IN THE REVENUE APPEALS TRIBUNAL ESWATINI

JUDGMENT

CASE NO: RATE/VT014/23

In the appeal between:

RATE/VT014/23 **APPELLANT**

And

ESWATINI REVENUE SERVICES- **RESPONDENT**

THE COMMISSIONER GENERAL

Neutral Citation:	RATE/VT014/23 *v Eswatini Revenue Services, The Commissioner for Eswatini Revenue Services (010/23) (2023) RATE 010 (May 2023)*
Coram:	Mr Mbuso Simelane (President), Ms Fikile Dlamini, Ms Ntombenhle Shongwe, Mr Sandile Dlamini, Ms Khethiwe Dlamini and Mr John Henwood (Members)
Heard:	4 April 2024
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 06 August 2024

Summary: *Tax issue: VAT Audit Assessment- findings established that standard rated output was declared as zero rated whereas standard rated. Appellant averred that the invoices considered as misclassified by Respondent were erroneously accounted under Appellant whereas they belonged to a sister company.*

The Respondent issued a notice of assessment having conducted a Value Added Tax (VAT) desk audit on the tax affairs of the Appellant for the 2020 to 2021 tax years. Findings indicated that standard rated output were declared as zero rated- Respondent revised assessment- Appellant filed objection to assessment averring that the revision was on the basis of invoices mistakenly included under Appellant whereas they related to a related company~~)~~-Appellant alleges that invoices declared correctly under the related company-Objection disallowed on the basis (among others) that the Appellant has an obligation to ensure that the correct information is furnished to the Respondent-Objection lodged again by the Appellant on the same basis, except that the Appellant expressed willingness to provide evidence that VAT was actually paid on the invoices by related company. Objection disallowed again on basis that the Appellant had misclassified standard rated supplies as zero-rated supplies and the Appellant advised to lodge an appeal to Tribunal.

JUDGMENT

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1) The Appellant is a juristic person registered and established in terms of the laws of Eswatini, (the Companies Act 2009), carrying on whole and retail business in Mbabane in the Hhohho District, Eswatini.

2) The Respondent is described as Eswatini Revenue Service, a semi-autonomous revenue administration agency on behalf of the State, established through the Revenue Authority Act No. 1 of 2008. This organisation operates within the broad framework of government but outside of the civil service. The Commissioner General is cited herein in 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) A brief history of the matter is set in the paragraphs that follow; The Appellant was served with a VAT inspection notification letter on the 29th of August 2022, with specific focus to ascertain whether the Appellant complies with the requirements of the VAT Act, 2011. As

part of the process, the Appellant was further requested to avail their sales capturing process, a system walk through for the sales capturing processes and a product file.

4) The Respondent conducted the audit covering the period July 2019 to June 2021. A notice of assessment was issued by the Respondent on the 30th of November 2022 in respect of VAT returns. The audit established that standard rated output was declared as zero-rated output. Pursuant to these findings the Respondent raised a total liability amounting to SZL 309 093.42, inclusive of additional tax charged at 25%. The Appellant was informed of its right to object in terms of Section 35(1)(4) of the VAT Act, 2011 (hereinafter referred to as the Act).

5) On the 3rd of January 2023, the Appellant filed an objection, raising concern that the assessment included two invoices (invoice numbers 1526 & 1530), belonging to a sister company, which were mistakenly included in the VAT report for the Appellant. The Appellant submitted that these invoices were rightfully declared under the sister company VAT return for the tax period July-September 2020 and as such their inclusion in the Appellant's VAT output was a duplication. The Appellant further submitted that VAT was charged and remitted to the Respondent in full under the sister company.

6) The Appellant avers that the invoices in question indicate clearly that they relate to the supply of uniforms to the National Commissioner of Police and to His Majesty's Correctional Services. It is the Appellant's submission that Appellant's business activities include wholesale of grocery commodities, which is completely different to that of the sister company.

7) As contained in the statement of facts, the parties are engaged in a dispute wherein the Appellant was dissatisfied with the outcome of an audit raised by the Respondent. The purpose of the audit was to confirm completeness, accuracy, and timeliness of tax declarations. The Respondent's main concern was that standard rated supplies were misclassified as zero-rated supplies.

8) The audit finding was that the Appellant had made supplies of uniforms to the Eswatini Royal Police Service and His Majesty's Correctional Services which were declared as zero-rated supplies instead of standard rated supplies. In addition, a supply of maize meal,

cooking oil and sugar to His Majesty's Correctional Services were misclassified as zero rated.

