IN THE REVENUE APPEALS TRIBUNAL ESWATINI

JUDGMENT

CASE NO: RATE/CU005/23

In the appeal between:

RATE/CU005/23	**1ST APPELLANT**
ANOTHER	**2ND APPELLANT**
And	
ESWATINI REVENUE SERVICES-	**RESPONDENT**
THE COMMISSIONER GENERAL	

Neutral Citation:	**RATE/CU005/23** *and Another v Eswatini Revenue Services-The Commissioner General (005/23) (2023) RATE 005* (March 2023*)*
Coram:	Mr Mbuso Simelane, Ms Fikile Dlamini, Ms Ntombenhle Shongwe, Mr John Henwood, Ms Khethiwe Dlamini (Members)
Heard:	15 June 2023
Delivered:	This judgment is to be handed down electronically by circulation to the parties, legal representative by email and uploaded on email platform. The date for hand-down is deemed to be 5th September 2023.

Summary: Tax Issue: Customs – Import – Customs duty – valuation- The Respondent impounded the Appellant's vehicle on the basis that import duties were not paid whereas it was considered to have been imported. Notice of application to stay hearing for non-compliance - section 20 (1) of the Revenue Appeals Tribunal Act No. 13 of 2019.

JUDGMENT

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1) The 1st Appellant is RATE/CU005/23, an adult male and South African citizen ordinarily resident at the Gauteng province at 17 Salix North Road, Hurlingham Manor, Sandton, South Africa. The 2nd Appellant is, Another, an adult male, ordinarily resident in the Kingdom of Eswatini. It is the 2nd Appellant from whom the vehicle that is the subject of this case was impounded.

2) The Respondent is described as Eswatini Revenue Service, a semi-autonomous revenue administration agency on behalf of the state, established in terms of the Revenue Authority Act No. 1 of 2008. The Commissioner General cited herein his official capacity as the Chief Executive Officer of Eswatini Revenue Service, a legal body charged with the responsibility of revenue collection on behalf of the Government of Eswatini.

3) This is an appeal where the 1st Appellant submits that he received a letter, through the 2nd Appellant from the Respondent advising him of the detention and conditions of the release of his motor vehicle, a Corsa utility bakkie, bearing vehicle registration number TSV 520 GP, which had been detained by the Respondent on account that the 1st Appellant (owner of the vehicle impounded) was ordinarily resident in the Kingdom of Eswatini, thereby rendering the vehicle an import.

4) The conditions for release of the motor vehicle in the letter includes the lodgement of a customs declaration (SAD 500 IM 4) for home consumption, payment of Value Added Tax (VAT) amounting to SZL 10 500, 00 (Ten Thousand, Five Hundred Emalangeni) and the payment of a penalty in the amount SZL 10 500, 00 (Ten Thousand, Five Hundred Emalangeni) and payment of SZL 17 500, 00 (Seventeen Thousand Five Hundred

Emalangeni) in *lieu* of forfeiture. The total of which amounts to SZL 38 500, 00 (Thirty-Eight Thousand, Five Hundred Emalangeni).

5) The Appellant responded to the Respondent to state that the decision as outlined was taken on the wrong assumption. The Appellant submits that his attempts to prove that he was not ordinarily resident in Eswatini were met with an outright dismissal and mockery. The 1st Appellant appealed in writing to have the decision reconsidered and attached all relevant proof that both him and the vehicle were South African registered, him by way of citizenship and the vehicle by way of being licenced in South Africa. The Appellant mentioned that his appeal yielded no results and after the passage of a considerable amount of time he was advised that the matter could no longer be administratively dealt with by the Respondent, and he should approach the Tribunal.

6) The 1st Appellant then made an outright appeal on the valuation of the motor vehicle to the Respondent stating that it was extremely excessive considering that the car had been bought as a second hand back in the year 2010.The Appellant also stated that the additional amount of SZL 17 500,00 (Seventeen Thousand Five Hundred Emalangeni) was extremely high given that the penalty had already been charged for the purported breach of the Customs and Excise Act, 1971.

7) The Appellant in advancing further reasons for the mitigation of the total costs charged to him, submitted that the detention and conditions of release of the vehicle led to a deterioration state of health in his case leading to hospitalization for a 10-day period suffering from diabetic ketoacidosis and hypertension.

8) The Respondent confirms that the parties are engaged in a dispute in which Appellant seeks to recover a motor vehicle which the Respondent detained during one of its Anti-smuggling operations at Mhlaleni in the Manzini Region. The Respondent submits that the vehicle was driven by the 2nd Appellant on the date of apprehension and / detention. The Respondent submits that the vehicle in question is a Corsa utility bakkie bearing registration TSV 520 GP.

9) The Respondent submits before the Tribunal that the basis for the apprehension of the motor vehicle is the fact that upon request for documents confirming importation into the country from the 2nd Appellant, none was received. The Respondent submits that the 2nd Appellant indicated that the vehicle did not belong to him but the 1st Appellant being his

uncle, whom the Respondent states it sought the required documentation for importing the vehicle for home consumption from, however neither of them were able to produce such documentation. It was on this basis that the Respondent submits before the Tribunal that the vehicle was detained[1].

10) This is however contrary to the reason advanced to the Appellants in a letter bearing conditions of the release of the motor vehicle in which the Respondent indicated that from its own investigation it had noted that the 1st Appellant was ordinarily resident in Eswatini and as such should have cleared the motor vehicle with Customs. Stating further that the motor vehicle being imported and utilised in Eswatini without customs authority or payment of the taxes due amounted to an irregular dealing with or in goods, which is regarded an offence in terms of section 83 of the Customs and Excise Act, 1971 (hereinafter the "Customs Act").

11) The Respondent in its conditions letter indicated to the Appellants that to obtain the motor vehicle they were liable to pay a total amount of SZL 38 500, 00 (Thirty-Eight Thousand Five Hundred). Constituted by a VAT payment, and a payment for a penalty and costs in lieu of forfeiture as indicated by the Appellant above. The letter also stated the condition of the lodgement of a Customs declaration for home consumption, as requirement for the release of the vehicle. The Respondent submits that it determined the value of the vehicle at SZL 70 000,00 (Seventy Thousand Emalangeni) according to section 65(4) as read together section 66(9) of the Customs and Excise Act 1971, from which the due penalties were derived.

12) After incessant follow up requests by the 1st Appellant to have the Respondent reconsider the above position, the Respondent eventually acknowledged the 1st Appellant's written appeal but, however advised him that the matter can no longer be administratively determined by the Respondent itself, in terms of section 91 of the Customs Act and therefore advised the Appellant to appeal the decision with the Tribunal.

13) Dissatisfied with the Respondent' decision, the Appellant lodged its Appeal under section 15 (1) of the Revenue Appeals Tribunal Act 13 of 2019, which appeal was lodged with the Tribunal on the 14th of March 2023.

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[1] Paragraph 5 of Respondents statement of facts and reason for the decision.

