commissioner in the first instance nor this court as a court of revision can on an appeal in the wider sense remit or waive the additional tax to anything other than 100%. See the remarks of Squires J in *ITC No 1334* (1981) 43 SATC 98 at 106 and of Smith J in ITC 1631, *supra*, at p70. Mr *de Bourbon* urged me to apply the principles that I set out in *PL Mines v Zimbabwe Revenue Authority* 2015 (1) ZLR 708 (H). In imposing the penalty the Commissioner and the appeal court are obliged to consider the triad of the offender, the offence and the interests of society.

Before dealing with each specific transaction for which penalty was imposed I do take cognisant of the specific factors pertaining to the appellant. It cooperated with the respondent in some and all instances. It was a good corporate citizen which until the investigation under consideration took place had complied with its tax obligations. It was an employer which

held the interests of its workforce at heart. It served the country by bringing some modicum of foreign currency into the country when the local economic environment was bleak.

The offence of tax avoidance was described by MacDonald JP in *Commissioner of Taxes* v *F* in rather strong language as an evil. Of course taxpayers are allowed to employ legitimate means to lessen their tax burden and these do not invite public opprobrium. Tax avoidance certainly places the burden of taxation on other taxpayers to the exclusion of the offender. Courts emphasise both personal and general deterrence in imposing suitable penalties. As will appear in my assessment of each offending transaction, the appellant and its tax advisers deliberately implemented an opaque system of tax avoidance and reduction with the intention of evading the payment of the correct tax due. This course of action obviously raises the moral turpitude of the appellant and results in the imposition of the maximum penalty permitted by law. The interests of society require that taxpayers abide by the law and pay their fair share of taxes. Those who deliberately break the law must feel the pinch. I have these factors in mind as I consider each offending transaction and assess the suitable penalty.

Penalties were imposed in respect of the following transactions.

a. Provision for leave pay and for security

In each of the four financial statements in question the appellant made provision for accrued leave pay due to its staff and in 2010 and 2011 a provision for security. Each provision was claimed as an expense incurred under the general deduction formula, s 15 (2) (a) of the Income Tax Act in the year in which it was made but was not reversed in the following tax year. The appellant conceded the failure to reverse these provisions in each of the four years of assessment. The sole witness for the appellant averred that this was due to a bookkeeping oversight for which it did not evince any intention to mislead the respondent or seek to obtain a tax advantage. The appellant ended up erroneously claiming excess deductions under this head of US$ 10 520 in 2009, US$28 982 in 2010, US$ 17 416 in 2011 and US$312 in 2012, which were added back to income by consent during the investigations and included in the amended assessments.4 The respondent treated the non-reversal as a deliberate attempt to evade the payment of the correct tax and imposed the penalty of 100%. The appellant failed to show how such an error could have taken place consecutively in each year. It seems to me that the respondent was justified in treating these failures as deliberate

4 P44.2 and 44.3 of exh 1 and p 13.2 of exh 2

attempts motivated by the desire to reduce the appellant's tax liability. The imposition of a penalty of 100% in these circumstances was justified.

b. The 2010 bad debt claim

This was in respect of rentals in the sum of US$18 783 owed by a tenant for the appellant's property in Mutare for the 2011 calendar year. The claim in the summons and declaration issued on 22 May 2012 was in respect of arear rentals in the sum of US$2 000 per month for the period 1 June 2010 to 31 December 2011, eviction and holding over damages from 1 January 2012 and other consequential relief [p 52 to 52.7]. However an e-mail from the appellant of 10 October 2013 indicated that the tenant paid all the rentals at the rate of US$2 300 per month during 2010 but defaulted in 2011. The appellant included the unpaid rentals in its 2011 income but reversed it all at the end of that calendar year. The tenant commenced payment of reduced rentals of US$1 500 after the issue of summons.

In *BT (Pvt) Ltd* v *Zimbabwe Revenue Authority* 2014 (2) ZLR 640 (H) at 655D-E I set out the three requirements that a taxpayer is required to prove on a balance of probabilities in respect of a bad debt. An application of these requisite elements show that the amount claimed by the appellant was due and payable. The financial statements for 2011 were prepared on 14 March 2012, the date on which the debt was declared to be bad. It is clear to me that by that date the amount was unlikely to have been recovered at the end of the 2011 financial year. The Commissioner must also have been satisfied that it was a bad debt. The amount had been included in the taxable income of the taxpayer in that year of assessment. In my view, the amount should have been deducted from the appellant's income. For undisclosed reasons the appellant conceded that it wrongly deducted the amount and Mr *de Bourbon* correctly found himself bound by that concession that the appellant knowingly and voluntarily made. Clearly the imposition of a penalty of any nature let alone of 100% was not justified. In the exercise of my discretion I will direct that the penalty imposed in respect of the bad debt be discharged in full.