9) The Appellant was requested to provide VAT supporting schedules, including sales general ledgers for the purpose of confirming completeness and accuracy of the declarations and the same was not provided. Consequently, an assessment was raised in terms of Section 33 of the VAT Act due to the failure on the part of the Appellant to provide additional documentation as requested.

10) The Respondent did not accept the explanation that the invoices were included in the Appellant's VAT Schedule erroneously, thus Respondent made an adjustment on the Appellant's VAT assessment for the periods October-December 2020 and January, March 2021 and sought a payment of a tax payable amounting to SZL309 093.

11) Dissatisfied with the Respondent' determination, the Appellant lodged its Appeal under section 15 (1) of the Revenue Appeals Tribunal Act 13 of 2019 (RATE), which appeal was set down for hearing before the Tribunal on the 16th of May 2023.

12) The Appellant has raised the following three grounds of appeal and submitted as follows:

1. That, two invoices were erroneously included in Appellant's VAT report which rightfully belong to a sister company.
2. That VAT on the said invoices was charged and remitted to the Respondent in full under the sister company.
3. That the business activities of the two entities are completely different, hence the error is easy to verify.

13) The main issues for determination in this appeal are three and, the Tribunal breaks them down as follows:

14.1 Firstly, the Appellant seeks the Tribunal to determine whether the inclusion of the sister company invoices in Appellant's VAT report was as a result of a *bona fide* inadvertent error.

14.2 Secondly, the Appellant seeks the Tribunal to determine whether the additional VAT assessment was justified.

14.3 Thirdly, whether the Appellant sufficiently discharged the onus of proof that the additional assessment is unreasonable.

14) **Appellant's submission**

The Appellant in the above case advanced the following main arguments as to its case;

15.1 The Appellant's case is that their accountant duly employed and carrying out his duties as such erroneously classified two invoices viz: 1526 and 1530 (the invoices) as zero rated which same invoices were for "Union Supplies- a sister company".

15.2 The Appellant further contends that the VAT on these invoices was indeed paid under the sister company on the said period and there was evidence in support of this. The Appellant had submitted bank statements as proof in this regard.

15.3 The Appellant conceded that this error was picked up during an audit inspection by the Respondent for the period 2020-2021 upon a scrutiny of the submitted company returns for the company.

15.4 The Appellant further conceded that these invoices were declared as zero rated on the returns of the company where they were erroneously classified by the posting accountant because at the time when capturing them, they lacked the "VAT element" captured in the schedules but contends that they were correctly classified under the sister company where, in the Appellants' version they rightfully belonged. Appellant further submitted that this anomaly was picked out by the officials of the Respondent because the company deals with the supply of groceries.

15.5 The Appellant submitted that in an effort to resolve the confusion occasioned by the misclassification of the invoices, they submitted the returns, schedules and bank statements for both the company and sister company. The Appellant submitted that this effort did not yield any positive outcome as the Respondent

ultimately rejected their objection and advised that they lodge an appeal with the Tribunal.

15.6 Appellant further conceded that the Respondent requested further documents which unfortunately were never submitted by the Appellant on time. A delay which the Appellant submitted was occasioned by the fact that the custodian of the requested documents was indisposed at the time.

15.7 When Appellant was questioned on the lack of dates on the said invoices by the Tribunal, the Appellant's version was that such was occasioned by an understanding that they had reached with government to have provisional invoices prepared without dates which dates would then be inserted when government was ready to pay. He explained this to be an arrangement that helped them post the invoices under the correct financial year upon receipt of payments for goods or services supplied and rendered respectively.

15.8 Appellant further conceded that these provisional invoices were not VAT inclusive, but the finalised invoices as would appear in the sister company were VAT inclusive.

15.9 Against the above submissions, Appellant prayed to the Tribunal to review the decision of the Respondent for the payment of the tax accrued and the penalty for the misclassification by the company. The Respondent buttressed this submission by stating that the company did not in reality receive the monies in the invoices, but such monies were received by the sister company as appears from the bank statements which in turn and rightfully so indeed paid the tax.

15) **The Respondent's submission**

16.1 It is the Respondent's version that the error that is relied upon by the Appellant is not in reality an error but rather an act of bad faith and ought not to be relied upon by the Tribunal. It is non-existent the Respondent submitted.

16.2 In support of this submission, Respondent submitted that reliance on the meaning of "error" as defined in the Oxford dictionary would not assist the Tribunal as the dictionary only provided the general meaning thereof.

