

MDS (PVT) LTD
versus
THE COMMISSIONER GENERAL
ZIMBABWE REVENUE AUTHORITY

SPECIAL COURT FOR INCOME TAX APPEALS
KUDYA J

HARARE 26, 27 and 28 May, 6, 7, 8, 9 and 10 July and 24 September 2015 and 12
September 2017

Income Tax Appeal

AR Chizikani, for the appellant
N Mbiriri, for the respondent

KUDYA J: This is an appeal against additional revenue added back into the gross income of the appellant by the respondent in the amended assessments number 00114972 dated 5 June 2013 as further amended by assessment number 20200043 issued on 31 December 2013 in respect of the 2010 tax year and 00114970 dated 3 June 2013 as further amended by 20200045 issued on 31 December 2013 in respect of the 2011 tax year.

INTRODUCTION

On 29 May 2014 the appellant timeously filed its notice of appeal in the Fiscal Appeal Court instead of the Special Court for Income Tax Appeals. The error was brought to the attention of the appellant's counsel by the respondent on 21 July 2014. The erroneous notice of appeal was withdrawn. On 31 July 2014 the appellant filed an application for condonation and extension of time to file the present notice of appeal in this Court in terms of s 65 of the Income Tax Act [*Chapter 23:06*]. On 4 August 2014 the respondent did not oppose the application and it was accordingly granted by consent.

On 15 January 2015, the appellant withdrew ground of appeal number 4 of 2011. The ground concerned two bulk purchases of 20 000 litres and 24 000 litres of petrol supplied on 25 March 2011 and 14 November 2011, respectively, by one of its major suppliers EG. It paid the full purchase price of US\$25 999.40 and US\$ 31 676.04, respectively. It however took delivery of 10 000 litres respectively on each consignment. The appellant indicated in

the notice of appeal and in its letter to the respondent of 19 March 2014¹, that it was still investigating what had become of the unaccounted 24 000 litres worth US\$31 478.74. On 7 April 2014², the respondent declined to remove this amount from the appellant's taxable income. The withdrawal was premised on the failure to take the decision of the chief investigations officer to whom the matter had been remitted back to the Commissioner for determination.

The fifth ground of appeal in respect of 2011 concerned the disallowed deduction of cash purchases of US\$661 656.63. The appellant did not raise this ground in the objection to the Commissioner of 1 October 2013. I declined at the first pre-trial hearing of 15 January 2015 to refer this ground for determination on appeal for the reason that it was not raised in the notice of objection of 1 October 2013 or in its sequel of 6 January 2014³, and had not therefore been determined by the Commissioner.

The appellant was incorporated in 2001 as an automobile engineering company involved in the servicing of injector pumps and motor vehicles. In January 2009 the appellant diversified its portfolio into the earthmoving plant and equipment business unit and in January 2010 it added the distribution and retail of petroleum products business unit. The petroleum products were procured from identified local suppliers and dispensed for cash from the service station in Graniteside to both individual and corporate clients. The service station had a holding capacity of 175 000 litres and owned amongst other assets a petroleum tanker⁴. In addition the appellant made bulk sales to a portfolio of identified large corporate clients on credit and cash. The credit sales were referred to as invoiced sales and were desegregated from cash sales. The earthmoving plant and equipment were hired out to the Ministry of Transport, a local authority and two identified private corporations.⁵

The appellant kept two books of account at the service station. These were the petty cash book in which all cash transactions were recorded and the stock book in which both cash and invoiced transactions were recorded. Other primary source books and records such as purchase invoice files, sales invoice books and quotation books were also kept at the service station.

The tax investigation was prompted by a deposit of US\$10 million into one of its accounts, a figure far in excess of the combined turnover declared in the 2010 and 2011

¹ Annexure 47 p139-140 annexure 47 at p 139 to 140 dated

² Annexure 48 p 144 of Commissioner's case and annexure 17C p 72 of notice of appeal

³ Annexure 44 p 128-132 of Commissioner's case

⁴ P 20 of the financial statements, exh 2

⁵ P 13 of Commissioner's case and pages 7 of exh 2

financial statements. The investigation was led by the chief investigations officer who testified on behalf of the respondent. During the duration of the investigation, the appellant was represented initially by the general manager, group accountant, accounts clerk and internal accountant and after 6 March 2013, by the tax consultant.

The parties held meetings on 19 October 2012 and thereafter on 21 December, 2012, 9 and 15 January 2013, 19 and 26 March 2013 and on 4 and 23 April 2013. At these meetings reconciliations of the sales and purchases schedules were carried out using the various source books that were provided by the appellant to the respondent and numerous omissions and duplications were removed from these schedules. The sales schedule reconciliations of December 2012 and January 2013 disclosed duplications on invoices worth US\$261 296 for 2010 and US\$ 16 800 for 2011. The parties disagreed on some of the amounts that remained on the sales schedule. On 19 February 2013 the respondent issued an amended assessment that effectively increased the appellant's tax liability. On 26 February 2013 the appellant filed an objection with the respondent that did not meet the requirements of s 65 of the Income Tax Act [*Chapter 23:06*].

On 6 March 2013 it enlisted the services of the tax consultant who scrutinised all the correspondence and documents exchanged between the parties and thoroughly examined all the manual records of the appellant. On 13 March 2013 the tax consultant engaged the respondent and attached 10 schedules to his written submissions. Amongst these were the second purchases schedule in respect of the 2010 tax year and the second schedule in respect of the 2011 tax year. The chief investigations officer compared the second schedules with the first schedules and added to the second schedules all the transactions in the first schedules that the appellant had omitted. On 26 March 2013 he requested the appellant to reconcile the purchases schedules for each of the two tax years and was supplied with the response on 2 April 2013. However, on 24 April 2013 the appellant submitted a third purchases schedule for 2010 and resubmitted a third sales schedule for 2011 that was almost identical to the disowned first sales schedule. The respondent declined to consider these latest schedules but resorted to the second schedules as amended by the reconciliations that had been conducted by the parties.

Between 22 April and 1 October 2013, the parties exchanged correspondence on the validity of the amended income tax assessments issued by the appellant based on the amended second schedules. The unresolved disputes, which centred on some sales invoices that the appellant claimed were non-existent, cancelled or duplicated in both tax years and the

refusal by the chief investigations officer to accept the cost of purchases amounting to US\$292 210 in respect of the 2011 tax year, were crystallised in the statutory objection to the Commissioner of 1 October 2013. Because the two grounds of objection raised factual disputes between the parties, the Commissioner adopted a two pronged approach in dealing with them.

The first was the request for more information in regards to the 2011 expenses of US\$292 210 on 6 and 18 November 2013. The appellant furnished her with two identical 2011 purchase schedules but failed to list the individual invoices that constituted the sum of US\$292 210. The Commissioner allowed the deduction of the cost of purchases of US\$127 814.56 and excluded the balance of US\$ 164 395.44. On 5 March 2014 she remitted this balance to the chief investigations officer for reconciliation with the appellant. The reconciliation was done over four days in March 2014. On 7 April 2014 the chief investigations officer further allowed the cost of purchases of US\$95 816.70 leaving an outstanding balance of US\$ 68 578.74. In regards to the outstanding balance, the appellant conceded that the US\$25 200 expense was incurred on 22 August 2012 and not 22 August 2011 as indicated in the November 2013 purchases schedules and the further expense of US\$11 900 was duplicated. The remaining two comprised the transactions of 25 March and 14 November 2011 that were raised in ground of appeal number 4 of 2011. The appellant claimed to have paid the cumulative amount of US\$31 478.74 for the fuel that was never delivered. The chief investigations officer disallowed the amounts on the ground that the appellant was still investigating what had transpired in respect of these transactions.

The second approach involved allowing the objection in respect of non-existent sales to CZ amounting to US\$15 601 in the 2010 tax year and US\$25 098.10 in the 2011 tax year and a cumulative US\$10 804 in respective of duplications in 2010 cash sales for three other corporate clients on 2 January 2014 and calling for further representations on the outstanding issues before the actual determination to the objection of 1 October 2013 was made. On 6 January 2014 the appellant welcomed the adjustments made on 2 January 2014 and sought determination of the outstanding issues.

The remaining issues that were raised in the objection of 1 October 2013 were determined on 11 March 2014. The appellant disallowed the objection in respect of US\$118 245 sales to HW and COH and the cumulative amount of US\$ 2 028 in respect of three cash sales to two corporate clients but allowed the cancelled sale of US\$10 200 to another corporate client in the 2010 tax year. In regards to the 2011 tax year the Commissioner

allowed the duplicated sale to COH of US\$13 100 and disallowed the purported cancelled vatable sales to COH in the cumulative sum of US\$ 19 876. The appellant filed the notice and grounds of appeal on 24 July 2014 while the respondent filed the Commissioner's case on 13 October 2014.

THE ISSUES

At the pre-trial hearing of 21 January 2015 the following four factual issues were referred for determination on appeal.