14) Subsequent to the institution of the appeal by the Appellant, Respondent upon receipt of the hearing notice sent by the Tribunal on the 2nd of June 2023, setting the matter down for hearing, the Respondent has on the 12th of June filed an interlocutory application to stay hearing of the appeal.

15) The interlocutory application that was directed to be heard on 15 June 2023, was on the basis that the Appellant has not complied with Section 20 (1) of the Revenue Appeals Tribunal Act, which provides as follows.

> **"The obligation to pay and the right to receive and recover any tax chargeable under a revenue law shall not be suspended by an appeal or pending the decision of the Tribunal or a court of law".**

16) Following the filing of the application to stay the appeal, the Registrar acting on the instructions of the President of the Tribunal directed, that the main matter (appeal), including the interlocutory application, be argued together on the hearing date (15 June 2023). The application to stay the appeal was opposed by the Appellant on the basis that there was procedural unfairness in the appeal process. A *point in limine* was raised by Appellant in opposition to the application to stay the hearing of the appeal. The Respondent proceeded to file its heads of arguments on both the application to stay and the main appeal. The application to stay was argued which was later dismissed by the Tribunal stating that the reasons for dismissal will follow in the main judgment.

17) RATE/CU005/23 appeared in person, with a power of attorney to represent the 2nd Appellant and Mr Bongisipho Dlamini with him Ms Joy Dlamini appeared on behalf of the Respondent.

18) The Appellant has raised the following two grounds of appeal and submitted as follows:

(1) That the conditions as contained in the conditions of release letter be set aside and the vehicle returned to the 1st Appellant, on the basis that the process has been gravely administratively unfair to the 1st Appellant.

(2) That that the 1st Appellant has suffered prejudice for the prolonged deprivation of the vehicle.

(3) That costs of processing this appeal be ordered against the Respondent.

(4) That in the event that the Tribunal finds that the Respondent acted administratively and procedurally unfairly that the valuation of the motor vehicle and corresponding charges be reconsidered, utilising a clear and acceptable valuation method.

(5) Lastly that the Tribunal consider in mitigation the consequence of ill health suffered by the 1st Appellant occasioned by the Respondents actions.

19) The main subjects of discussion in this appeal are three issues for determination and the Tribunal breaks them down below:

19.1 Firstly, the Appellant seeks the Tribunal to determine whether the motor vehicle, a Corsa utility bakkie, bearing vehicle registration number TSV 520 GP is an 'import' for purposes of the Customs Act.

19.2 Secondly, the Appellant seeks the Tribunal to determine whether the valuation of the vehicle at SZL 70 000,00 (Seventy Thousand Emalangeni) is a fair valuation for the motor vehicle and whether the penalty as imposed by Respondent is proportionate in the circumstances.

19.3 Thirdly, the Appellant seeks the Tribunal to determine whether the matter in its entirety was dealt with in an administratively fair manner by the Respondent. If not what the legal implication of the protracted time period in which the Respondent dealt with the matter.

19.4 Lastly, the Appellant seeks the Tribunal to determine whether the Applicant is entitled to an order as to cost incurred in the processing of this Appeal.

20) **Submissions on stay of proceeding application.**

20.1 **Applicants' arguments**

20.1.1 The Applicant in the above application advances the following main arguments as to the application.

20.1.2 That the Tribunal in the matter of ***RATE/IT 001/22 v Eswatini Revenue Service***[2]**,** held that preliminary issue relating to failure by the Appellant to comply with section 20 of the Act should be brought by way of application before the Tribunal, hence the current application. Further, that in terms of Rule 27 of the Tribunal rules of procedure states "*The Tribunal may determine an appropriate procedure where there are no applicable procedures under these rules or the Act*". Thus, it is well within the Tribunals remit to deal with this procedure.

20.1.3 The Applicant argues further that the principle as captured by Section 20 of the RATE Act being the "*pay now and argue later*" principle, which the Eswatini courts in the case of ***CIC (Pty) Ltd vs SRA and Others***[3] stated was applicable in Eswatini in terms of Section 45 of the VAT Act of 2011 is an internationally recognised and applied principles and is particularly applicable in open and democratic societies, which Eswatini is as well. Thus, as per the prescripts of the taxation laws of the country the Appellant has a mandatory obligation to pay its tax dues notwithstanding the pending legal proceedings being the appeal.

20.1.4 As to the issue of simply executing against the asset in its possession, being the vehicle, which is the subject of this case, the Applicant submits that it is trite that the Respondent is resident in South Africa and thus enforcement is not possible. It would be risky to enforce only for the decision to be overturned. Thus, what would be best is if the Respondent had signed an acknowledgement of debt, which in accordance with their records had not been signed.

20.1.5 In light of the above the Applicant prayed that the application to stay proceedings pending payment by the Respondent be allowed with costs.

20.2 **Respondent's arguments**

20.2.1 In ***Limine,*** The Respondent raised the argument that in filing its response to the appeal, the Applicant failed to adhere to the Tribunals rules and or the legislative requirement for the form of the response. The Respondent argued that Applicant did not raise the issue of paying the taxes due. Further,

[2] *Case No. RATE/IT 001/22*
[3] *Case No. 798/2014*

Respondent argued that he was only advised to approach the Tribunal as the matter was *functus officio*. It is the Respondent submission that Applicant was well aware of it when filing the reply but decided to stand by the issues they have formulated in the reply until the last minutes.

20.2.2 The Respondent submits that there are no rules of procedure or regulation within the Tribunal's legal framework that speaks to staying proceedings pending payment and to this end there is no legal basis for the application and consequently need not be entertained by the Tribunal. Further, this was a matter rightly pointed out by the Registrar of the Tribunal when the application was first filed. Yet the Applicant still persisted with the application showing wilful disregard of the Registrars' advice.

20.2.3 Further that there seems to be no value at all for the application given that the Applicant has the vehicle which was impounded as security for the debt which can be executed against should the Applicant worry about recovering its funds in respect of due taxes.

20.2.4 It was the Respondent's prayer that the application to stay proceedings pending payment of the taxes due be dismissed with costs.

21) **Members analysis on stay of hearing for non-compliance.**

21.1 With the above submissions on both applications from both parties, the Tribunal will commence by addressing the arguments on application to stay hearing for non-compliance with the provisions of section 20 (1) of the Revenue Appeals Tribunal Act of 2019.

21.2 It is trite law that in such a case, the Tribunal is obliged to consider both the merits of the matter, as well as the prejudice that may befall either of the parties. In this matter the Respondent clearly stands to be severely prejudiced should the application to stay be granted in Applicant's favour.

21.3 As mentioned above the Respondent applied for a stay in proceedings for non-compliance immediately after being served with hearing notice, setting the matter

down for hearing by the Tribunal. This raised the question of whether the relief of stay applied before the Tribunal was fair when all enforcement measures are actually at disposal of the Respondent.

21.4 The Applicant argued that the Tribunal in the matter of ***RATE/IT 001/22 v Eswatini Revenue Service***[4] held that the preliminary issue relating to failure by the Appellant to comply with Section 20 of the Act should be brought by way of application before the Tribunal, hence the current application. Further, that in terms of Rule 27 of the Tribunal Rules of procedure states "*The Tribunal may determine an appropriate procedure where there are no applicable procedures under these Rules or the Act*". Thus, it is well within the Tribunals remit to deal with this procedure.