16.3 Respondents submitted that the Tribunal in dealing with the issue at hand should go deeper into the transaction concerned instead. To buttress this point, the Respondents made an example of the issue of production of income. Respondent submitted that on such issues the courts have taken a stand that in dealing with such one should investigate further to ascertain the connection between the transaction and the income generating activities for one to deduce that indeed there was production of income. Two case law were quoted in this regard, in particular *ABC Holdings (Pty) Ltd v The Commissioner for SARS*[1] case which adumbrated the principle:

> *"It follows from the above that the bona fide inadvertent error has to be an innocent misstatement by a taxpayer on his or her return. Resulting in an understatement, while acting in good faith and without the intention to deceive."*

16.4 Respondent in support of this submission further submitted that South African jurisprudence has developed this jurisprudence on error to mean that the taxpayer must in good faith timeously identify the error and bring it to the attention of the Commissioner. Respondent contends that this was not the case herein as the error was only picked up in the course of an audit. In this vein the Respondent submitted that the Tribunal ought not to believe the Appellant's version.

16.5 The Respondent further submitted that the punitive sanction meted out was justified as simply put 'there was an understatement and the fiscus suffered

[1] ITI13772) [2016] ZATC 7 (4 November 2016)

prejudice.' Respondent further submitted that the sanction was in terms of the law and Respondent's internal processes ought to apply.

16.6 To expand on this point, Respondent submitted that in meting out the sanction, reliance was sought under section 72 (6) of VAT Act which in Respondent's opinion is punitive in nature and is aimed at providing a deterrence in cases of inaccurate returns are filed. In this regard, the case of *Motloung and another v Commissioner for SARS*[2] was cited.

16.7 Further expanding on this point, Respondent averred that the returns lodged were binding on the Appellant in that the same document is prepared akin to an affidavit which invites one to affirm under oath that the contents thereof are accurate and a true reflection which the Appellant duly did herein. As such the Respondents submitted that the Appellant could therefore not later turn around and contend that there was an error as it now does in the current matter.

16.8 Lastly, the Respondent submitted that the doctrine of *estoppel* was relevant and applicable to the facts of the matter and in applying it, the Tribunal should hold in their favour. Relying on this submission, the Respondent submitted that the Appellant should be prevented from relying on an error that is non-existent.

16.9 Submitting further, the Respondent citing the case *of Footgear (Pty) Ltd T/A New Jumbo Sales v Standard Bank Swaziland Limited*[3] pleaded with the Tribunal to find these cases compelling. In this particular case it was held that for one to rely on the doctrine of *estoppel* there must have been a statement made by a representer to the representees which statement the representee acted on to his or her prejudice. The Respondent submitted that this was exactly the case *in casu* as there was an understatement and the fiscus suffered prejudice in this regard. The case of *Jeke (Pty) Ltd v Samuel Solomon Nkambule*[4] was also cited in this regard.

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[2] (5492/2021) [2022] ZAFSHC 327; 85 SATC 504 (21 November 2022)

[3] Civil Case No: 2216/98

[4] (1040/2009) [SZHC12] (9 August 2013)

16.10 Respondent countering issues raised by Appellant, further submitted that the error relied upon by Appellant was non-existent and that *in casu* were returns submitted by the company and not the sister company. The sister company did everything according to the book.

16.11 Respondent further submitted that it was not accurate that the [further] requested documents were submitted on time and this inaccuracy could be attested to by the officials that conducted the audit. Actually, there is communication, which was disclosed to the Tribunal, that showed that only part of the requested documents were submitted and not all the documents. The Respondent submitted that Appellant's conduct aimed at withholding information much against the purpose of an audit which is to verify information on record.

16.12 As such this made the Respondent's duty to audit difficult. It was the Respondent submission that they had actually requested VAT ledgers for the missing periods under audit which were not forthcoming as such reliance was only given on the declarations that they had made for the sale. This they requested to link the two invoices to possible government orders but could not ascertain anything in this regard.

16.13 Respondent also submitted that Appellant had relied in an error committed by an Accountant who was not before the Tribunal to attest to such an error and as such, these submissions ought not to be relied upon by the Tribunal.

16.14 Lastly, and in counter to issues raised by the Appellant was the issue of an arrangement made with the government as discussed above. Respondent submitted that the office of the Commissioner was not aware of such an arrangement. In essence, the Commissioner has always emphasized of invoices being dated accurately to be accepted as tax invoices.

16.15 The Respondent's argument on the amendment of the submitted tax returns, emphasis was made on the fact that ordinarily amendments to returns were not allowed nor are they sanctioned by legislation. Instead, the Commissioner has a discretion to do so where the taxpayer has made a case or has proved that the circumstances require an amendment. As such it was the Appellant's version that

leave to amend should have been sought prior to an audit and any attempt to amend after an audit is an afterthought with the reasonable apprehension of same being done in bad faith and Appellant ought to be penalised for the same.