1. Whether or not invoices for the amounts specified by the appellant in ground of appeal 1 and 3 for 31 December 2010 tax years and ground of appeal 1 for 31 December 2011 tax year were cancelled and whether or not the appellant was liable for tax on the said invoices
2. Whether or not the appellant under declared sales for 31 December 2010 tax year to the tune of US\$119 556.59, which represented a 12% mark-up
3. Whether or not appellant understated purchases for 31 December 2011 tax year to the tune of US\$ 31 336.56, which represented a 12% mark-up and
4. Whether or not the appellant was liable for tax on additional income for the 31 December 2011 tax year to the tune of US\$ 359 073.00

The appeal was heard over 9 days and was recorded in four note books and 19 tapes in May, July and September 2015. In considering judgment in this matter I soon realised that my shorthand notes failed to accurately capture the voluminous evidence led during the trial. I therefore resorted to the full transcript of the proceedings which unfortunately was not available at the time I commenced writing this judgment on 1 April 2017. It took me a period of 10 weeks from 1 April to 10 July 2017 to personally transcribe the 383 pages of the record of proceedings. The dispute between the parties essentially related to the consideration and assessment of numerous figures.

The appellant called the evidence of four witnesses comprising its managing director, AEM, the internal accountant VM, tax consultant CM and an accountant with one of its major customers JW. In addition the appellant relied on 17 annexures constituting 76 pages and 6 documentary exhibits comprising the 122 paged exh 1, 25 paged exh 2, the three paged letter, exh 3 and exh 4 and two tax invoices books exh 5 and 6. The respondent relied on the evidence of its chief investigations officer, VM, and the documents attached to its 183 paged Commissioner's case.

Whether or not invoices for the amounts specified by the appellant in ground of appeal 1 and 3 for 31 December 2010 tax years and ground of appeal 1 for 31 December 2011 tax year were cancelled and whether or not the appellant was liable for tax on the said invoices.

The first and third grounds of appeal in respect of the 2010 tax year and the first ground of appeal in respect of the 2011 tax year concerned sales invoices that were raised by the appellant to two separate and distinct business units based at different locations and operating different accounting systems under the aegis of a municipal authority in Zimbabwe, which for ease of reference I will call HW and COH. The fuel sales to the two business units were all invoiced sales that were direct deliveries from a supplier to each business unit. They did not emanate from the service station.

The first 2010 tax year ground of appeal

The appellant sold bulk fuel products to both HW and COH on agreed credit terms. To initiate a sale, the procedure was that these bulk customers would first place either a verbal or written purchase order of its fuel requirements. The appellant would deliver the fuel together with a delivery note or goods received note at the agreed destination. The customer would take delivery by signing the delivery note in duplicate retaining the original and returning the fast copy to the appellant. The appellant would raise an invoice quoting the order number and indicating the date of delivery, the quantity and price and attach the delivery note and deliver it to the accounts office of the customer for payment. The customer would check, approve and capture the invoice in an electronic ledger opened for the appellant before processing payment and filing it in a manual register. It was common cause that payment was due and payable on presentation of an accurate invoice that captured the correct order number.

At the initial interview of 19 October 2012 the appellant identified the two business units amongst some of its major corporate clients to whom bulk fuel sales and the hiring out of earthmoving equipment was made⁶. On 29 October 2012 the respondent received the financial statements and copies of income returns together with the schedules of monthly sales depicting standard and zero rated and exempt sales and on the following day purchases invoices and schedules showing monthly transactions and bank statements from the appellant covering the tax years under investigation⁷. On 5 November 2012⁸ the respondent wrote similar letters to each business unit requesting information on the purchases of goods and

⁶ Annexure 1 p13 of Commissioner's case

⁷ Annex 1 p 14 and annex 2 p 15 of Commissioner's case

⁸ Exh 4

services made from the appellant during the period from February 2009 to the date of the letter showing in tabular form invoice number, date of purchase, product or service purchased, invoice amount excluding VAT, the VAT and the total amount inclusive of VAT⁹. HW supplied the requested information but without the invoice numbers¹⁰ on 15 November 2011. The information related to 77 transactions [40 fuel and 37 hire of plant and equipment] covering the period from 4 February 2010 to 15 February 2012.¹¹ It was common ground that the list did not cover all the transactions conducted between them.

The respondent discovered that some of the sales invoices on the schedules, which included some which related to the two business units, had been ripped out of the sales invoice books that were surrendered to the appellant. The chief investigations officer stated that he added back to the initial sales schedules those invoices that were in the invoice books but not on the schedule. He added back those invoices with both the hard and fast copies in the invoice book and with fast copies only which had no cancellation endorsement. The appellant demonstrated that some of the subsequent invoices in the invoice books carried identical transactional details with the unendorsed invoices. The identical order number in both sets of invoices established the “cancellation” of the earlier invoices and satisfied the respondent that the latter invoices replaced the earlier ones. The respondent maintained the HW and COH invoices in the sum of US\$118 245 on the schedule because the hard copies were missing, the fast copies were not endorsed “cancelled” and they had not been replaced. The appellant was obliged to establish on a balance of probabilities before the Commissioner and this Court that these invoices were either contrived or cancelled and that income had neither been received nor accrued. In this regard, on 10 April 2013 the managing director requested HW to confirm that the 23 invoices listed in his letter were cancelled and had not been paid out¹². In his response of 19 April 2013¹³ and through the verbal evidence of his contact person and accountant JM the director confirmed that his records and the letter to the respondent of 15 November 2012 were devoid of such invoices.

In oral evidence JM confirmed the averments made in the letter of 19 February 2015 that HW did not receive any goods or services nor make payments of US\$129 995 in respect of these invoices. He also averred that HW neither received nor cancelled these invoices. He opined that “what we received we paid and we have got goods received notes for them but

⁹ Annexure 3 p 19 of Commissioner’s case and Exh 4

¹⁰ Annex 4 p17-18 of Commissioner’s case

¹¹ Annexure 4 p 17-18 of Commissioner’s case

¹² Exh 3

¹³ Annexure 10 page 17-18 of notice of appeal and 24-25 of exh 1

what we did not receive we did not credit or debit it because we did not receive and credit it". He was adamant that HW accounting system was able to capture all received invoices, debtors and creditors. He maintained that HW did not have any outstanding transactions with the appellant. He however failed to explain why in the letter of 15 November 2012 HW was unable to disclose all the transactions effected between HW and the appellant during the tax period in question. The request of 5 November 2012 and the response of 15 November 2012 unlike the letters written by the appellant to HW in April 2013 and February 2015 and their responses of 19 April 2013 and 5 March 2015 did not suggest the answer. They carried a higher probative value than the latter letters. I am satisfied that the appellant failed to establish through the evidence of JM that the invoices in dispute were either contrived or cancelled.

To the extent that the 2013 correspondence from both HW and COH equated the appellant's liability to income tax with receipt of payment and not accrual of an unconditional obligation to such payment, the determinations of the respondent on 23 April 2013 and 11 March 2014 that the appellant was liable for income tax on these disputed amounts was correct. In order to counteract the correctness of the decision, the appellant wrote highly suggestive letters of 15 February 2015 to HW and COH seeking confirmation that they had not received any services from the appellant relative to the invoices in issue. The two business entities confirmed the point on 5 March 2015. Further, in regard to HW, JM confirmed the contents of the letter of 5 March 2015.

For the sake of completeness I proceed to deal with each disputed figure. The first written explanations on these disputed figures were proffered by the appellant on 2 April 2013 in annexure 22 p 62 to 65 of the Commissioner's case.

The sum of US\$ 7 800

This amount was shown on the sales schedule as a sale of fuel to HW on 3 February 2010. The invoice number was not indicated on the sales schedule. The appellant did not provide an explanation for this amount in annexure 22 p 62 of the Commissioner's case. It was not on the inaccurate list of 15 November 2012. It was also amongst the entries that the fuel administrator indicated on 14 January 2013 had been extracted from wrong source books such as the "other quotation books and cancelled invoices." The duty to call her to establish the source of those figures lay on the appellant. It did not do so nor did it produce any such source books. Contrary to her explanation, the appellant alleged that she had manufactured

these figures from thin air. In my view, the appellant failed to establish that this was a contrived sale. It was correctly included in the 2010 sales.

The two sums of US\$ 4 700

These two amounts of US\$ 4 700 were listed on the schedule as constituting sales to HW on 12 February 2010. Again, no invoice numbers were indicated on the schedule. The appellant explained in item 8 and 9 on p 62 of the Commissioner's case that these were not sales as the figures were not derived from any source book. HW indicated that it did not have any record of these sales. They were not listed on the inaccurate schedule of 15 November 2012. The wrong source books from which they emanated were not produced to the Commissioner or this Court. The appellant failed to call the evidence of the fuel administrator to establish the source. It failed to discharge the onus on it to show that these were indeed non-existent sales.

The sum of US\$ 7 850 and US\$ 4 850

These two sales were on the schedule under 1 March 2010 and no invoice numbers were shown thereon. In annexure 22 item 13 p 62 and item 14 p 63 of the Commissioner's case the appellant indicated that these two transactions to HW were actually captured on the two invoices number 038 and 036 on 16 March 2010, respectively. In evidence the appellant produced exh 6, the invoice book in which these two transactions were captured. The two transactions of 16 March 2010 were also shown on the sales schedule and on the list from HW of 15 November 2012. The appellant did not call the evidence of the fuel administrator to establish the source books from which she extracted these figures. Reliance on the inaccurate list of 15 November 2012 was not enough to discharge the onus it carried to show that the sales were non-existent. The respondent correctly included these two amounts in the appellant's 2010 taxable income.