21.5 In response, the Respondent submits that there are no rules of procedure or regulation within the Tribunals legal framework that speak to staying proceedings pending payment and to this end there is no legal basis for the application and consequently need not be entertained by the Tribunal.

21.6 It is the Tribunal's considered view that this revolves around the interpretation and application of the relevant provisions of the Revenue Appeals Tribunal Act on the obligation to pay any tax chargeable under any revenue law visa vis the suspension of an appeal pending the decision of the Tribunal or a court of law. Section 20 (1) of the Revenue Appeals Tribunal Act, 2019 provides that:

> **"The obligation to pay and the right to receive and recover any tax chargeable under a revenue law shall not be suspended by an appeal or pending the decision of the Tribunal or a court of law".**

21.7 In doing so the Applicant has relied on the principle laid down in the landmark case of ***RATE/IT 001/22*** **vs Eswatini Revenue Services**, paragraph 10[5] where the Tribunal held;

> **"… After the above submission by both parties, it should be noted, because it is fundamental to the preliminary issues raised by the**

[4] *Case No. RATE/IT 001/22,*

[5] *(*RATE/IT001/22

Respondent, on the payment of tax pending appeal. The challenge to the Tribunal on this rule advanced by the Respondent is because it was raised during the hearing and the issue is *whether or not* such a challenge could have been raised by way of application. However, the Tribunal take note and advise the Appellant on the provision of the Income Tax Order section 55 read with section 20 of the Revenue Appeals Tribunal Act of 2019, that an appeal does not stop Respondent from paying the tax due.

21.8 The Applicant argued that in this judgment, the Tribunal made it clear that such an application should have been raised by way of application. The Applicant in advancing further reasons argues that this provision (section 20 of the Act), refers to the principle of *pay now argue later* rule which is an international best practice on tax related matters as the principle is applicable in the country in terms of section 45 of the VAT Act, 2011.

21.9 The Tribunal now turns to the evidence of the Applicant to determine whether they were correct to cite this provision as their basis for the application to stay the proceeding interpreting it to mean, pending the non-payment of the taxes due under this matter, the hearing may not proceed unless the Applicant makes payment or provides security for the due taxes. There is certainly no doubt that section 20 of the Act of the Revenue Appeals Tribunal Act, 2019, precludes this Tribunal from entertaining an application pending payment of taxes due.

21.10 It is the Tribunals view that the case of ***RATE/IT 001/22 vs Eswatini Revenue Services*** was wrongly interpreted in this application. *Usutu Forest School v ERS*- paragraph 10 of the judgment is self-explanatory, as the Tribunal never gave guidance on how preliminary issue relating to failure by the Appellant to comply with payment of tax due should be handled. Instead, the Tribunal was commenting because it was not certain whether it was the right forum to address such an application. It is therefore erroneous for Respondent to rely on this case in the present circumstances.

21.11 It is the Tribunal's view that this case brings to the fore the grave mistake which legal practitioners always commit, failure to interpret, legislations and certain paragraphs in judgments. Legal practitioners are called upon to be industrious,

especially in interpreting or understanding laws issued by Tribunals and Courts. The Tribunal was of the view that, in the *RATE/IT 001/22* judgment, Appellant should not be found in contravention of the relevant legislations as the liability to make payment has not been suspended by the appeal. Accordingly, the interpretation of the Usutu case by the Respondent in this regard leads to inaccurate results. Thus, as per the prescripts of the taxation laws of the country the Appellant has a mandatory obligation to pay its tax dues notwithstanding the pending Appeal.

21.12 The Applicant argues further that the "*pay now and argue later*", which the Eswatini courts in the case of ***CIC (Pty) Ltd vs SRA and Others***[6] stated was applicable in Eswatini in terms of Section 45 of the VAT Act of 2011, is an internationally recognised and applied principles and is particularly applicable in open and democratic societies, which Eswatini is as well. The Applicant argued that this was firmly established by her Lady Justice Mumcy Dlamini in the case of ***CIC vs Eswatini Revenue Service*** quoting the words of Eberson J that, the law in Eswatini is the same as in Republic of South Africa.

21.13 The Respondent on the other side, argued that there seems to be no value at all for the application given that the Applicant has the vehicle which was impounded as security for the debt which can be executed against should the Applicant worry about recovering its funds in respect of due Taxes. This the Respondent contends was plain delusional to seek to enforce the pay now argue later principle in circumstances where the appeal is meant to resolve the dispute and the Respondent is in possession and control of the 1st Appellant asset presumably worth more than the Respondents claim.

21.14 The Applicant submits that this Tribunal should grant the relief sought and further conclude that stay of proceedings for noncompliance with section 20 of the Act is always available in appeal disputes where Appellant, as in this case, bears the onus to make payment of the taxes due or provide security for the tax due before an appeal is lodged and heard.

21.15 It is the Tribunal's view that Respondent holds all the enforcement powers to expeditiously effect collection of the taxes due to the fiscus. Section 20 (1) of the Revenue Appeals Tribunal Act of 2019 spousing as it does, the "*pay now, argue later*"

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[6] *Case No. 798/2014*

principle, mandates that, even if a taxpayer is disputing the assessed amount due to the fiscus, that taxpayer is still obliged to pay the amount, even if an objection to the assessment has been lodged with the Commissioner General, and furthermore, this obligation is not suspended by an appeal lodged against him.

21.16 The Tribunal is in full support of the "pay now argue later" principle as decided in the matter of ***Metcash Trading Ltd v Commissioner for the South African Revenue Service***[7] where the constitutional court declared the rule relating to VAT to be constitutional sound. However, The Tribunal dismissed the application as this is not the correct interpretation of the provision and would result in the absurdity that all taxpayers would no longer be able to approach the Tribunal for determination of their appeals where no payment or security for the taxes due has been made, something that would defeat the whole purpose of the function of the Tribunal.

21.17 The Tribunal is confident that, Section 20 (1) of the Revenue Appeals Tribunal Act of 2019, is a permissive provision, giving the power to the Respondent (in the main case) to continue and employ its collection enforcement mechanisms even where a taxpayer has noted an appeal with the Tribunal or the courts for that matter. It is the Tribunal's view that section 20 (1) gives guidance to taxpayers that the lodgement of an appeal would not be a defence to any demand for taxes by the Respondent. As such the application to stay proceedings at the Tribunal is defective and therefore dismissed.

21.18 We have dispassionately considered these arguments. Having so done, we are inclined to agree with RATE/CU005/23 (Appellant) that the application to stay hearing pending compliance with taxes due does not vitiate the proceedings. We shall give reasons.