16.16 In conclusion, the Respondent prayed for the appeal to be dismissed with costs, the assessment and penalty be upheld.

16) **Tribunal's Analysis**

17.1 For the sake of fairness and proper procedure, Respondent must clearly state the grounds on which it bases its assessment and make it clear to the taxpayer what it disputes. In the matter before the Tribunal, this was done by the Appellant correctly to allow the Appellant to know what is required from it to discharge the onus of proof.

17.2 Having considered the contention submissions and also perused all the relevant material on record and handed at the hearing, the Tribunal will commence to address the arguments from which the issues for determination emanate. The Tribunal on this appeal is called upon to consider three main issues set out below.

17) **As to whether the inclusion and submission of the sister company invoices in Appellant's VAT report was as a result of an error committed by the Appellant in the tax period under review.**

18.1 The Appellant submitted before the Tribunal that the submission of the two invoices was a genuine error done by their accountant duly employed when carrying out his duties, as he erroneously classified two invoices viz: 1526 and 1530 as zero-rated which same invoices were for a sister company". The Appellant further contended that the VAT payable under these invoices was indeed paid under the sister company in the said period and there was evidence in support of the alleged claim.

18.2 The Respondent contends that the error relied upon by the Appellant was in reality not an error but rather an act of bad faith and ought not to be relied upon by the Tribunal. Respondent took the view that this error is non-existent as

Appellant disclosed this error post the audit hence case unmerited. The Respondent contends that it was only discovered upon investigation by the auditors that these invoices belonged to the sister company (Union Supplies).

18.3 Regarding the issue as to whether the inclusion and submission of the sister company invoices in Appellant's VAT report can form a proper basis for raising tax liability, it is the Tribunal's considered view that Appellant here bears the onus, to show on a preponderance of probability, that the decision of the Respondent against which the tax assessment was based, was wrong. In relation to the burden of proving non-liability, section 38 of the VAT Act reads as follows.

38. The burden of proving that an assessment is excessive is on the person objecting.

18.4 Submitting in rebuttal, Respondent further contends that the Appellant was served with a VAT inspection notification letter on the 29th of August 2022, with specific focus to ascertain whether the Appellant complies with the requirements of the VAT Act, 2011. As part of the process, the Appellant was further requested to avail their sales capturing process, a system walk through for the sales capturing processes and a product file.

18.5 The Tribunal is of the considered view that, serving Appellant with a VAT inspection notification letter to ascertain whether there was compliance with the requirements of the VAT Act, was in effect a show cause notice to the Appellant who was to reply by submitting all material showing that there was an error in the contents of the documents forwarded by submitting the correct invoices and that indeed it was a genuine mistake.

18.6 Further the Tribunal is of the view that this letter was self-explanatory; setting out the contentious items in the Appellant's tax computations, the reasons thereto and calling upon the Appellant to action and treat the letter as a notification that there may be something wrong with their tax computation. The Tribunal is fully aware that when conducting audits, the Respondent notifies the taxpayer in writing and the notice received will have specific information about

why the return is being examined, what documents if any they need from the taxpayer, and how the taxpayer should proceed.

18.7 The Tribunal is of the view that when conducting audits, Respondent has the power to issue notices to obtain information or evidence to conduct the said audits. Respondent's jurisdiction to exercise its powers under section 53 (1) (a) and ((b) is subject upon the existence of the issuance of notice in writing. Section 53 (1) (a) (b) of the Act, provides as follows:

> *(1) The Commissioner-General may, by notice in writing, require any person, whether or not liable for tax under this Act-*
>
> *(a) to furnish such information as may be required by the notice; or*
>
> *(b) to attend at a time and place designated in the notice for the purpose of being examined on oath by the Commissioner-General or by an officer authorized by the Commissioner-General, concerning the tax affairs of that person or any other person, and for that purpose the Commissioner-General or an authorized officer may require the person examined to produce any book, record, or computer-stored information in the control of the person*

18.8 The Respondent contended that despite having exchanged correspondence in terms of which they requested further documents, the Appellant, for the most part, failed to fully co-operate with Respondent and make the necessary documents available.

18.9 When considering the non-disclosure or non-submission by the Appellant of the requested documents post audit, the Tribunal took cognisance of the Appellant's failure to provide the proper documentation in respect of those invoices and on the basis of that, the Tribunal took the view that Respondent would in fact have been entitled to assess the taxpayer as falling into the tax evasion bracket or rather as being grossly negligent.

18.10 The Appellant maintained that these invoices were declared as zero rated on the returns of the company when they were erroneously classified by the posting accountant because at the time of capturing them, they lacked the "VAT element"

later captured in the schedules where they are correctly classified under the sister company as they rightfully belonged there.