c. The failure to reverse the donation of US$100 made in the 2011 financial year

This was attributed to a bookkeeping error. It was deducted in the 2011 tax computation as an expense. Again, like in the issue in respect of leave pay and security provisions, the appellant failed to indicate how such "an error" could occur in the face of the accounting

skills that were at its disposal. The respondent was justified in treating the purported error as evincing a deliberate intention to reduce the appellant's taxable income for which he had no choice but to impose a 100% penalty.

d. The failure to apportion the wages of the drivers employed by the appellant who drove the related party's vehicles

The appellant paid all the statutory salaries and wages and allowances of some of its drivers who drove the related party's vehicles that did not form party of the leased equipment without any form of reimbursement from the related party. The appellant always claimed these drivers' wages as expenses against income. The appellant admitted that it had been doing this for years. This was only discovered during the investigation. On the advice of its South African based accountants, the appellant agreed that 50.28% of the total wage bill be disallowed. This figure was arrived at using the information on p 42 to 42.6 exh 1. The agreed amounts that were added back to income in respect of each tax year are set out on pages 42.4, 42.6 and 38.2 of exh 1. They were US$ 90 908.17 for 2009, US$ 158 374.08 for 2010, US$ 170 616.13 for 2011 and US$ 190 669.93 for 2012. It was apparent that the appellant did not incur the expense in relation to these drivers. In terms of the agreements, the appellant leased only its equipment and not the drivers to the appellant. All the 110 drivers were not rendering any service to or on behalf of the appellant but were doing so to the related party. In my view, there was no legal justification for the appellant to deduct the wage bill of all the drivers who were driving both the appellant's rented equipment and the related party's equipment. The appellant's case throughout these proceedings has always been that it was not in the business of cross-border transportation. It ill behoves the appellant to now claim that all the drivers involved in the cross border haulage business of the related party were actually engaged for the purpose of its own trade or in the production of its income. The pleadings and evidence showed that its income in respect of this equipment was derived from the rental agreements. The salaries of these drivers were the responsibility of the related party. I fail to discern how any self-respecting internal and external accountants of the appellant would allow such a practice to prevail for as long as it did without batting an eyelid. The only reason it prevailed was because the appellant and its erstwhile accountants and tax advisers deliberately intended to evade the payment of the appropriate tax due to the Zimbabwean fiscus. The penalty imposed of 100% was most appropriate.

e. The assessment of additional income from the hire of equipment to the related party

The appellant conceded that some level of additional tax less than the 100% penalty imposed was appropriate. The appellant was uncooperative. I have already found that the transactions infringed the provisions of s 98. The appellant deliberately intended to evade the payment of tax due to the respondent. A penalty of 100% was and remains most appropriate.

f. The unreconciled bank deposits

During the investigation the appellant failed to reconcile bank deposits of US$100.25 for 2009, US$0.31 for 2010 and US$87.47 for 2012. These amounts were omitted from the taxable income of the appellant and were added back by consent in the amended assessments. The appellant failed to account for the anomaly. The issue is not how insignificant they are, but the principle involved. This is because the logical conclusion such a contention would be that payment of a 100% penalty on these insignificant amounts would not place any undue burden on the appellant. The failure to explain the discrepancy does demonstrate a pattern of tax avoidance or reduction on the part of the appellant that was motivated by the intention to evade the payment of the correct amount of tax due. The imposition of a penalty of 100% on these insignificant amounts was and remains most appropriate.

Costs

In terms of s 65 (12) of the Income Tax Act, an order for costs is only made against the Commissioner if the claim of the Commissioner is held to be unreasonable and against the appellant if the grounds of appeal are found to be frivolous. I do not find the positions taken by the Commissioner to have been unreasonable neither do I find the grounds of appeal to have been frivolous. Accordingly, each party will bear its own costs.

Disposition

Accordingly, it is ordered that:

1. The amended assessments number 1/3433 for the tax year ended 31 December 2009, 1/3434 for the tax year ended 31 December 2010, 1/3435 for the tax year ended 31 December 2011 and 1/3436 for the tax year ended 31 December 2012 issued on 23 June 2014 be and are hereby set aside.

2. The Commissioner is directed to issue further amended assessments against the appellant in respect of each year of assessment in compliance with this judgment and in so doing shall:
   a. Apply the gross rates per kilometre set out in table 4 in computing the variance between the expected income and received income.
   b. Apply the average exchange rates between the United States dollar and South African rand in each year of assessment of as set out in table 4 of this judgment of R8.64 for 2009, R7.22 for 2010, R7.06 for 2011 and R7.98 for 2012 to 1U$.
4. The appellant is to pay additional tax of 100% in respect of provision for leave pay and for security, failure to reverse the donation, the failure to apportion the wages of the drivers employed by the appellant who drove the related party's vehicles, hire of equipment to the related party and unreconciled bank deposits.
5. The additional penalty imposed in respect of bad debts is waived in full.
6. Each party shall bear its own costs.

31/10/2017

Gill, Godlonton & Gerrans, appellant's legal practitioners
Kantor & Immerman, the respondent's legal practitioners