21.19 First, the Tribunal operations are guided by mainly the Revenue Appeals Tribunal Act 2019, the Revenue Appeals Tribunal Regulations, 2022 and in particular on the appeals cases, the Rules of Procedure. Under none of these pieces of primary and secondary legislation was a stay of proceeding envisaged. This is why it would be folly of the Tribunal to entertain such applications in so far as there is nothing to guide

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[7] (CCT3/00) [2000] ZACC 21; 2001 (1) SA 1109 (CC); 2001 (1) BCLR 1 (CC) (24 November 2000)

the process, circumstances, and time limits to be considered in deciding whether to grant such applications. In this instance, it is disturbing to note that Applicant has waited until the last hour to apply for such stay and had this step been legislated, it would have guided properly the time limits applicable thereto.

21.20 Second, Applicant contended that Rule 27 of the Tribunal rules provides that the Tribunal may determine appropriate procedure where there is no applicable procedure under the Rules or the Act. Rule 27 of the Tribunal Rules of procedure states.

> ***"27 The Tribunal may determine an appropriate procedure where there are no applicable procedures under these Rules or the Act".***

21.21 It is doubtful however that this rule would cover instances that are self-created as in the present case as Applicant has all the powers to enforce collection measures at the outset. This was confirmed by the Respondent's arguments, in that Applicant has the vehicle which was impounded as security for the debt which can be executed against should the Applicant worry about recovering its funds in respect of due Taxes.

21.22 Thirdly, it is of concern to the Tribunal that the Applicant has waited for this whole time to demand payment and is now in fact attempting to use the Tribunal as its collection agent. As such where the Applicant has chosen to forego enforcing this and has instead gone through the whole process of not only directing the taxpayer to approach the Tribunal for relief, but also filing a reply (in the main matter) that does not allude to any failure by the Respondent to satisfy any legal requirements. It is our view that Applicant cannot then turn around at the last hour to suspend the hearing in this manner as they have by conduct acceded to the proceeding of the appeal.

21.23 As to the issue of simply executing against the asset in its possession, being the vehicle, which is the subject of this case, the Applicant submits that it is trite that the Respondent is resident in South Africa and thus enforcement is not possible. The Tribunal is amazed by the Applicant's submission considering the letter dated 11th July 2022 where the Applicant states:

> ***"……. please note that if I do not hear from you by the 11th of August 2022, I shall assume that you have lost interest in the motor vehicle. The motor vehicle will be forfeited to the state and disposed of without further reference to you…***

21.24 The Tribunal is of the considered view that the purpose behind the forfeiture of the motor vehicle to the state was made under a law which makes provision for prompt settlement in the event Appellant failed to pay the taxes due. Section 35 (5) of the VAT Act gives the Applicant ample powers in this respect to enforce collection measures at the outset by requiring that even before an objection is considered, a taxpayer must have provided security for the debt. As regards to the letter referred to above, it is well settled, that it is evidence to be relied upon by the Tribunal in determining the purpose of impounding the motor vehicle by the Applicant as they made it clear that failure to pay the VAT owed, the motor vehicle will be forfeited to the state and disposed of without further reference to him. It is our view as the Tribunal that all enforcement measures were at the Applicant's disposal, from the moment the Respondent's vehicle was impounded. It is the Tribunal's view that the Applicant would be prudent to want the matter to be settled soonest so that the issue would be settled once and for all. It is our considered view that, if the whole issue is about the provision of security for the debt under appeal, then the seized vehicle is itself adequate security.

21.25 It is the Tribunal view that allowing for stay in proceedings pending payment of tax due in a tax case would not make much sense. There is therefore, in Tribunal's view, sound logical reason for not making provision for stay of proceedings in the rules of this Tribunal. In the result, the Tribunal comes to the conclusion that the remedy of stay of proceedings is not available to the Applicant in this instance.

21.26 It is on the basis of the foregoing that we are respectfully unable to subscribe as a Tribunal to the Applicant's application in respect of the application to stay the main appeal. Therefore, the application to stay hearing of the appeal is hereby dismissed.

22) **Main appeal**

Having heard the arguments from both parties, and the point in *limine* raised by Appellant, the Tribunal is of the view that such points in *limine* raised is in support of Appellant's ground of appeal which is the real issue and the most fundamental one in the matter. The Tribunal shall cover the point in *limine* raised in a realistic and practical manner when examining the ground of appeal as they have a bearing in the whole case. Before examining the grounds, which lead to this appeal, it is important for this Tribunal to remind itself the submissions of this matter as follows.

23) **Appellants submission**

23.1 In ***Limine***, the Appellant first argued that there was *procedural unfairness in the decision* by the Respondent. He raised the argument that Respondent in dealing with this matter administratively was unfair and unjust. Appellant argued that Respondent failed to take the administrative decision timeously, and without unreasonable prejudicial delay and that in doing so caused the 1st Appellant to suffer prejudice for the prolonged deprivation of the Appellants vehicle.

23.2 The second and last point *in limine* raised by the Appellant is that decision was taken presumably on the wrong assumption that 1st Appellant ordinarily live with the vehicle in Eswatini, and that the vehicle was imported into Eswatini.

24) **Appellants' main arguments**

24.1 The Appellant in respect to its main appeal raises three main arguments. The first of which is that the matter pertaining to the detainment of his vehicle lacked procedural fairness. In that following that the Appellant indicated that it ***objected*** to the decision of having its vehicle impounded on the basis that it was considered that he was resident in the country, he was not afforded an opportunity to advance his case and explain the circumstances of the presence of the vehicle that was impounded. Instead on indicating that the Appellant wishes to object he was directed to do so either with the Ministry or the Tribunal, thus eventually lodging his matter with the Tribunal.

24.2 As such, the Appellant asserts that it was not afforded an appropriate internal remedy to have the matter reviewed internally by the Commissioner himself prior to advancing the matter to external dispute resolution. The Appellant submits that it remains unclear to it why this was the case, and no reasons were advanced in the Respondent's papers.

24.3 The Appellant asserted in this regard that from a Constitutional standpoint it was entitled to a fair administrative process, which in this case is thus an obligation that the Respondent must discharge as an administrative body and that entails a speedy process to resolve its objection or dispute.

24.4 The second argument advanced by the Appellant was the fact that the vehicle belonging to the Appellant was impounded on the assumption that he is ordinary resident in Eswatini, a fact the Appellant submitted was not true. The Appellant stated that the Appellant did, however, spend a considerable amount of time in the country because he had family in Eswatini. This was more so the case during the COVID 19 pandemic.

24.5 The Appellant submitted that without an effective and fair administrative internal process the Appellant was deprived of the opportunity to explain all these circumstances and the vehicle was impounded and stored in Matsapha.

24.6 The third and last argument made by the Appellant was in relation to the exorbitance of the penalty imposed on him as condition of release of the motor vehicle. To this the Appellant submitted that even if it were to be established that the vehicle was in Eswatini permanently or forever, and used for personal use or home consumption, the resulting penalty was inordinate in the circumstances and in fact excessive in the circumstances.

24.7 This the Appellant continued to state was excessive because he purchased the vehicle in the year 2010 for E 72 000.00 (*Seventy-Two Thousand Emalangeni*), it is thus unfathomable that in the Respondent's view, the vehicle had depreciated by only E 2 000.00 (*Two Thousand Emalangeni*) over a 10-year period. That is an astounding rate.