18.11 In respect of these two invoices erroneously included to Appellant VAT report, the Tribunal will consider the case of *Income Tax Case No 1948 84 SATC 110*[5] which articulated the determination of an inadvertent error. The judge stated as follows;

> *''The context of what will classify as an honest mistake, is in my view an instance where the determination of what an inadvertent error is, must be done with reference to what it is not, that is to be defined in the negative. In other words, an error is not inadvertent, and therefore inexcusable, where the taxpayer's action or omission can be classified as a failure to take reasonable care in the completion of his or her tax return, or as being intentional or grossly negligent. This approach to the question is in my view consistent with the dictionary definitions of the word inadvertence, in that the meaning ascribed thereto are generally concerned with the nature of the attitude or disposition with which the person concerned acts or fail to act''.*

18.12 The Tribunal is in respectful agreement with the Respondents' contention that, taxpayers must maintain adequate records. We are of the view that, this is a duty and obligation of a taxpayer to have evidence supporting his business operation for tax purposes. All tax claims are raised based on evidence of business operations. Where there is no such evidence from the taxpayer, the tax authority would definitely determine tax liability based on the information they have. Failure to do so could lead to a finding by the Respondent that the taxpayer misreported tax for tax returns, it could lead in egregious situations to the imposition of a tax penalty.

18.13 The Tribunal is of the considered view that the Appellant in this appeal being a large taxpayer is expected to know all his obligations that come with the type of business carried out. The taxpayer is expected to have properly kept records and can produce such records upon request or when needed to support his claim. This is a simple common practice, where the business world and especially should be the case with the Appellant's business, since it's of large magnitude.

[5] 1948 84 SATC 110

It is our considered view that, there are instances taxpayers would be expected to go out of his way by having extra information to prove his claim, though this is not a legal requirement, but common sense does require that at times.

18.14 For an enterprise as large as the Appellant conducting business with the Government of Eswatini, the Tribunal is of the view that, one would therefore expect that sufficiently discharging the burden of proof would entail submission of authentic supporting documents, including the respective invoices. This finds support in the case of *A v The Commissioner for the South African Revenue Service*[6] where the court was faced with a problem of deciding whether the burden of proof was discharged that certain expenditure was of a capital or income producing nature, the court stated as follows;

> *''It is common cause that appellant bears the onus to show that an amount included in an assessment is not taxable. It has been held that what is required of the taxpayer to discharge this onus is affirmative evidence that satisfies a court upon a preponderance of probability that the amount is deductible or alternatively not taxable''.*

18.15 The duty to discharge the burden of proof was further discussed in the case of *GB Mining and Exploration SA (PTY) LTD v Commissioner for South African Revenue Service*[7]**.** The court held that;

> *"That the Appellant bore the onus of satisfying the Commissioner that the information furnished by it is incorrect and that a reduction in the assessment was justified and in order, this additional evidence would have to be placed before the Commissioner. The balance sheet and accounts perform a vital and formal role in corroborating the information in the return and the Commissioner must be able to rely upon the veracity and accuracy of this evidence which form the basis of the assessment. As such each of the contested determinations made by the Commissioner had to be approached on the basis that the Appellant bore the onus of proving that the Commissioner was wrong and had to show that it had provided credible and reliable evidence to explain the error and to substantiate what it maintained was the true position".*

[6] *(2007)*
[7] 76 SATC 3475

18.16 When scrutinising the invoices, the Tribunal has noted that the invoices were not sequential and also were not updated. When Appellant was questioned on the lack of dates on the said invoices by the Tribunal, the Appellant's version was that such was occasioned by an understanding that they had reached with government to have provisional invoices prepared without dates which dates would then be inserted when government was ready to pay.

18.17 It is the Tribunal's considered view that, the purpose of an invoice is to record, amongst other things, a sale and it also acts as a formal payment request from the recipient of the goods. As a result, it is expected that the recipient of the goods would make the payment in accordance with the details as per the invoice. If the invoices in question lack some of the salient attributes that would support this, it clearly cannot be accepted as affirmative evidence on the basis that it lacks the particulars required of a valid invoice for a VAT registered vendor as required under section 29 of the Act read together with the Third Schedule of the VAT Act.

18.18 Again, the Tribunal wonders as to how Appellant could make an arrangement with Government without the involvement of the Respondent as custodians of the invoices. The Tribunal is of the view that even if the arrangement was paramount to them, in terms of posting the invoices under the right financial year upon receipt of payments for goods or services supplied and rendered, there was a need to seek consent from the Commissioner General as tax collector of the Value Added Tax in the country.