Invoice 033 of US\$ 5 150 and invoice 307 of US\$5 050

These were raised by the appellant on 30 April and 1 May 2010 for the disputed sale of fuel to HW in the sums of US\$ 5 150 and US\$5 050 respectively. The appellant commented on these purported sales in annexure 22 p 64 items 37 and 40 respectively of the Commissioner's case and indicated that invoice 033 was cancelled but not endorsed while invoice 307 was cancelled and replaced by invoice 023. The fast copy of invoice 033 dated 13 May 2014 in exhibit 6 the invoice book for transactions recorded on invoices ranging from numbers 002 to 048, showed that the appellant sold petrol worth US\$5 150 to HW. An endorsement on this fast copy indicated that it was a duplication of invoice 035. Invoice 035

bears the same date and details as invoice 33. The schedule of transactions between HW and the appellant of 15 November 2012 showed that the appellant issued two separate invoices of US\$5 150 each to HW on 30 April 2010 thereby confirming the information on the disputed sales to the effect that the appellant sold two consignments of petrol to HW on invoice number 033 and 035¹⁴. The explanation provided by the appellant in annexure 22 and by the internal accountant in oral evidence that invoice number 033 was cancelled and replaced by invoice number 035 was therefore demonstrably false. The sales raised on invoice 033 and 035 were not one but two separate transactions. The amount of US\$5 150 was properly included in the appellant's taxable income.

The fast copy of invoice 023 dated 13 May 2010 showed that the appellant sold US\$ 5 050 worth of petrol to HW. Notwithstanding the fact that invoice 307 was completely torn out of the invoice book to which it related, the transaction of 1 May 2010 was missing from the listed transactions between HW and the appellant that were captured on the schedule of 15 November 2012. The transaction for the same amount and quantity was recorded in this schedule under 13 May 2010. The schedule of 15 November 2012 however did not capture all the transactions between HW and the appellant. Invoice number 023 did not cross reference invoice 307. The appellant failed to establish on a balance of probabilities that invoice 307 was cancelled. I hold that the sum of US\$ 5 050 raised on invoice number 307 constituted an active sale. It was properly included in the appellant's taxable income.

The invoice numbers 341, 344, 347, 348 and 350

These invoices formed part of the June 2010 invoiced sales derived from a sales invoice book containing invoices ranging from 341 to 350. These constituted fuel sales to HW between 9 June and 23 June 2010 in the aggregate sum of US\$31 730. The respondent requested an explanation from the appellant in respect of these invoices in the meeting of 26 March 2013. The explanations were attached to the letter of 2 April 2013, annexure 22 on p 64 of the Commissioner's case and similar receipts were produced in annexure 3 p 11, 13, 16, and 17 of exh 1. The dates on similar invoices in annexure 3 did not follow any chronological sequence.

Invoice number 341

Invoice number 341 dated 9 June 2010 was in the sum of US\$ 8 410. The appellant explained that such an invoice did not exist. The invoice with this number, annexure 3 p 11 of exh 1 was issued to COH and not HW on 19 July 2010 and not on 9 June 2010 for the sale of

¹⁴ Annexure 1 p3 of exh 1

30 000 litres of diesel for US\$ 30 600 and not for US\$ 8 410. The letter of 19 April 2013 from HW did not cover this transaction. It was not amongst the transactions listed in the letter of 15 November 2012. The appellant failed to call the evidence of the fuel administrator and did not produce the wrong source book from which she extracted this amount. Accordingly, it failed to show that the sale did not exist.

Invoice 344

Invoice 344 dated 10 June 2010 was for US\$5 050. The appellant explained that such an invoice with that amount did not exist. The invoice on file bearing that number showed sales of US\$106. It produced such a faint and almost illegible invoice as annexure 3 page 13 of exh 1 dated 20 June 2010 for pump hire. The amount charged is illegible. The letter of 19 April 2013 from HW incorrectly indicated that there was no record for the transaction of 10 June 2010 on invoice 344 in the sum of US\$5 050 that the appellant indicated did not exist in its records. There is however a transaction of the same date and in the same amount in the schedule of 15 November 2012. The director did not indicate the invoice number to which it related. The onus was on the appellant to discount this transaction on a balance of probabilities. It seems to me that the appellant failed to discharge this onus in respect of this amount. It was properly included in the appellant's 2010 taxable income

Invoice 347

Invoice 347 dated 17 June 2010 and was for US\$ 4 930. The explanation was that such an invoice did not exist. The one with such a number was cancelled and both the fast and bottom copies were on file. It produced an invoice bearing that number dated 22 June 2010 as part of annexure 3 p 16 of exh 1 for the offloading pump hire from MP for US\$60. However, the appellant failed to call the evidence of the fuel administrator to establish the wrong source book from which she derived this invoice from. It failed to discharge the onus of establishing that the sale did not exist. The sale was correctly included in the appellant's 2010 taxable income

Invoice 348

Invoice 348 dated 23 June 2010 was for US\$ 8 410. The explanation was that such an invoice with such an amount did not exist. In existence was the invoice bearing that number in annexure 3 p 17 of exh 1 dated 21 June 2010 for pump hire of US\$ 57 issued to MP. Again the failure to call the evidence of the fuel administrator was fatal to the appellant's case.

Invoice 349

Invoice 349 dated 23 June 2010 was for US\$ 4 930. The explanation was that this was not a sale and no payment was received. I found the failure to call the evidence of the fuel administrator to establish the wrong source book from which this figure was derived fatal to the appellant's case.

The tax consultant, managing director and internal accountant averred that the appellant did not keep two sets of invoice books with the same numbers. Again, it was their uncontroverted testimony that the appellant surrendered all the source books in its possession to the respondent who in some instances kept them for in excess of 5 months. It seemed to me that having provided the respondent with the letter written by the fuel administrator on 14 January 2013 that explained the source of these sales; the appellant had the duty to lead evidence from her on this aspect. The failure to call such evidence was fatal to the appellant's case. Accordingly I find that the amounts relating to these 5 invoices were correctly added to the appellant's taxable income.

US\$ 15 815 on invoice number 13413

This invoice related to the provision of services to HW on 20 August 2010 valued at US\$15 815. The tax consultant indicated that all invoices with 5 digits pertained to the hire of plant and equipment. In annexure 22 page 64 item 55 of the Commissioner's case, the appellant disputed such a transaction on the ground that it did not have any record of its existence. The transaction in question is not recorded in the inaccurate schedule of transactions between HW and the appellant of 15 November 2012. However, the failure to call the evidence of the fuel administrator was fatal to the appellant's case in respect of this sale.

The COH US\$ 30 600 transaction

In the sales schedule submitted to the respondent on 29 October 2012, annexure 1 page 5 of exhibit 1, the appellant extracted from invoice number 134 the sale of 30 000 litres of fuel for US\$ 30 600 to COH on 14 September 2010. The invoice book containing numbers 101 to 150 and in which invoice number 134 was recorded was produced as exh 5. The meeting of 26 March 2013 between the parties prompted the appellant to respond to the issue raised in regards to this invoice. The comment appears under the same annexure dated 2 April 2013 item number 57 on page 65. The appellant averred that: "134 and 135 US\$30 600 each: invoice 134 was cancelled as it did not have an order number. It was replaced by number 135 and this sale is included on the schedule lodged. Only one payment of US\$30 600 was received." At the meeting of 4 April 2013 the respondent was concerned by the appellant's

failure to raise a credit note against the invoice or to even endorse “cancelled” on the invoice but the appellant took the view that the cancellation was done before delivery had been made to COH.

The appellant furnished the respondent with the letters from COH of 22 April 2013 confirming that the invoice in dispute had not been processed and no payment had been made thereby allaying the fear expressed on 19 February 2013¹⁵ by the respondent that COH could have used the invoice to claim input VAT. On 5 March 2015, COH in response to an explicit letter dated 17 February 2015 confirmed firstly that the appellant did not provide any service in respect of this invoice and secondly that it did not receive the invoice nor make any payment on it. That letter controverted the unsubstantiated averment in para 1 of the respondent’s case that the accounting system of COH was unable to show invoices paid. The assertion by the appellant that the invoice in question was cancelled was therefore correct. Accordingly, I am satisfied that no income accrued to the appellant in respect of that invoice.

In regards to the disputed inclusion of US\$118 245 in the appellant’s 2010 taxable income I am satisfied that the amount of US\$87 645 was properly included thereon.

The 2010 second ground of appeal

The second ground of appeal concerned US\$1 975 of fuel sold to a corporate client DT on credit. The client purchased two consignments of fuel worth US\$1 008 and US\$960 on 10 May 2010 and 18 May 2010 on a 4 and 5 days credit facility, respectively¹⁶. The credit sale of US\$ 1 968 was recorded in the credit sales schedule. DT made cash payments of US\$989 and US\$987¹⁷, an aggregate of US\$1 976 in respect of these credit sales on 10 and 18 May 2010, constituting a prepayment of US\$8.00 on the credit sales of US\$1 968. In the objection letter of 1 October 2013¹⁸, the appellant wrongly averred that these two credit transactions were not sales when in fact they were. Thus, even if its version were upheld, the two cash payments in respect of these sales of 10 and 18 May 2010 would not constitute sales. However, in his response of 2 January 2014 the respondent correctly declined to remove the amount of US\$1 986 from the gross income of the appellant in the 2010 tax year, a position that was hotly disputed by the appellant on 6 January 2014. In her determination of 11 March 2014 the respondent disallowed the objection in respect of the US\$1 968 on the ground that the credited amounts did not correspond to the cash payments. In his oral

¹⁵ Annexure 14 p 36 of Commissioner’s case

¹⁶ Annexure 11 invoice numbers 314 and 316 on p 19 and 20 of notice of appeal

¹⁷ Petty cash book annexure 11 p 21 and 25 and 22 and 26 of notice of appeal and annex 42 p 117 and 121 and 118 and 122 of Commissioner’s case re- submitted to Commissioner on 21 November 2013

¹⁸ Annexure 37 p 102

testimony, the internal accountant indicated that this ground of appeal was resolved between the parties together with the queries on cancelled invoices that were raised during investigations. Mr Mbiriri, for the appellant conceded that the respondent had conceded in favour of the removal of the amount from the appellant's 2010 taxable income. I will endorse the concession in my order.