24.8 The Appellant stated further that it was unclear from any of the Respondents papers what valuation method was utilized in arriving at the valuation of the vehicle. The Appellant therefore sought the Tribunal to find that the valuation was excessive.

25) ***Respondent's main arguments***

25.1The Respondent in its defence stated that with respect to the vehicle that was impounded it was found in use in Eswatini while the Appellant was in South Africa. Therefore, it is not as though the Respondent is trigger happy when detaining motor vehicles that are imported but do so after thorough investigation and after establishing that the vehicle is indeed in use Eswatini.

25.2 The Respondent went on further to submit that the vehicle in question was imported in 2015 as shown in the records of all ports of entry in the country. The Respondent submitted that the vehicle is captured coming into the country in 2015 at the Ngwenya Border post (port of entry) and does not show up in any record of either exit or re-entry.

25.3 To this end the Respondent submitted that though it is not in dispute that the Appellant is both a citizen of South Africa, his property was in use in Eswatini and as such is liable as any other taxpayer in his position to pay the due value added tax. As others have and there are no grounds to absolve him from this payment and in fact to do so would be unfair to all other Taxpayers who have paid their dues.

25.4 In concluding its point, the Respondent submitted that requirement of "use" was established in the case of ***Swaziland Revenue Authority vs Charles Mefika Ndzimandze*** [8] where it was held that goods being brought into the country for home consumption or use are to be considered as imports and as such the vehicle was imported into the country.

25.5 The Respondent argued further with respect to the Applicant's assertion that it was not afforded a fair administrative procedure that is misconceived. This was

[8] (89/12) SZSC

because the Appellant was offered a section 91 Form which provides a space for him to give reasons as to why the vehicle should not be impounded, he was further given a Notice of Seizure which provides a similar opportunity and lastly a conditions of release all of which provided him the opportunity to make representations and in fact that he did make representations as to being the owner of the vehicle (but having borrowed it to his sister) were captured in an email he sent. To this end the Respondent insisted that the Appellant's assertion that he was not afforded a fair administrative procedure is both misconceived and bad in law.

25.6 The Respondent submitted that with respect to the issue of its valuation of the motor vehicle, the Respondent uses a series of options to value a motor vehicle. The first being to seek the actual *transactional value* of the motor vehicle failing which they consider an *Identical goods* model in which they compare with the value of identical goods, failing identical goods, they consider *similar goods,* failing that they use a *deductive* model and failing that a *fall back /comparative* model.

25.7 The Respondent explained that in the absence of any evidence of the value of the vehicle, since the Appellant had not provided any proof of the purchase value, the Respondent utilized the "*fall back*" method to value the vehicle and dated its value back to its year of entry in Eswatini being 2015.

25.8 The Responded submitted that the valuations as stated are provided for by Sections 64 and 65 of the Customs and Excise Act. Further that the flexible nature of the fall-back method is alluded to in the case of ***SRA vs Impunzi Wholesalers (Pty) Ltd***[9].

25.9 The Respondent submitted that with respect to the penalty and forfeiture, it had already been established and was not in dispute that the vehicle was in <u>use</u> in Eswatini. Therefore, due to it having not paid the due taxes upon entry it had been dealt with irregularly in terms of Section 83 of the Customs and Excise Act. The Act therefore empowered the Respondent to impose a penalty of up to three (3) times the value of the vehicle and in the current case, the Respondent was lenient and did not apply the law in full as the penalty was only placed at E 10

[9] (06/2015) SZHC 06

500.00 (*Ten Thousand Five Hundred Emalangeni*) which is far less than what the Act says.

25.10 Further that this amount should be distinguished from the charges for forfeiture which are standard in a case where the Respondent forfeits an asset and keeps it in its storage. Thus, the E 17 500.00 (*Seventeen Thousand Five hundred*).

25.11 The Respondent as a last submission stated that the Appellant advanced personal circumstances that prove as hinderance to him being able to honour the payment of the taxes and penalties due, to which the Respondent submits that the law does not recognise such personal circumstances so as to exonerate the Appellant from paying the due taxes and penalties.

25.12 The Respondent in light of the above submissions prayed that the Tribunal dismiss the Appellants appeal in its entirety.

26) **Tribunal's analysis on main appeal**

26.1 When the appeal came up for hearing, the 1st Appellant raised two points in *limine* upon which the Tribunal invited him to argue the said point in *limine* along with the substantive appeal. Essentially what the 1st Appellant is saying is that there was procedural unfairness in the decision taken by the Respondent in the whole case. The Tribunal is of the settled view that it would be rather unfair not to hear the Appellant vent out his grievances. One of the best things we think we should do as a court of equity is, in deserving cases, not to avoid the determination of such disputes on purely technical points because that has caused the miscarriage of justice. It is therefore because of the above reason that we found it imperative to start by discussing the two preliminary points in *limine.*

26.1.1 **First *point in limine* – procedural unfairness in the decision**

26.1.1.1 Regarding the first point in *limine*, it was the Appellants' submission that Respondent in dealing with this matter administratively was unfair and unjust. The Appellant directed the Tribunal to the provisions of section 33 of the Constitution of the Kingdom of Eswatini, 2005 which put more

emphasis on the right to be heard and be treated justly and fairly. The Constitution of the Kingdom of Eswatini provides as follows;

"33*. **Right to administrative justice***

1. ***A person appearing before any administrative authority has a right to be heard and to be treated justly and fairly in accordance with the requirements imposed by law including the requirements of fundamental justice or fairness and has a right to apply to a court of law in respect of any decision taken against that person with which that person is aggrieved."***

2. ***A person appearing before any administrative authority has a right to be given reasons in writing for the decision of that authority."***

26.1.1.2 While Appellant maintained that he was treated unfairly, the Respondent is diametrically opposed to that view, saying it did not treat the Appellant unfairly.

26.1.1.3 The Tribunal has considered these arguments. Having done so, we are inclined to agree with The Appellant that there is procedural unfairness in the decision which vitiated the whole proceedings. We shall give reasons.

26.1.1.4 First, it is our settled view that, the outright failure by the Respondent to deal with this matter within a reasonable time period, in particular the failure by the Respondent to give succinct reasons for the continued detention of the motor vehicle despite reasons being advanced by the Appellants that the initial assumption which had been the basis of the detention of the motor vehicle was based on a false premise (being that Appellant was ordinarily resident in Eswatini).

26.1.1.5 The Tribunal is saying this because this was over Six (6) months from the initial appeal and nine (9) months from date of detention of the motor vehicle. Suffice it to state by the time of the hearing, the vehicle in question

would have been detained a little in excess of a year in the Respondent's custody and not without the 1st Appellant having made reasonable efforts to resolve the matter.

26.1.1.6 It is our considered view that the Appellant's case is seemingly bedevilled by the fact that no proper professional handling was accorded by the Respondent and as such the Appellant had persistently been asking the Respondent about the case. The reason we are saying this, is because, the first recorded attempt by the Appellant to reach the Respondent to settle this matter is on the 11 August 2022 where the Appellant lodged an appeal in writing to the Respondent. It was only on the 16 February 2023, that the Respondent resurfaced with communication of any substance to the 1st Appellant.