18.19 The Tribunal further, faults the Respondent for accepting invoices in breach of the requirements as stipulated under section 29 of the Act read together with the Third Schedule of the VAT Act as Appellant has been consistently forwarding non-sequential invoices to the Respondent. This in our view, is clearly non-compliance with the tax legislations.

18.20 The Tribunal is of the view that not much was submitted by the Appellant during arguments as to why such conduct of not keeping proper records for a business should be treated as one that could fit for a *bona_fide* inadvertent error. Appellants' only justification was that the delay was occasioned by the fact that

their custodian of the requested documents (Accountant) was indisposed at the time.

18.21 It is because of this state of affairs that we find that there was gross negligence on the Appellant in keeping proper records as there was no evidence presented to support how this was an error which could not have been picked up before the start of the audit process. We are of the view that the use of wrong invoices merely indicates that VAT was not paid by Appellant yet there were zero-rated supplies. The Tribunal is in respectful agreement with the submission made by the Respondent that indeed this was supposed to trigger an enquiry on to the taxable activities of Appellant.

18.22 The Respondent pointed out the flaws in the Appellant analysis and explain how those records and accounts should be properly understood and kept. Relying on the case *of ABC Holdings (Pty) Ltd v the Commissioner for the South African Revenue Service*[8] where the court looked at the case which adumbrated the bona fide, inadvertent error principle:

> *"It follows from the above that the bona fide inadvertent error has to be an innocent misstatement by a taxpayer on his or her return. Resulting in an understatement, while acting in good faith and without the intention to deceive."*

18.23 It is the Tribunal's view that, it was incumbent upon the Appellant to prove that indeed, the invoices in question were erroneously declared on the Appellant's VAT report. This can only be done through providing credible and reliable evidence to explain the error and to substantiate what it maintained is the true position. Having established that the invoices provided by the Appellant, that is invoice number 1526 and 1530, were not valid, the conclusion is unavoidable that the Appellant failed to provide credible and reliable evidence to substantiate the allegation. This contention by the Appellant of genuine error is without any foundation and requires no further consideration because Respondent did prove the non-compliance of the Appellant in terms of keeping proper records.

[8] Case No ITI 13772

18.24 It is the Tribunal's view that, the failure to meet the legal requirements stated in the Third Schedule renders the invoices defective in light of Section 29 of the VAT Act read with the Third Schedule and are sanctionable withing the scope of the VAT Act. The Tribunal was in this regard well within the Respondent's right to refuse to consider them as reliable evidence of the Appellants claims about them. The Tribunal is of the above view and of the belief that it cannot accept the defective invoices as credible evidence of the Appellants' claims. To do would be endorsing a position in stark contradiction of the Act and further create a dangerous precedent.

18.25 In light of the foregoing the Tribunal therefore find that there was such an administrative incapacity on the Appellant's side to keep authentic invoices which are punishable by the VAT Act. This contention by the Appellant of genuine error is without any foundation and requires no further consideration because Respondent did prove the non-compliance of the Appellant in term of keeping proper records.

18) **On the applicability of the Doctrine of *Estoppel***

19.1 The Respondent then raised a point of *estoppel* before the Tribunal alleging that the Appellant, produced the incorrect invoices in the name of Union Supplies (Pty) Limited in the total amount of E1 397 949.00 (One million three hundred and ninety-seven thousand nine hundred and forty-nine Emalangeni), which created the incorrect state of affairs, upon which the Respondent acted, therefore the Appellant was now estopped from denying the correctness thereof.

19.2 The essence of the doctrine of *estoppel* representation is that a person is precluded or estopped from denying the truth of a representation previously made by him to another person if the latter, believing in the truth of the representation, acted thereon to his detriment, argued the Respondent citing the case of *Footgear (Pty Ltd t/a New Jumbo Car Sales Vs Standard bank*

Swaziland Limited[9] *and Footgear (Pty) Ltd t/a New Jumbo Car Sales Vs Standard bank Swaziland Limited*[10].

19.3 In its Heads of Argument, the Respondent quotes the work by *PJ Rabie, the law of estoppel in South Africa of the principle in this manner.*

> "*The doctrine of estoppel by representation as applied in the Courts of South Africa may generally be said to consist in this, that where a person (the representor) has by his words or conduct made a representation to another person (the representee) and the latter, believing in the truth of the representation, acted thereon and would suffer prejudice if the representer were permitted to deny the truth of the representation made by him, the representor may be estopped, that is, precluded, from denying the truth of his representation."*

19.4 It is trite however that *estoppel* is not a cause of action but rather a defence, PJ Rabbie[11] stated as follows;

> *"Estoppel must be pleaded and the onus to establish it rests on the party who raises it".*

19.5 From a reading of the Respondents' submissions, the point of *Estoppel* was not raised at all in the course of the objection process before the Commissioner General. The first time the issue was raised was in the Respondents' heads of argument. It is the Tribunal's view that, it was incumbent upon the Respondent to raise the point of *estoppel* in its reply, which would then have allowed the Appellant an opportunity to replicate on that point, and unfortunately that did not happen.