The 2010 third ground of appeal

The appellant hired out a compressor and other equipment to HW for the price of US\$18 298.50 excluding VAT and US\$ 21 043.78 inclusive of VAT. It raised invoice number 13421 on 13 September 2010. The order number for the supply was not indicated on the invoice. There was however the endorsement "customer unable to pay" annotated on the fast copy of the invoice. On 12 November 2010 the appellant raised another invoice, number 13430 that mirrored the exact information on invoice 13421 save for the endorsement¹⁹. The appellant averred that the first invoice was cancelled and replaced by the second invoice. The respondent included both invoices in the appellant's 2010 gross income contending that the appellant failed to establish that the first invoice had been cancelled.

It was common cause that s 20 of the VAT Act [*Chapter 23:12*] precludes the appellant from issuing more than one tax invoice for a single taxable supply. It was also agreed that such a tax invoice must be provided to the recipient such as HW within 30 days from the date of supply. It was further common cause that a credit note is issued in terms of s 21 (1) (a) as read with (1) (i) of VAT Act in fulfilment of three conditions. The first is that the taxable supply has been cancelled and the second is that the tax invoice must have been handed to the recipient and the last is that the output tax charged on the invoice was incorrect. Again, it was common ground that the appellant did not issue a credit note nor attach the original copy to the fast copy nor endorse the words "cancelled" on the fast copy. The director for HW confirmed in annexure 12, p 27 of the notice of appeal on 15 January 2013 that HW did not claim input VAT on the questioned invoice but did so on the replacement invoice. Accordingly, in terms of s 21(1) (a) as read with subpara (1) (i) of the VAT Act, the appellant was not required to issue a credit note to cancel the invoice. The failure to endorse cancelled on the invoice was not fatal to the appellant's case. The evidence of JW, the managing director and internal accountant established on a balance of probabilities that the invoice was cancelled before it was presented to HW. In the result, the respondent improperly brought it to account in the 2010 gross income. However, the appellant did not raise it in its

¹⁹ Annexure 6 p 29 and 30 of exh 1, annexure 12 p 28 and 29 of notice of appeal

objection and did not invoke the provisions of s 65 (4) of the Income Tax Act to rely on this ground of appeal. Accordingly the amount remains part of the appellant's 2010 gross income.

The 2011 tax year first ground of appeal

The amount of US\$ 15 842

The first ground of appeal against the 2011 determination concerned the sum of US\$15 842 inclusive of VAT of US\$2 068.40. The amount exclusive of VAT was US\$13 776. It was common cause that this was a proper case for the appellant to raise a credit note as contemplated by s 21(1) (a) as read with subpara (1) (i) of the VAT Act. However, the correspondence²⁰ between the appellant and COH disclosed that the appellant did not provide any service valued at US\$15 842²¹. COH indicated that it neither paid such an amount to the appellant nor claimed input VAT thereon from the respondent. Rather the correspondence confirmed that invoice number 0010 dated 2 November 2011 based on order number 73481 for hiring equipment at US\$42 per hour was replaced²² by invoice number 0080 dated 19 July 2012 based on the new order number 75491 for the hire of the same equipment at US\$35 per hour. The respondent averred that it was not cancelled in 2011 but in 2012 and therefore accrued in 2011, the year in which it was liable to income tax. There is no doubt in my mind that the service was provided in 2011. This was apparent from claim number 123 compiled by the appellant in respect the initial and replacement invoice covering the period of service from 18 June 2011 to 26 October 2011. The cancellation should have been effected by a credit note. The appellant did not raise a credit note

In our law an accrual of income suffices to found income tax liability. In *Lategan v Commissioner for Inland Revenue* 1926 CPD 202 at 209, 2 SATC 16 accrual was held to be synonymous with "become entitled to". In *Mooi v Secretary for Inland Revenue* 1972 (1) SA 675(AD), 34 SATC 1 (AD) "entitlement to" was equated with "unconditionally entitled to the amount" and excluded contingent dependency on a future event. The uncontroverted testimony of the managing director and his internal accountant was that the initial invoice was rejected by COH for lack of an approved tender price on the hired equipment. It is trite that a contract of sale is perfected once the parties are, amongst other requirements, of the same mind on the price of the service or goods²³. At the time the service was provided and

²⁰ Correspondence of 10 January 2013 p 50, response of 14 January 2013 and attached inv 0010 and claim number 123 on p 51-53 of exh 1 and annexure 14A pp 40 & 42 of notice of appeal, orders and invoices on pp 48-56 of exh 1 and annexure 14A p 41, 43 & 44 of notice of appeal

²¹ Appellant letter on 17 February 2015 and response of 5 March 2015 pp 49 and 48 respectively of exh 1

²² Replacement tax invoice and claim and purchase order pp54-56 of exh 1

²³ Mackeurtan's Sale of Goods in South Africa 5th Ed by Dr Hackwill at pages 5-6

thereafter invoiced the price of the service had not been set nor could it be ascertained. There was therefore no sale of the service and the appellant was not unconditionally entitled to payment of the amount invoiced on 2 November 2011. It became unconditionally entitled to the amount on presentation and approval of the invoice of 19 July 2012. The respondent wrongly brought it into the 2011 gross income.

The amount of US\$4 900

The sales schedule of the appellant, annexure 14B p 46 of the notice of appeal shows that COH paid the appellant twice in the sum of US\$4 900 on 17 November 2011. In the letter of 11 February 2013 the managing director stated that the amount of US\$ 4 900 on invoice 0030 was invoiced once. In the tax amended schedule attached to that letter the amount was shown to have been paid on claim 125 on 15 March 2012. The respondent averred that according to the payment schedule from COH the amount was paid twice. The COH payment schedule in question was not produced in evidence. The only document that suggested that a double payment of this amount was made by COH on 17 November 2011 was the sales schedule annexure 14B on page 46 of the notice of appeal. The tax invoice in question was reproduced in annexure 15 page 59 of exh 1. COH hired a truck for the sum in question. VAT in the sum of US\$735 was charged and the amount paid inclusive of VAT was US\$ 5 635. The two payments in the sales schedule in the notice of appeal indicate these figures under 17 November 2011. The document was produced by the appellant. I am satisfied that despite its denials, the appellant was paid twice on one invoice. It did not produce any evidence to show that the second payment was returned to the appellant. It is trite that our income tax law is based on receipts and accruals. In this instance, the appellant received the money in the 2011 tax year in the course of trade. It is liable to income tax on that basis for the second payment, notwithstanding that in annexure 14 page 58 of exh 1 in the letter of 19 February 2013 the chief investigations officer indicated that he was allowing the deduction as a duplicated entry. The sum of US\$4 900 was correctly assessed to tax.

The amount of US\$1 200

In the letter of 11 February 2013 the appellant's managing director indicated that invoice 0145 in the sum of US\$1 200 which formed part of disclosed vatable sales was duplicated by the respondent in the computation of the 2011 taxable income[p34 of Commissioner's case]. The respondent conceded this fact in the letter of 19 February 2013[p 37 of Commissioner's case]. Despite the concession, by the time of objection on 1 October 2013 this duplicated amount was still appearing in the respondent's computation of the 2011

taxable income [p 102 of Commissioner's case] and was subject of complaint by the appellant on 6 January 2014 in regards to matters it sought a determination of its objection from the Commissioner as if formed part of the US\$19 876 covered under the aegis of non-existent vatable sales [p 132 of Commissioner's case]. In the determination of 11 March 2014 the Commissioner disallowed the amount of US\$19 876 on the ground that the appellant failed to establish that these vatable sales were cancelled. After this tumultuous journey, the respondent finally conceded in para 5 p 8 of the Commissioner's case to the exclusion of this amount from taxable income. The appeal against its inclusion succeeds.

Accordingly, in regards to this ground of appeal, the appellant should have been assessed on the sum of US\$ 4 900 and not US\$ 19 876.

Whether or not the appellant under declared sales for 31 December 2010 tax year to the tune of US\$119 556.59, which represented a 12% mark-up.

At the commencement of hearing both counsel agreed that the appropriate average mark-up rate in the fuel industry at the time was 7% and not the 12% applied by the respondent. However, in evidence the managing director, internal accountant and tax consultant sought a further reduction of the mark-up to 5%. It was common ground that on 30 October 2012²⁴ the group accountant of the appellant furnished the first schedule of purchases for the 2010 tax year in the aggregate sum of US\$ 3 725 875.87²⁵ to the respondent. This schedule was used in the preparation of the 2010 financial statement, exhibit 2. The total figure in the first schedule and the ledger accounts in exhibit 2 were identical²⁶. That was also the indisputable understanding of the respondent in the letter of 5 June 2013 who requested the appellant to "please note that the initial purchases schedule was not prepared for Zimra but was part of the documentation used in in the preparation of your 2010 financial statements"²⁷. It was further common ground that the second schedule of purchases in the aggregate sum of US\$ 3 660 755.27²⁸, a figure first mentioned by the managing director in his letter of 11 February 2013²⁹, was availed to the respondent with the letter written on behalf of the appellant by the tax consultant on 13 March 2013. This was averred by both parties in their respective summaries of evidence³⁰ and in the oral testimony of the

²⁴ Para 4 page 7 of Commissioner's case

²⁵ P 31-34 of exh 1 and annexure 13B p 35-38 of notice of appeal and annexure 55 p 159-162 of Commissioner's case

²⁶ P28-29 of exh 1

²⁷ Annex 29 p 83 para B first sentence of Commissioner's case.