26.1.1.7 The Tribunal find it irresistible to refer to the decision in ***Lebohang Tau and Joaquim Alberto Olivera Ferreira Alves,***[10] where the court made a conscious effort to display the intolerance of the law towards the abuse of power by administrative authorities failing to deal with matters of such a nature within a reasonable time. The court held that;

> "***The order a quo ruled that further and continued detention of the vehicle by SARS is unreasonable, arbitrary and therefore unlawful, it was ordered that the vehicle be returned within 48 hours of the order of the court and SARS was ordered to pay the costs of the application."***

26.1.1.8 The court further made what it termed an;

> ***"….. unambiguous and explicit finding of the court was that SARS delayed the investigations to establish whether the vehicle is liable to forfeiture under the Act to such an extent that it impeded the right of the Respondent in terms of section 25 (8) of the Constitution, 1996."***

26.1.1.9 The court was quite unequivocal in illustrating that a lackadaisical attitude in dispensing with a matter that stands to infringe a taxpayer's right under the Constitution, such as the right of protection from deprivation of

[10] (A194/2019) [2020] ZAFSHC 123 (27 July 2020)

property and the right to fair administrative action as enshrined in the constitution was unacceptable. The Respondent, in their statement of facts, has also not bothered themselves to explain the gap between 11 July 2022 when they served the Appellants with the Conditions of Release Notice and 9 February 2023 when they advised him to lodge an appeal to the Tribunal.

26.1.1.10 Again, the Tribunal noted during the hearing that a litany of documents was handed over from the bar by the Respondent in complete disregard of rule 5 (6) (f) of the Tribunal rules of procedure. Rule 5 (6) (f) reads: ***a reply shall contain all documents which are necessary to enable the Tribunal to review the decision.*** The Respondent when asked as to why Appellant was not served timeously with all the necessary documents, Respondent informed the Tribunal that the reasons as to why it hadn't delivered or served the Respondent with all the documents timeously was because the tone used by Appellant was harsh. We are of the considered view that a hasty glance at the Respondent's present documents could severely affect the 1st Appellant in defending the action. It is our settled view that Respondents' point in *limine* regarding procedural unfairness in the Respondent's decision is allowed.

26.2 **Second *point in limine* – substantive unfairness in the decision**

26.2.1 The second and last point *in limine* raised by the Appellant is that decision was taken presumably on the wrong assumption that 1st Appellant ordinarily lives with the vehicle in Eswatini, and that therefore the vehicle was imported into Eswatini. The Appellant further submitted that the matter pertaining to the detainment of his vehicle lacked procedural fairness. It is apparent from the foregoing stances maintained by each party respectively that, what is now to be resolved by this Tribunal is whether detainment of the vehicle based on residence, was procedurally fair and proper.

26.2.2 The Tribunal's attention is drawn to a critical defect in the Respondents pleading and in turn its case. The Respondent in its initial interaction with the Appellants based their cause of action for impounding the 1st Appellants' vehicle on the fact that the 1st Appellant (owner) of the vehicle is "ordinarily resident" in the Kingdom

of Eswatini. This is evidenced by the Appellant's statement of case, where he states that the Commissioner of Customs indicated that Appellant is ordinarily resident in Eswatini. However, during the course of the Respondent submissions, he withdrew the issue of residence. It is the Tribunal's view that, as may be gathered from the Respondent' pleadings the controversy of this appeal is on this issue which is now being deserted/ dropped by the Respondent.

26.2.3 The Tribunal has noted that the defect herein lies in that, at the outset the Respondent advanced a wrong cause of action to the Appellant in dealing with its case, meaning the Appellants were made to answer to the wrong cause of action, on which it must be stated, was not sufficient to sustain its case, thereby rendering their process faulty.

26.2.4 It is our settled view that, it is not acceptable for a taxpayer to be given a cause of action which is inconsistent with the Respondents claim, thereby causing the Appellants to veer off on a tangent expending their energy defending a cause of action that would later not be sustained. That is grossly unjust and would be outwardly admonished in any court of law, by reason of an exception raised on the basis of defective pleadings on the part of the Respondent.

26.2.5 It is the Tribunal' s view that the new cause of action by the Respondent has deprived the Appellants the fair and adequate opportunity to respond to the Respondents case properly which undercuts them completely and breaches the *audi alterem partem rule*, not to mention the equity and fairness principles which underlie taxation.

26.2.6 It is our view that, had the Appellant been given an opportunity to express his points of view about his residence, to be listened to and to have his opinions considered by Respondent, he would not have been charged with an incorrect cause of action being "ordinarily resident in the country" from the beginning.

26.2.7 It is our considered view, that the wrong cause of action has grossly contributed to injustice in the matter. It is the Tribunal's view that in order for Respondent to maintain and improve levels of trust, as a tax authority should acknowledge the importance of fair procedures and endeavour to implement and enhance the fairness of their procedures, which in turn may result in nurturing voluntary

compliance by all taxpayers. Taking into account all the circumstances mentioned above, it is our considered view that the Appellant has made out its case in this *point in limine* raised.

27) Having summarized the submissions, arguments and points in *limine* raised, we should now be in a position to confront the three issues for determination on which both parties have locked horns. The Tribunal now turns to the evidence of the Appellant to determine whether the motor vehicle, a Corsa utility bakkie, bearing vehicle registration number TSV 520 GP is an 'import' for purposes of the Customs Act, because it is from this that all legal consequences may flow or attach.

27.1 The Appellant submitted before the Tribunal that he objected to the decision of having its vehicle impounded on the basis that it was considered as a resident in the country and further that he was not afforded an opportunity to advance his case and explain the circumstances of the presence of the vehicle that was impounded.

27.2 In Response, the Respondent, in its defence stated that with respect to the vehicle that was impounded it was found in use in Eswatini while the Appellant was in South Africa. The Respondent during the hearing, abandoned "ordinarily resident" as a cause of action for impounding the 1st Appellants vehicle and maintained that it was after thorough investigation that the vehicle was found to be indeed in use in Eswatini.

27.3 It is the Tribunal's view that the appeal proceedings have now been vitiated by the abandonment of residence as a major cause of action. However, flowing from the above, and taking inspiration from the guidance offered by the Customs Act on the presumption of goods being imported as long as they are entered into Swaziland, the Tribunal shall determine whether the motor vehicle, is an 'import' for purposes of the Customs Act.

27.4 The only guidance offered by the Customs Act in this regard, is the presumption of goods being imported as long as they are entered into Swaziland. There is a clear shortcoming in the broad definition of "actually bringing goods into the country" as it is common knowledge that not all goods brought into the country, much less vehicles are imports. This renders the definition quite bare.