19.6 The Tribunal is of the view that the nature of the proceedings before this Tribunal are appeal in nature. This Tribunal is bound to consider only those issues and documentation which were presented before the Commissioner-

[9] High Court case No. 2216/1998
[10] High Court case No. 2216/1998
[11] (Supra) at page 8

General and it is not within the discretion of this Tribunal to consider a matter raised for the first time before it.

19.7 In view of the aforegoing, it is not necessary for the Tribunal to rule on the correctness or otherwise of the point of *estoppel* in these proceedings given the nature of the proceedings, and the manner in which the point has been raised.

20) As to whether there was prejudice to the Respondent or the fiscus.

20.1 Even though, our ultimate decision as a Tribunal does not depend only on what we have said above (failure to keep proper records). We still have to answer the question as to whether the requisite tax under the Value Added Tax Act, 2011 was duly paid or not. Of course, as we shall demonstrate immediately hereinafter the parties are of the opposite views. The Respondent's stand is that the Appellant had not paid the Value Added Tax.

20.2 Having subjected the arguments from both sides in this case to a serious scrutiny, we are of the settled view that in examining the question of whether or not the VAT with respect to the two invoices in question was paid, we in the interest of justice, have of necessity, to scrutinise the motivation or incentive of Appellant to want to attempt fraud with respect to these invoices.

20.3 The Tribunal is of the view that there is no motivation on the Appellant to declare these invoices as trade under their activities because it will increase both income tax and value added tax. The Tribunal is of the view that even if there is no VAT liability, there will however be income tax liability because there will be a fictitious income that is not supported by actual income generation. The Tribunal is of the view that, in fact, it would be worse as it does not even have cost of sales, however, it is just the income alone putting Appellant at a disadvantage. The Tribunal noted this would have a negative impact on the Appellant income tax as it has zero tax implications. The Tribunal is of the view that there is no justification for such a finding on the evidence for VAT liability but that of income tax liability.

20.4 The Respondent raised two contentions with regard to the question of the prejudice which is necessary in order for additional tax to arise. Firstly, The Respondent's main

contention was that the meted out punitive sanction was justified as there was an understatement and the fiscus suffered prejudice.

20.5 Rebutting this contention, Appellant contended that the VAT on the said invoices was charged and remitted to the Respondent under the sister company and there was nothing that contributed to the economy under the Appellant. The Appellant further submitted that the business activities of the two entities are completely different, hence the error is easy to verify.

20.6 By providing relief in this matter, the Tribunal has not only reinforced the principle that the law should serve as a tool for the effective collection of revenue but also ensure fairness and justice in its application. The Tribunal is of the considered view that tax authorities must consider the context and intent behind discrepancies in tax documents. Moreover, it highlights the importance of procedural flexibility to rectify genuine mistakes, ensuring that businesses are not unduly penalised for non-fraudulent errors.

20.7 Turning to the issue of prejudice, the Respondent submitted that, prejudice to the Government of Eswatini (fiscus) is implicit in the consequent failure of the Appellant to pay the tax due under those returns at the time when it was supposed to be paid. Although evidence presented before the Tribunal indicated that Respondent had the funds in its possession under the correct company Union Supplies Pty Ltd.

20.8 In this case, the implicit does not apply as the tax under the sister company was duly remitted to the Respondent. This submission by the Appellant coupled with the recognition of the erroneous posting by the Respondent, is sufficient proof that for purposes of the VAT Act, a correction of the error results in no VAT liability for the Appellant under the Act, as when the liability rightfully arose it was fully paid.

20.9 It is the Tribunal's view that, regardless of whether VAT on the said disputed invoices was paid or not, it was incumbent upon the Respondent, after a proper determination of the misclassification (zero rate instead of standard rate) to then further ascertain under whose account was this VAT (ostensibly not charged) supposed to have been accounted for.

20.10 Since the Respondent had already determined that these were in fact sister companies, after having completed the analysis on the misclassified grocery supplies, focus ought to have then shifted to the sister company in order to verify the Appellant's assertions and further raise the additional assessment on the correct taxpayer if any.