²⁸ P 35-40 of exh 1 and annexure 56 p 163-168 of Commissioner's case

²⁹ Annex 13 p 33 of Commissioner's case

³⁰ P3 para 13 of appellant's and p 6 of respondent's summary of evidence

respondent's witness. Again, the respondent suggested in the letter of 19 February 2013³¹ that the revelation of the new and different purchases figure was made not in a schedule but in the letter of 11 February 2013. It was further common cause that until 24 April 2013, the date on which the tax consultant submitted the third schedule³², there were these two schedules at hand³³. Indeed in the letter of 14 May 2013 the respondent referred to the first schedule as the original schedule and the second schedule as the last schedule. This was confirmed by the request made to the tax consultant in the meeting of 26 March 2013, called by the respondent to discuss the appellant's letter of 13 March 2013, to reconcile the purchases schedules that he had provided to Zimra for 2010 and 2011³⁴ and the concession by the tax consultant on 2 April 2013³⁵ that there were omissions detrimental to the appellant that had been made in the purchases schedules.

It was also common ground that there were variances between the first and second schedules. It was the uncontroverted testimony of the respondent's witness that he conducted reconciliations over many days with the appellant's officers during which time duplications and cancelled purchases were removed leaving 33 purchases transactions worth US\$996 387.45 outstanding. In correspondence between the parties and in evidence, the appellant disputed the extent of the variance by adopting a two pronged approach in regard to the second schedule. Firstly, the appellant disowned the second schedule and sought to substitute it, as suggested in its letter of 20 May 2013, with the third schedule, submitted to the respondent on 24 April 2013. Save for some minor variations in the purchase prices in the months of June, August, September and October the third schedule was identical with the original schedule. The first approach was rejected by the respondent on 5 June 2013. Rather, the respondent persisted in treating the second schedule as the appellant's last schedule. Secondly, the appellant sought to establish that the variance of US\$996 387.45 was embedded in the second schedule.

I was concerned with the propriety of the rejection of the third purchases schedule. It did not ordinarily appear to me that the Commissioner was at liberty during the course of an investigation to summarily disregard a schedule submitted for his consideration by a taxpayer for the purpose of establishing the taxpayer's taxable income. However, it seems to me that

³¹ Annexure 14 second para on p 37

³² Appellant's summary of evidence p 3 and 4 paras 13 and 18 and tax consultant's letter of 20 May 2013, annexure 27 p 79.

³³ Annex 25 p 72 para on 2010 purchases

³⁴ Annex 21 at p 56 and 58 of Commissioner's case

³⁵ P annex 22 p 59

the respondent was justified in rejecting the third schedule. It will be recalled that the third purchases schedule was a virtual reproduction of the original purchases schedule. The appellant had disowned that schedule in preference to the second schedule, which had been prepared with the help of the tax consultant. The tax consultant had thoroughly examined all correspondence and documents exchanged between the parties and scrutinised all the manual records of the appellant pertaining to the issues in dispute. In oral evidence, the tax consultant together with the managing director and internal accountant attempted to distance himself from the preparation of the second schedule by suggesting that he requested the second schedule from the respondent after he had submitted the third purchases schedule. I have already highlighted various correspondences and meetings which demonstrated that the second schedule was submitted to the respondent by the appellant on 13 March 2013 and not before his engagement. The only request from the appellant for the second schedule filed of record was made, obviously in preparation for the appeal, and supplied on the same date, the 12th May 2014³⁶. The morphing of the first schedule into the third schedule was in my view a disingenuous delaying tactic raised by the appellant. Accordingly, the respondent correctly declined to consider it.

I proceed to determine the correct variance between the original and second schedule. The appellant contended that all the amounts constituting the variance were incorporated in the second schedule. Both the managing director and the internal accountant attempted to match the date, amount and name of the supplier in the original schedule to the unnamed suppliers who were recorded as “cash” in the second schedule. The invoiced sales in the second schedule were in the sum of US\$3 001 771.54. The date of purchase, the name of the supplier, the literage purchased and the purchase price were indicated. The cash purchases amounted to US\$658 983.73. Only one cash supplier was identified by name while the remaining 28 were not identified by name but by the appellation “cash”³⁷.

Reconciliation of US\$ 658 983.73 cash purchases to US\$ 998 378.45 discrepancy

In oral testimony the managing director abdicated the task of reconciling the cash purchases to the overall discrepancy to the internal accountant after attempting four entries.

The cash supplier of US\$43 292.10 in second schedule against US\$43 272 in first schedule

The total amount from cash suppliers in the second schedule for 13 and 14 June 2010 was US\$43 292.10. The internal accountant equated this amount with US\$ 43 272 supplied by K on 30 June 2010, in the first schedule. It is clear to me that these were three different

³⁶ Annexure 53 p 156 and annex 54 p 157 of Commissioner’s case

³⁷ Page 39-40 exh 1 and p 167 -168 of Commissioner’s case

transactions by date and amount. He failed to establish that these were one and the same transaction.

US\$ 19 600 against US\$18 949

The internal accountant equated US\$19 600 of 24 July 2010 in the second schedule with US\$18 949 dated 30 July 2010 purchased from T& T in the first schedule. The figure recorded in the first schedule for this purchase was US\$18 929. Clearly these transactions differ by date and amount. He failed to establish that they refer to the same transaction.

US\$29 400 against US\$29 000

The internal accountant equated US\$29 400 of 19 July 2010 in the second schedule with US\$29 000 purchased from K on 30 July 2010 in the first schedule. Clearly the dates and amounts reflect different transactions. He failed to establish that these related to one transaction.

US\$ 29 792 plus US\$ 29 694(US\$ 59 486) against US\$56 913

The internal accountant added US\$29 792 of 31 July 2010 to US\$29 694 of 9 August 2010 in the second schedule totalling US\$56 486 and equated it with US\$56 913 purchased from K on 30 August 2010. These were in my view three different transactions by amount and date. He failed to establish that they related to one transaction.

US\$ 9 277.66 plus US\$14 550 total US\$23 827.66 against US\$ 23 243

The internal accountant added US\$ 9 277.66 of 18 August 2010 to US\$ 14 550 of 29 August 2010 in the second schedule totalling US\$23 827.66 and equated it to US\$ 23 243 purchased from MF on 30 August 2010. These were by date and amount three different transactions. He failed to establish that they were one transaction.

US\$ 14 308 plus US\$ 28 032 total US\$42 340 against US\$43 969

The internal accountant added US\$14 308 of 30 July 2010 to US\$ 28 032 of 2 August 2010 totalling US\$ 42 340 in the second schedule and equated it to US\$ 43 969 purchased from T and T on 30 August 2010. Again these were three different transactions. He failed to establish that they constituted one transaction.

US\$15 600 invoiced purchase from ZX against US\$15 600

The internal accountant further highlighted a credit purchase of US\$15 600 dated 1 December 2010 from ZX in the second schedule was one and the same purchase with that of 30 November 2010 for the same amount that is in the first schedule. An examination of the schedules shows that the appellant purchased 15 000 litres of diesel valued at US\$15 600 from ZX on two consecutive days, respectively. According to the first and third schedules,

the fuel was purchased on 30 November 2010 under invoice number 1046 and 2 December 2010 under invoice number 1206 while the second schedule indicated the dates of purchase as 1 and 2 December 2010 without showing the invoice numbers. The duty to establish that the purchases of 30 November and 1 December were one and the same transaction lay on the appellant. He could discharge this duty by producing either a delivery note or an invoice relating to these transactions. It did not do so to the Commissioner or in this Court. Accordingly the respondent was correct to bring the purchase to account.

US\$7 520 invoiced purchase against US\$7 520

The internal accountant indicated that the first entry on page 35 of exh 1 of US\$ 7 520 dated 11 January 2010 purchased from MP appeared on the first schedule on page 31 of exh 1 under the purchase from the same supplier and in the same amount of 11 February 2010. He failed to establish that the invoice number for the 11 January 2010 purchase was one and the same with that of 11 February 2010. His evidence failed to establish that these two transactions were in reality a single transaction. The appellant could very well have purchased the same quantity of fuel from the same supplier for the same price on the two different dates indicated in the schedules. The respondent was correct in adding back to income the 11 February 2010 purchase as it was omitted from the second purchases schedule.

The internal accountant abandoned the exercise after comparing 11 of the 33 entries that formed the variance of US\$996 387.45. I am satisfied that he failed to establish that the listed variances recorded in the original schedule and omitted in the second schedule were incorporated in the undisclosed “cash” purchases in the second schedule. I, accordingly find that the appellant under declared purchases in the sum of US\$ 996 387.45 in the 2010 tax year which did not form part of the gross sales made in that year.