27.5 Fortunately, the question of the bare nature of the definition of the term import has come up for consideration in the Eswatini courts, in the case of ***Charles Mefika Ndzimandze vs Swaziland Revenue Authority,***[11] in which the Honourable J. Hlophe presiding set the following dictum;

> "***In my view the term "import" as used in the said Acts connotes some permanence in the bringing into the country of the said goods or at least some permanent use. A good example would be a car brought into the country, permanently against one that has been brought into the country either on holiday or for some specific project meant for a limited time. I would therefore agree in that sense that the intention of bringing in the goods is a factor if viewed from this angle and certainly not if it is meant for an indefinite period which connotes some permanence."***

27.6 In the above case, the effect of the dictum is the establishment of the intention of the importer to actually "import" the goods as an added requirement to establish whether goods brought into the country are actually imports for purposes of the Customs Act, failing which the Act would serve the unjust cause of being a catchall Act, that implicates even goods that do not qualify as imports in the true sense. Therefore, in driving the point Honourable J. Hlophe, relying on the case of ***Beckett &Coy. LTD vs Union Government***,[12] went on to further note that;

> ***"…the intention of the person bringing the goods into the Republic as to their disposition also has a bearing upon whether or not the goods have been imported."***

27.7 Noting even further as alluded in the case of ***Tieber vs Commissioner for Customs and Excise,***[13] as proffered by per Goldstone JA, that;

[11] (1803/12) [2012] SZHC 258
[12] 1921 TPD 142 at page 149
[13] 1992 (4) SA 844

"If regard is had to the scheme of the Act, it is clear that the Legislature intended the word "import" to have a restricted meaning."

27.8 We are of the established view that the above is a clear illustration of the requirement that over and above the plain requirement of the goods actually being brought into the country, it is incumbent on the Respondent in seeking to levy import duties to establish clearly that the intention is to import the goods. Further as guided by the above dictum, establish an intention to have the goods in the country for an indefinite period which connotes some permanence.

27.9 The framework of the Act, on what constitutes an import, then further alludes to the concept of goods brought into the country for "home consumption". The Act does not outrightly state that goods brought into the country for 'home consumption' are imports. Instead, this is inferred from the reading of section 46 of the Act which states that it is only goods that are not declared to be for home consumption that are not subject to the due customs duty. In that way it infers that it is only goods brought into Swaziland for home consumption that will be liable for the due customs import duty. However, the Customs Act gives no clear definition of what home consumption entails.

27.10 To this the South African Customs and Excise Act[14], was sought for guidance which proffered the following definition of home consumption:

"1***. (xv) "Home consumption" means consumption or use in the Republic."***

27.11 The clarity brought about this definition of home consumption provides a determination of what an import is, which is much easier to prove. It is crucial for the Tribunal to point out that, a copy of a document was handed over from the bar capturing entry of the motor vehicle into the country in 2015 at the Ngwenya Border post (port of entry) and does not show up in any record of either exit or re-entry. Though there are various observations made by the Tribunal on the document, which in our view, are totally unwarranted, we refrain ourselves to refer

[14] Act 91 of 1964

to them as any comment thereon would unnecessarily prejudice the rights of either of the parties.

27.12 The Tribunal will only limit itself to the minimum possible observations that the vehicle in question indeed entered into the country because it was impounded in Matsapha. It is not in dispute that the Appellant is a citizen of South Africa, however, his property was in use in Eswatini and as such is liable as any other taxpayer in his position to pay the due Value Added Tax. It is in this respect that the Tribunal found that there are no grounds to absolve him from this payment and in fact to do so would be unfair to all other taxpayers who have paid their dues. Thus, this ground of appeal is not merited, and we dismiss it in its entirety.

28) The second issue to be determined by the Tribunal is whether the valuation of the vehicle at SZL 70 000,00 (Seventy Thousand Emalangeni) is a fair valuation for the motor vehicle and whether the penalty as imposed by Respondent is proportionate in the circumstances.

28.1 Regarding the second ground of appeal, Appellant submitted that the valuation was excessive because he purchased the vehicle in the year 2010 at the value of E 72 000.00 (*Seventy-Two Thousand Emalangeni*), it is thus unfathomable that in the Respondent view the vehicle had depreciated by only E 2 000.00 (*Two Thousand Emalangeni*) over a 10-year period. That is an astounding rate. He added that it was unclear from any of the Respondents papers what valuation method was utilized in arriving at the valuation of the vehicle.

28.2 In response, the Respondent explained that in the case of the Appellant in the absence of any evidence of the value of the vehicle, since the Appellant had not provided any proof of the purchase value, the Respondent utilized the "*fall back*" method to value the vehicle and dated its value back to its point of entry in Eswatini being 2015.

28.3 The Responded submitted that the valuations as stated are provided for by Sections 64 and 65 of the Customs and Excise Act. Further that the flexible nature of the fall-back method is alluded to in the case of ***SRA vs Impunzi Wholesalers (Pty) Ltd (06/2015) SZHC 06***.

28.4 After having applied itself to whether the vehicle in question is actually an import, the Tribunal finds that the vehicle is an import in terms of the Act and now needs to ascertain whether the valuation of motor vehicle is correct. This has a direct correlation to the penalties imposed on the Respondent.

28.5 The Appellants have raised an appeal against the valuation in line with section 65 (4) of the Customs Act which provides for the right of the Appellant to Appeal the value determined by the Commissioner to the Minister (such procedure has since been replaced by the Tribunal).

28.6 In any event, the Tribunal observes that when deciding the question with regard to valuation of the vehicle, the Respondent did take into consideration the principles which a court or a revenue service is required to take into consideration while deciding such a matter. The Tribunal is saying this because the Respondent submitted that with respect to the issue of its valuation of the motor vehicle, they used a series of options to value a motor vehicle.

28.7 The Respondent's counsel averred that the valuation methods have to be applied sequentially, specifically by starting with method 1 and go to method 2 only if method 1 does not suffice or is inapplicable, you go to method 3 if method 2 is inapplicable until you get to method 6 which is the *fall-back* position in the event none of the preceding five adequately serve the purpose.

28.8 The Tribunal has noted that after Appellant's failure to forward Respondent with the actual *transactional value* of the motor vehicle, they were then compelled to consider other options such as an *Identical goods* model by which they compare with the value of identical goods, failing identical goods, they consider *similar goods,* failing that they use a *deductive* model and failing that a *fall back /comparative* model is used.

28.9 It is the Tribunal's view that, in fact, they were compelled to use the *fall back* because the Appellant could not produce the documents to enable them to use the straightforward method which is the *transactional value*. Having said that, this Tribunal finds nothing wrong with the Respondent's application of the *fall-back*

method. The nature of the fall-back method is supported by the case of ***Lyimo Sebastian Maiko v. Commissioner General***[15] in which the Tribunal held that:

> "***Since the Appellant could not tender importation documents to the Respondent proving the value of the item imported, the Board was right when it held that there was no evidence presented to the Commissioner General as regards the importation of goods in question, therefore the Respondent was right when he applied the fall-back method instead of the transactional value. The Tribunal held that this is a standard Principle of proof resting on the importer of the goods to furnish Commissioner General with the original documents of the import goods".***

28.10 In our view, indeed, at face value the Respondents' valuation of the vehicle in question is quite high, when one considers the factors outlined by the 1st Appellant that the vehicle is a second hand rebuild and was purchased as a second hand in the year 2010 even though no evidence was produced to support such claim. To this end, the Tribunal draws attention to the provision of Section 38 of the Value Added Tax Act, 2011, which reads:

> ***"38. Burden of proof - The burden of proving that an assessment is excessive is on the person objecting.***

28.11 This section clearly stipulates that the burden for supporting an objection to a valuation lies upon the Appellant claiming such objection and, it is the Appellant who must discharge the said burden. It is the Tribunal's view that such a burden of proof cannot then get shifted on the Respondent when Appellant has failed to produce proof of procurement, or the payment made by himself to the vehicle dealer.

28.12 The Appellant contended that it is highly unlikely that the vehicle would fetch a transaction value of SZL 70 000,00 (Seventy Thousand Emalangeni). It is the Tribunal's view that his failure to assist the Respondent to determine the correct value of the subject matter rendered the proceedings of the Respondent correct. The Tribunal has observed and holds that unless and until the Respondent

[15] *Appeal: DSM 13 of 2009 (2010)*

discharges the burden of proof imposed by Section 38 of the VAT Act, 2011 and proves the genuineness of the purchase price of the motor vehicle by producing the aforesaid receipts, the Respondent's valuation shall stand.

28.13 The Tribunal is primarily tasked with determining if the amount of SZL 17 500, 00 (Seventeen Thousand Five Hundred Emalangeni) in *lieu* of forfeiture is in fact a valid amount to be levied in the circumstances. It is the Tribunal's view that in the absence of procurement proof of the vehicle, it would be difficult to conclude that the penalty is proportionate to the valuation, given that the penalty is expressed as a percentage of the determined value.

29) On the third and last ground of appeal, the Appellant seeks the Tribunal to determine whether the Applicant is entitled to an order as to cost incurred in the processing of this Appeal. The Appellant, in the course of his appeal as lodged with the Tribunal makes an application for an order as to costs in his favour, specifically the "Reimbursement of all costs incurred by the Appellant in the processing of this appeal" in terms of section 18 of the Revenue Appeals Tribunals Act,[16] providing that where the decision of the Commissioner is held by the Tribunal to be unreasonable.

> ***"The Tribunal may, on application of the aggrieved party, grant an order for costs in favour of the aggrieved party, which costs shall be determined in terms of the rules prescribed under section 24, otherwise parties shall bear their own costs."***

29.1 The Respondent as a last submission stated that the Appellant advanced personal circumstances that prove as hindrance to him being able to honour the payment of the taxes and penalties due, to which the Respondent submits that the law does not recognise such personal circumstances so as to exonerate the Appellant from paying the due taxes and penalties. This argument is clearly untenable.

29.2 The Tribunal now turns to deal with the question of whether the request for costs by the Appellant is properly before the Tribunal having regard to the above analysis. The Appellant's request for costs is reasonable in the circumstances and in our view, it should be granted. We set out hereunder the reasons for our decision.

[16] 13 of 2019.

29.3 First, it is clear from the majority of submissions contained in the pleadings that there are several flaws the Respondent committed in the handling of this matter. This judgment has brought to the fore several defects in the manner in which the Respondent has dealt with the matter.

29.4 Secondly, the first point wherein it caused the Appellants to apply itself in dispelling a cause of action, when it would eventually bring before the Tribunal a different cause of action, bringing the legitimacy of its process into question, much to the expense of an aggrieved taxpayer whose property remains detained as a consequence. The Tribunal has noted that the Appellant wasted his time preparing for a wrong cause of action and further, he spent time and valuable resources, including travelling into the country only to be furnished with different cause of action. Those resources were wasted when Respondent abandoned its initial position of ordinarily resident as a major cause of action during the proceedings and opportunistically attempted to justify and flood both the Tribunal and the Respondent with completely new evidence during the hearing and something which was manifestly legally untenable.

29.5 In the circumstances, the Tribunal is satisfied that the Appellant has established that Respondent' decision to change the cause of action and bringing new evidence from the bar was unreasonable in the circumstances and that it would be just and equitable to order it to pay the Appellant 's costs in the Tribunal. It is the Tribunal view that failure to follow proper process can result in unfavourable outcomes.

29.6 Thirdly, the application for cost further stands to win because of non-compliance with the Rules of the Tribunal in that the reply by Respondent was never filed along with all relevant documents which the Commissioner General intends to rely upon in support of the Respondent's response.

29.7 Fourthly, the bulk of the submissions made by Respondent when weighed against Constitutional and other legal principles, fail to show the necessary, care, skill and diligence expected of an administrative authority in dealing with a matter of this nature that borders on the very Constitutional rights of a taxpayer, and show disregard for the basic tenets and principles of taxation being equity and fairness. It is the Tribunal view that the 1st Appellants' application for an order as to costs be considered and allowed

based on the unreasonableness displayed by the Respondent in dealing with this matter.

29.8 Section 18 of the Revenue Appeals Tribunal Act No.13 of 2009 grants the Tribunal the power to issue cost orders in the circumstances set out therein. We are of the opinion that this matter falls into the category set out in Section 18 (a) and indeed warrants censure by an order for costs.

30) **CONCLUSION**

Having considered the basis of the appeal as advanced by the Appellant, it is the Tribunal view that the motor vehicle, a Corsa utility bakkie, bearing vehicle registration number TSV 520 GP is an 'import' for purposes of the Customs Act, 1971. The Tribunal cannot disregard the fact that there were several shortcomings in the manner in which the Respondent has dealt with the case. Respondent in imposing a legal consequence on the Appellant failed to judiciously deal with the matter within a sensible period. It is our view that the detention of the Appellant's property this long potentially infringes the Appellant's Constitutional right to the protection from deprivation of property without lawful and just cause. In our considered view, the case is a reminder that both taxpayers and Eswatini Revenue Service should obtain proper advice when pursuing tax disputes against each other, to ensure that simple procedural errors are not a stumbling block to achieving success.

31) **ORDER**

The Tribunal therefore makes the following orders:

1. The application to stay appeal hearing is hereby dismissed.
2. The Appellant is ordered to pay the amount of E38,500 (Thirty-Eight Thousand, Five Hundred Emalangeni) VAT to the Respondent.
3. The Respondent is ordered to release the car, Corsa utility van bearing registration TSV 520 GP to the Appellant upon payment of the VAT.
4. The Respondent is ordered to pay the Appellants' costs.

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MR MBUSO SIMELANE

PRESIDENT OF THE TRIBUNAL

I Agree. ________________________________

MS FIKILE DLAMINI

MEMBER OF THE TRIBUNAL

I Agree ________________________________

MR JOHN HENWOOD

MEMBER OF THE TRIBUNAL

I Agree ________________________________

MS NTOMBEHLE SHONGWE

MEMBER OF THE TRIBUNAL

I Agree ________________________________

MS KHETHIWE DLAMINI

MEMBER OF THE TRIBUNAL

Appearance

For Appellant:

For Respondent: Mr Bongisipho Dlaimini (with him Ms Joy Dlamini)