The mark-up

The appellant contended that the appropriate mark-up for the under declaration was 5% and not even the 7% conceded by the respondent. The appellant did not seek to establish the 5% mark-up during the hearing. The respondent did not lead any evidence to establish that 7% was the mark-up used by the appellant. I will apply the mark-up of 7% on the basis of the agreement reached between the parties that the Court should apply 7% to the actual discrepancy computed by the Court. The imputed sales amounted to US\$69 747.12. Had the appellant established the 5% it would have been US\$49 817.37. My own computation from the total sales figure less the total purchases before the inclusion of the purchases variances was 16%. The parties agreed on cash sales for 2010 of US\$ 1 999 320.48. The invoiced fuel

sales figure that they haggled over after the reconciliations on 14 and 20 May 2013 was US\$ 2 317 200.40. In the letter of 6 January 2014, the appellant maintained that the correct invoiced sales figure was US\$ 2 135 527.40 and not US\$ 1 912 459 set out in the letter of 13 March 2013. I deducted all the sales duplications allowed after the objection and appeal by the Commissioner and this Court of US\$69 173 to compute invoiced sales of US\$2 204 495.40. The total sales before adding the purchases variance plus mark-up was US\$ 4 203 815 and not US\$ 4 134 847.40 calculated by appellant in its letter of 6 January 2014 at p 131 of the Commissioner's case. The total purchases in the second schedule before the purchases variance was US\$3 660 755.27 less contamination and closing stock of US\$ 43 532 set out in letter of 11 February 2013 leaving purchases at US\$ 3 617 223.27. I subtracted this figure [US\$3 617 223.17] from the total sales figure [US\$ 4 203 815] and got US\$586 591.83. The mark up from this figure expressed as a percentage of the purchases figure was 16.2%. The correct taxable income on the variance would be US\$159 421.99. However, in case my computations were wrong, I have resorted to the agreement reached by the parties at the commencement of trial that I apply 7% to the variance. I will direct the respondent to add the sum of US\$69 747.12 to the appellant's 2010 taxable income.

Whether or not appellant understated purchases for 31 December 2011 tax year to the tune of US\$ 31 336.56, which represented a 12% mark-up

The appellant submitted the first 2011 purchases schedule to the respondent on 31 October 2012³⁸ and the second on 13 March 2013³⁹. The internal accountant indicated that he resubmitted the second schedule on 24 April 2013. The differences between the second schedule and the resubmitted schedule related to the petrol purchases. In the second schedule some of the petrol suppliers were identified as cash. This was clear from annexure 15 p 55 to 57 of the notice of appeal and annexure 17 p 67 to 69 of exh 1. In the resubmitted schedule the cash suppliers were substituted by GV, as shown in annexure 59 at pages 181 to 182 of the Commissioner's case. The total purchases in the first schedule were in the sum of US\$ 2 027 301 while in the second and resubmitted schedule they were in the sum of US\$ 2 756 123.03. The total in the second schedule was the same as the one indicated for both invoiced and cash purchases by the tax consultant in his letter of 13 March 2013. Following the objection of 1 October 2013, the appellant submitted a further two purchases schedules on 11

³⁸ Annex 58 p 174-176 of Commissioner's case, annex 15B p 59-60 of notice of appeal and annex 16 p 60-62 of exh 1

³⁹ Annex 59 p 177-182 of Commissioner's case, annex 15B p 51-54 of notice of appeal and annex 17 p 63-66 of exh 1

and 21 November 2013. The total indicated in each of these two schedules was US\$ 2 257 009.66, respectively. All these different purchases figures were substantially more than the US\$1 964 800 recorded in the 2011 financial statement in exh 2⁴⁰. The only difference between these two schedules was that unlike in the first, the appellant indicated the invoice, receipt and delivery note numbers and that payment was made by bank transfer or cash in respect of all the listed purchases.

The reconciliations conducted by the respondent on 14 May 2013 revealed that the purchases in the second schedule did not include purchases in the sum of US\$ 261 388 that were in the first. The respondent applied a mark-up of 12% to these unaccounted purchases and computed notional income of US\$31 336.56 which he added to the 2011 taxable income of the appellant. The appellant was adamant that the purchases figure disclosed in the second schedule was the correct one but appeared to have altered his position in the objection of 1 October 2013. In that objection he accused the respondent of failing to deduct the cost of purchases amounting to US\$ 292 210 from income. He indicated on 11 and 21 November 2013 that this amount was the difference between the total purchases submitted to the respondent of US\$ 2 257 009.66 and the amount in the 2011 financial statement of US\$1 964 800. On 2 January 2014, the respondent noted that the purchases schedule of 11 and 21 November 2013 carried new figures amounting to US\$ 164 395.44⁴¹. Included in that amount was the purchase of 30 000 litres of diesel in the sum of US\$ 33 600 from K on 23 February 2011. This amount was also included in the variance between the first and second purchases schedules of US\$ 261 388. A summarised schedule of the disputed amount was filed of record.⁴² The chief investigations officer testified that most of the purchases described as cash purchases in the second schedule were proved by documentary evidence produced during the reconciliations carried out by the parties after the pre-trial hearing to have been supplied by K including some that were purported to have been supplied by GV. The net effect was the reduction of the variance from US\$261 388 to US\$ 107 350.

I reproduce below the transactions from which the variance of US\$261 388 was derived.

⁴⁰ p 18

⁴¹ Annexure 43 p 123 of Commissioner's case and annexure 19 p 80 of exh 1

⁴² Annex 13C p39 and annex 15C p 58 of notice of appeal, annex 10 p 46 and annexure 18 p 70 of exh 1 and annex 54 p 158 of Commissioner's case

Date 2011	Supplier	Amount US\$
20 January	PD	45 220.00
28 January	MP	12 500.00
23 Feb	K	33 600.00
28 Feb	K	12 700.00
28 March	MP	20 282.00
8 March	K	19 650.00
11 May	MP	544.00
13 May	AG	13 200.00
30 May	RG	13 584.00
10 Oct	EG	12 000.00
13 Nov	MP	4 080.00
23 Nov	K	17 080.00
24 Nov	K	10 800.00
26 Nov	K	13 400.00
26 Nov	K	12 000.00
13 Dec	K	20 748.00
Total		261 388.00

The managing director and the internal accountant disputed the existence of such a variance and averred that the purported variance was captured in the second schedule. The task of demonstrating that the sum of US\$ 261 388 was captured in the second schedule fell on the internal accountant whose evidence was summarised in tabular form in annexure 19 p 71 of exh 1. I proceed to determine whether he established on a balance of probabilities that the disputed amount was captured in the second schedule.

US\$45 220 in first schedule and US\$ 49 176 in the second schedule

The first schedule identified PD as the supplier of 38 000 litres of fuel worth US\$ 45 220 on delivery note 3378 dated 20 January 2011. The internal accountant equated this delivery with the supply of 37 539 litres of petrol valued at US\$ 49 176 supplied by RG on the same date in the second schedule. He averred that invoice number 100026 issued by RG to the appellant on 24 January 2011 for 37 539 litres of petrol valued at US\$ 49 176 on p 73 of exhibit 1 established that the supplier of the fuel worth US\$ 45 220 in the first schedule was RG and not PD. He failed to explain the different dates between the confirming invoice and the second schedule. He also failed to explain the obvious discrepancies of the amount

and quantity recorded in the two schedules. His suggestion that a transporter was substituted for the supplier was unsatisfactory in view of the clear information on the invoice. He failed to establish that the two were one transaction. The purchase of US\$45 220 was correctly added back to purchases by the respondent.

US\$12 500 in first schedule and US\$ 12 267.52 in the second schedule

The first schedule indicated that the appellant purchased 10 000 litres of fuel for US\$12 500 on delivery note 747 from MP on 28 January 2011. The correctness of this information was confirmed by the delivery note filed on page 74 of exh 1. On the other hand the information recorded in the second schedule indicated that the appellant purchased 9 584 litres for US\$ 12 267.52 from MP on 27 January 2011. The invoice or delivery note number was not indicated in the second schedule. The internal accountant failed to explain the differences in dates, literage and value. Accordingly, the respondent correctly added it back to purchases that were used to compute the 2011 revenue estimates.

US\$33 600

The initial schedule showed that on 23 February 2011 the appellant purchased 30 000 litres on receipt number 0897 for US\$ 33 600 from K. The transaction information was derived from a pro forma invoice on page 75 of exh 1. On the other hand, the second schedule captured a purchase of 35 000 litres for US\$ 38 500 from K on the same date and did not disclose either the invoice number or delivery note number. Invoice number 0892 for that supply was captured in the schedule of 18 November 2013 and was coincidentally the same invoice number in the first schedule for the purchase of 22 March 2011 from the same supplier for the same amount and literage. The internal accountant referred to the letter from the respondent of 7 April 2014⁴³ in which the US\$ 33 600 in question was amongst the purchases of US\$95 816.70 that were allowed after the reconciliations conducted by the parties on 11, 13 and 18 March 2014. It was correct that the amount in question was part of an initial US\$ 164 395.44 that had been disallowed on 2 January 2014 and on which the respondent directed the chief investigations officer to reconsider his position in the letter of 5 March 2014⁴⁴. The appellant, however, recognised the US\$33 600 transaction as a purchase in the schedules submitted on 11 and 21 November 2013 even though it was not listed in the second schedule. The position taken by the appellant in this appeal that the US\$33 600 purchase in question was the same as the US\$ 35 000 purchase in the second schedule was

⁴³ Annex 19 p 80 of exh 1 and annexure 48 p 144 of Commissioner's case and annex 17C p 72 of notice of appeal

⁴⁴ Annexures 43 on p 123 and 45 p 133 of Commissioner's case

contrary to the justification it made on 19 March 2014 in annexure 47 p 138 of the Commissioner's case that the amount was included in the initial schedule provided to Zimra and was included in the initial calculation of sales. The respondent included it as an omitted purchase precisely because it was not listed in the second schedule. It was therefore improper for the appellant to exclude it from the purchases omitted in the second schedule. I accordingly hold that a proper purchase was effected on 23 February 2011 as recorded in the first schedule, notwithstanding that it was initiated by a pro forma invoice on the same date. The purchase appeared in the first schedule but was omitted from the second schedule. In my view, the respondent improperly allowed the removal of that amount from the understated purchases that constituted the variance of US\$261 388. I add it back to purchases.

US\$12 700 in the first schedule and US\$13 100 in second schedule

The first schedule indicated that the appellant purchased 10 000 litres for US\$12 700 on invoice MS27 on 28 February 2011 from K. The details of this purchase are captured in the pro forma invoice of 28 February 2011 on page 85 of exh 1. The internal accountant equated it with the purchase in the second schedule of 2 March 2011 of 10 000 litres for US\$13 000 from K on delivery note 52 328. The delivery note number is shown in the schedule of 18 November 2013. A pro forma invoice is an estimate. Some of the conditions indicated on the pro forma invoice were that delivery would be made within 24 hours from confirmation of payment and the price quoted valid for 7 days. While the literage and supplier were the same, the amounts were different. The internal accountant failed to establish that the pro forma invoice initiated the delivery in the second schedule. I, however find that the US\$12 700 in the first schedule was a quotation and not a confirmed purchase. Accordingly, the respondent wrongly computed this amount into purchases.

US\$20 282 in the first schedule and US\$ 19 370 in the second schedule

The first schedule showed a purchase of 15 250 litres for US\$20 282 on invoice 0398 on 28 March 2011 from MP. Apparently, the same supplier raised invoice 2182 filed of record on p 88 of exh 1 and not 0398 against the appellant on the same date for the same amount and quantity. The internal accountant equated this purchase with the one in the second schedule dated 26 March 2011 from the same supplier in the same quantity but for a different price of US\$19 370 supplied, according to the 18 November 2013 schedule on delivery note number 3509. The two were different by date and amount. He failed to establish that these two transactions were in fact one purchase. I find that the respondent properly accounted the sum of US\$20 282 into the 2011 purchases.

US\$ 19 650 in both schedules

In the first purchase schedule was the purchase dated 8 March 2011 of US\$ 19 650 for 15 000 litres on invoice number OSB 111000010 from K. This information was derived from the invoice on p 86 of exh 1. The internal accountant testified that this purchase was reflected in the second schedule under the same date for the same literage and amount as having been made from EG. In the schedule of 18 November 2013 the purchase was raised by K on invoice number 0981. The internal accountant contended that despite the different identity of the supplier, this was one and the same transaction. There was also the difference in invoice numbers that he did not explain. He thus failed to establish that these two purchases were in fact a single transaction. The Commissioner correctly included the amount in the variance of understated 2011 purchases.

US\$544 in the first schedule and US\$ 20 944 in the second schedule

The first schedule indicated that the appellant purchased 400 litres for US\$544 on invoice 2387 from MP on 11 May 2011. The appellant extracted this information from invoice number 2387 on page 89 of exh 1. The internal accountant averred that the appellant purchased 10 000 litres of petrol valued at US\$20 400 from MP as reflected in invoice number 2388 on page 91 of exh 1. MP however supplied 15 400 litres instead of 15 000 litres and on 11 May 2011 recorded on receipt 576 on page 87 of exh 1 the payment of US\$20 400. It further indicated on receipt 575 on page 90 of exh 1 the outstanding payment of US\$544 before issuing invoice 2387 on the same date. He explained that the US\$544 in the first schedule was incorporated in the sum of US\$20 944 for the purchase of 15 400 litres of petrol dated 7 May 2011. In the schedule of 18 May 2013, invoice number 2335 and not 2338 was raised for the 7 May 2011 transaction. However, there was in the first schedule a purchase dated 5 May 2011 of 15 000 litres valued at US\$20 400 on invoice number 2335. The internal accountant failed to explain all these discrepancies pertaining to the dates and invoice numbers. I hold that the purchase price of US\$544 in the first schedule was not reflected in the second schedule and was properly brought into the 2011 purchases.

US\$13 200 in first schedule and US\$13 500 in the second schedule

In the first schedule was the purchase dated 13 May 2011 of 10 000 litres for US\$13 200 on invoice number 0158 from AG. The internal accountant stated the purchase from the supplier identified as “cash” in the second schedule dated the same date for the same literage

but different price of US\$13 500 related to the disputed transaction. According to the schedule of 18 November 2013, this cash supplier transaction was raised on invoice number 0158 on 15 May 2011. Apparently, the purported invoice number 1058 was a quotation from AG filed of record on p 92 of exh 1 of 10 000 litres of petrol for US\$13 200 dated 13 May 2011. Accordingly, I am satisfied that the internal accountant established that US\$13 200 was wrongly included in the purchases variance for the 2011 tax year.

US\$13 584 in both schedules

This amount was reflected in both schedules under the same date and showing the same invoice number, amount and quantity. The only difference was in the identity of the supplier, denoted in the first schedule as RG and in the second schedule as MP. The internal accountant, by reference to that invoice number on p 93 of exh1, established that the purchase was procured from TK. I am satisfied that the respondent wrongly included this amount in the purchases variance of US\$261 388.

US\$12 000 in both schedules

This amount was reflected in the first schedule under invoice number 061792 raised by EG on 10 October 2011 for 10 000 litres worth US\$12 000. Invoice 061792, filed of record on p 94 of exh 1, was raised by OG on 11 October 2011 for the supply of 10 000 litres of diesel valued at 12 000. In the second schedule was a purchase for the same quantity of diesel from EG worth the same amount but dated 12 October 2011 and under invoice number 061793. The internal accountant testified that these two transactions were one and the same. He ignored the irreconcilable differences in dates and invoice numbers between the two schedules. I hold that the sum of US\$12 000 constitutes part the variance of US\$261 388 in respect of understated 2011 purchases.

US\$4 080 on the first schedule

It was common cause that this amount dated 13 November 2011 for the purchase of 5 000 litres on delivery note 697 from MP was actually purchased on 13 November 2010. This was apparent from the delivery note 697 on page 95 of exh 1. This amount was wrongly included in the 2011 purchases variance.

US\$ 17 080 in both schedules

This amount appeared in the first schedule for the purchase of 14 000 litres from K on invoice number 173151 dated 23 November 2011. There was a transaction in the second schedule purportedly from GV with the same quantity and for the same amount and on the same invoice number bearing the same date. The invoice which related to the transaction on p

96 of exh 1 demonstrated that the supply emanated from K on 22 November 2011. The internal accountant established that amount of US\$17 080 was wrongly included in the 2011 purchases variance.

US\$10 800 in both schedules

This amount appeared in the first schedule for the purchase of 9 000 litres from K on invoice number 173648 on 24 November 2011. There was a transaction in the second schedule purportedly from GV bearing the same date for the same quantity and amount and on the same invoice number. The invoice which related to the transaction on page 97 of exh 1 demonstrated that the supply emanated from K on 23 November 2011. By reference to the invoice number indicated in both schedules, the internal auditor established that the amount of US\$10 800 was wrongly included in the 2011 purchases variance.

US\$ 13 400 on both schedules

In the first schedule the sum of US\$13 400 was for the purchase from K of 10 000 litres on invoice number 179082 on 26 November 2011. In the second schedule the supplier was identified as “cash” and the invoice number was not indicated in this schedule or in the schedule of 18 November 2013. However, the other details relating to the date, amount and quantity are the same as in the first schedule. The internal accountant relied on invoice number 179082 on page 98 of exh 1, which originated from K, in a bid to establish that these transactions were one. The invoice in question was dated 27 November 2011. I am satisfied that he established that the two transactions were one and the same. The amount was wrongly included in the 2011 purchases variance.

US\$ 12 000 on both schedule

The sum of US\$12 000 for the purchase of 10 000 litres on 26 November 2011 on invoice number 179083 appeared on both schedules with the same details except that the supplier in the first was indicates as K while in the second it was GV. The invoice number for the purchase in the second schedule shown in the 18 November 2011 schedule was identical to the one that is in the first schedule. Invoice number 179083 on page 99 of exh 1 although dated 25 November 2011 confirmed that the supplier in the first schedule was K. I accept that the internal accountant showed that the sum of US\$12 000 in the first schedule was repeated in the second and was wrongly included in the 2011 purchases variance.

US\$ 20 748 on both schedules

The sum of US\$20 748 for the purchase of 15 600 litres on invoice number 180549 was dated 8 December 2011 in the first schedule and 6 December 2011 in the second

schedule. The supplier was K in the first and GV in the second. The supply in the second schedule was not listed in the 18 November 2013 schedule. The invoice number in the first schedule was filed of record on page 100 of exh 1. It was issued by K on 5 December 2011. The internal accountant demonstrated that the purchase in the first schedule, although dated 8 December 2011 emanated from K. He however failed to demonstrate that GV did not make a similar supply on the same date. The amount was properly included in the 2011 purchases variance.

Conclusion on the 2011 under declaration of purchases

It seems to me that the appellant established on a balance of probabilities that the sum of US\$ 96 844 did not form part of the purchases variance of US\$261 388. The amount of under declared purchases was therefore in the sum of US\$164 544 and not US\$ 107 350 that was conceded in evidence by the chief investigations officer.

The mark-up

The parties agreed on a mark-up of 7% on the under declared purchases of US\$ 164 544, even though the appellant was inclined to a mark-up of 5%. The appellant did not lead any evidence to prove the mark-up of 5%. In the objection of 1 October 2013 the appellant challenged the accuracy of the invoiced sales of US\$842 861.75. The deductions of US\$38 198.10 allowed by the Commissioner leaving the invoiced sales in the sum of US\$804 663.65. It was common cause that the cash pump sales from the service station were in the sum of US\$ 1 990 245. The dispute between the parties centred on the off the pump bulk sales that the appellant alleged were transacted through the service station while the respondent contented that they circumvented the service station books of account. In my view, for reasons set out in the determination of the last issue below, I hold that the appellant failed to establish that the off the pump bulk sales were transacted through the service station books of account. In that regard the appellant failed to establish the 2011 gross fuel sales. The appellant accepted the figure of US\$ 2 349 318 set out in the first 2011 sales schedule. The total sales figures before the inclusion of the purchases variance of US\$ 261 388 plus its mark-up was in the sum of US\$3 153 981.65. I found the purchases to be in the sum of US\$2 920 667.03 being the aggregate of US\$ 2 756 123.03 and US\$164 544. I deducted closing stock and contaminations of US\$ 44 519 that were set out in the letter of 11 February 2013 to compute actual sales figure of US\$2 876 148.03. The mark-up would be 14%. The computed sales figure derived from the variance of US\$164 544 would be in the sum of US\$23 036. However, in the off chance that my calculations are wrong, I preferred to apply the mark-up

agreed by the parties at the commencement of this hearing of 7%. The taxable amount due was in the sum of US\$11 518.08. I will direct the respondent to add that amount to the appellant's 2011 taxable income.

Whether or not the appellant is liable for tax on additional income for the 31 December 2011 tax year to the tune of US\$ 359 073.00

The appellant submitted 2 cash sales schedules to the respondent for the 2011 tax year. The managing director, internal accountant and tax consultant averred that the first sales schedule, from which the cash fuel sales of US\$ 2 349 318 were calculated, was not derived from source books and did not differentiate invoiced sales from cash sales. The second in the sum of US\$1 990 245⁴⁵ was extracted from the daily cash register exemplified by the petty cash book, annexure 22 p 112 to 121A of exh 1 and which the managing director offered in his summary of evidence and in oral evidence to produce all the bound petty cash book volumes and desegregated invoiced sales from cash sales. The variance between them was US\$359 073, which the respondent added to the appellant's taxable income⁴⁶. It was common ground that the respondent accepted the 2010 cash sales figures but rejected the 2011 cash sales figures. The 2010 cash sales, which were understated by US\$ 1 184 883.23⁴⁷, increased from US\$ 814 437.25 to US\$ 1 999 320.48, while the 2011 cash sales fell from US\$2 349 318 to US\$1 990 245. The 2011 cash sales source books were surrendered to respondent on 19 February 2015 and returned without comment in May 2015.

Mr *Chizikani*, for the appellant, contended that the 2011 petty cash book from which the sales figure of US\$1 990 245 was derived accurately captured all the cash sales transacted by the appellant in 2011. This amount represented cash paid from both cash sales and credit sales. He submitted that as the figure and the process from which it was derived were not impugned by the respondent, the appellant had established that it represented the correct 2011 cash sales figure. Mr *Mbiriri*, for the respondent contended that the figure of US\$1 990 245 represented the accurate pump cash sales but excluded direct bulk cash sales that were conducted from head office. He further argued that in view of the daily cash reconciliations carried out in preparation of daily banking, the appellant would have discovered such huge discrepancies long before the engagement of the tax consultant on 6 March 2013.

⁴⁵ Annex 20 p 104-111 of exh 1 and annexure 16A p 61-68 of notice of appeal

⁴⁶ Annexure 60 p 183 of Commissioner's case and annexure 16B p 69 of notice of appeal

⁴⁷ P122 of exh 1 and the daily cash register also known as the petty cash book from 19 January to 14 May 2010 p 112 to 121A of exhibit 1.

In oral evidence, the managing director and the internal accountant testified in regards to bulk fuel purchases and disposal. The long and short of their respective evidence was that all off the pump bulk purchases and sales were accounted for at the service station notwithstanding that the actual cash withdrawal and electronic transfers for the purchase of such fuel was done at the appellant's head office. Their evidence was not borne out by annexure 18 p 79 to 80 of the notice of appeal, the schedule of missing invoices of 2011 cash purchases. The schedule, *inter alia* demonstrated that the service station and head office kept separate petty cash books. Out of the 80 purchases transactions recorded, 45 were in respect of the purchase of diesel while the balance was for the purchase of petrol. In regard to the diesel purchases 1 was by electronic transfer and 7 by cash. These purchases were for a total lirage of 77 251 litres and cost US\$ 92 149. There were 3 such petrol purchase transactions of 20 824 litres bought at a cost of US\$ 27 717.80. In addition there were 4 diesel purchases that were reflected in both the service station and head office petty cash books for 95 000 litres bought for US\$119 050.

This document appears to contradict the testimony of the managing director that all off the pump bulk purchases conducted from head office were accounted for at the service station in the stock book and petty cash book. The fuel in question was sold directly from head office and was not entered into the two service station books of account. The internal accountant testified to the existence of a cash book for bank transfers at head office. On 13 March 2013 the tax consultant indicated that some purchasers made direct payments into the appellant's bank account that were not considered to be either cash or invoiced sales but were nevertheless recorded in the cash book as sales⁴⁸. The tax consultant and the chief investigations officer averred that this head office cash book was not availed to them. The document in the notice of appeal confirms the existence of such a cash book. The chief investigations officer suggested that the off the pump direct bulk purchases and sales were accounted for in this cash book. It seems to me that the figure of aggregate fuel cash sales derived from the service station books of account that was propounded by the appellant was inaccurate. In my view, the respondent correctly determined that the figure in question did not constitute the total 2011 fuel cash sales of the appellant.

It was also common cause that the fuel cash sales extracted from the service station petty cash book variously referred to as the cash register and daily cash book was in the amount propounded by the appellant of US\$1 990 245. While initially on 13 March 2013 the

⁴⁸ Annexure 19 p45

appellant insisted that the invoiced sales derived from the source books amounted to US\$ 791 863.65, by 6 January 2014 it had conceded that the correct amount after the deduction of US\$38 198.10 that was allowed after the objection of 1 October 2013 was US\$ 804 663.56. It seems to me that included in this amount was the duplication of invoice 0159 in the sum of US\$13 100, which was allowed as a deduction from invoiced sales in the determination of 11 March 2014. The invoiced sales would remain at US\$ 791 162.90 [in the first schedule they were US\$ 751 368] but for the addition of US\$72 000 in respect of invoice 029 and 030 issued on 6 January that I found to be invoiced sales to COH. The invoiced sales derived from the available source books would be in the sum of US\$863 162.90. The total fuel sales for 2011 derived from the records availed by the appellant during the audit would amount to US\$2 853 407.90. However, it is my view that this amount would exclude both direct cash and invoiced sales emanating from the appellant's head office that were not recorded at the service station.

In the final analysis, the duty to establish on a balance of probabilities that the variance of US\$359 000 constituted an overstatement lay on the appellant. The amount was derived from figures inserted in the first schedule furnished to the respondent by the appellant on 29 October 2012. The appellant contended that the variance was contrived by the fuel administrator. The letter of 14 January 2013 from the fuel administrator did not make any such confession. Rather, she maintained that she had picked these figures from the wrong source books. It was incumbent upon the appellant to call her to produce the wrong source books from which she picked the figures constituting the variance. Again invoice number 061, 062 and 064 were completely torn off from the invoice sales book such that the sales recorded thereon could not be established. In the result the appellant failed to discharge the onus on it to disprove the factual existence of such a variance.

Accordingly, the appellant failed to establish that the sum of US\$ 1 990 245 constituted the only cash sales derived from its fuel business operations in 2011.

COSTS

I do not find the claim by the Commissioner unreasonable nor the grounds of appeal of the appellant frivolous. Accordingly, I hold that each party should bear its own costs.

DISPOSITION

Accordingly, it is ordered that;

1. The amended assessments number 00114972 issued 5 June 2013 and 20200043 issued on 31 December 2013 for the tax year ended 31 December 2010 and 00114070 issued

on 5 June 2013 and 20200045 issued on 31 December 2013 for the tax year ended 31 December 2011 by the Commissioner be and are hereby set aside.

2. The Commissioner shall issue further amended assessments that incorporate the findings in this judgment and more specifically:
 - a. He shall adjust the taxable income for the 2010 tax year by:
 - (i) adding back the sum of US\$87 645 instead of US\$118 245;
 - (ii) excluding the sum of US\$ 1 975;
 - (iii) adding back the sum of US\$18 298;
 - (iv) adding back the sum of US\$ 69 747.12 being a mark-up of 7% on the undeclared purchases of US\$ 996 387.45
 - b. He shall adjust the taxable income for the 2011 tax year by:
 - (i) adding back the sum of US\$4 900 instead of US\$ 19 876;
 - (ii) adding back the sum of US\$11 518.08 arising from a mark-up of 7% on the undeclared purchases of US\$164 544
 - (iii) adding back the sum of US\$359 073
3. Each party shall bear its own costs

AR Chizikani legal practitioners, appellant's legal practitioners