20.11 The Tribunal is in respectful agreement with the Respondent that Appellant is a distinct legal person separate from the activities of its sister company, however the Tribunal will not lose sight of the fact that these are related companies.

20.12 The Tribunal is of the view that, in as much as the Act may not necessarily outline how the Respondent is supposed to satisfy themselves that an amount was not assessed, due diligence and proper accounting standards must still be applied. It does not suffice to merely rely on the non-submission of documents by the Appellant as a sufficient ground to then raise an additional assessment on them especially where there is clear evidence that such supplies are not within the scope of the Appellant's normal taxable activity.

20.13 It is the Tribunal' view that the Respondent, as a decision maker, in this case had access to both accounts, those the Appellant and the sister company that is, according to the Tribunal, an objective fact. Respondent as a statutory legal body whose function is to collect tax for the fiscus has the ability to see an entry in the accounts of every business in order to be in a position to rectify mistakes particularly those made by related companies.

20.14 The Tribunal is of the view that genuine errors should be correctable, especially when they do not affect the revenue and acknowledged the error as a clear mistake, noting there was no intention to evade tax and no loss of the revenue to the department. There is need to rectify bona fide mistakes without causing revenue loss to the fiscus.

20.15 It is the Tribunal's view that there is much substance in the contention raised on behalf of the Appellant. The Appellant was tested by the Tribunal on this point and no proposition was put to Appellant that he did not make the payments that are reflected in the bank statements. Respondent could therefore not have come to a conclusion that there was no payment made based on the information available to

it, and that in our view, the difficulty may have been created by the failure to keep and produce records timeously during audits.

20.16 Summing up the contention of prejudice, The Tribunal is of the view that this submission is without a foundation and therefore unwarranted evidently so, because the VAT was indeed remitted to Respondent under the sister company. It is thus insignificant to argue that Respondent, and indeed the fiscus, was prejudiced by the Appellant's use of wrong invoices relating to the sister company without taxable supplies.

21) As to whether the penalty imposed by the Respondent is justified

21.1 The next question is whether or not the penalty imposed by the Respondent is justified. As a direct result of the finding above, the Tribunal's next step is of course to establish what the consequence of such misclassification is. To this end and as pointed out by the Respondent, it is Section 72 (6) of the VAT Act that regulates the penal consequence attached to the misclassification or in the case of section 72 (6) a statement that is misleading.

21.2 In respect of additional tax (penalty), Respondent cited Section 72(6) of the Act, which provides as follows;

> *''Where a person knowingly or recklessly-*
> *(a) makes a statement to an officer that is false or misleading in a material particular; or,*
>
> *(b) omits from a statement made to an officer any matter or thing without which the statement is misleading in a material particular,*
>
> ***and the tax properly payable** by the person **exceeds the tax that was assessed as payable based on the false or misleading information, the person is liable to pay an additional tax equal to double the amount of the excess''**...*

21.3 The Respondent in our view, in meting out the sanction in accordance with the above section, is to conform to section 72 (6) of the Act to its letter and not modify it for its own benefit. Implicit in this section and underlined for emphasis is the express requirement to establish "*the tax properly payable*" to be able to

compare to the amount that was "*assessed as payable"* in order to determine if the amount actually or properly *payable "exceeds the tax that was assessed as payable"* as this is the only figure i.e. the excess on which the additional tax can be levied under the section.

21.4 *In casu* therefore, in arriving to the appropriate penalty, the Tribunal is of the view that no internal penalty matrix (as stated by the Respondent) was required as it had already made the election to penalise in pursuance to Section 72 (6) of the Act. It is the Tribunals view that the enquiry as to the "tax properly payable" required that the Respondent consider all the evidence presented to it to establish the tax properly payable to arrive at the conclusion of the excesses between the tax as assessed and which is actually payable to establish a penalty of additional tax.

21.5 The Respondent by its own admission at the hearing of the matter confirmed that upon verification of the two positions it established that indeed in the case of Appellant only zero-rated supplies were made. It is the Tribunal's view therefore that, if any additional tax would be levied in this case it would be confined to the sister company items as it is the only standard rated supplies that gives rise to due tax. The fact that Respondent ascertained that in respect of Appellant, only zero-rated supplies are made, this means that at no point could the company have a VAT tax liability, in the absence of such liability, they can never be tax properly payable under section 72(6) of the VAT Act. Therefore, no additional taxes are possibly of being imposed by the Respondent in this case.

21.6The raising of an additional assessment was discussed in the case *of Wingate-Pearse v Commissioner for South African Revenue Service and others*[12], where Meyer J stated as follows; "SARS, therefore, must show that its subjective satisfaction was based on reasonable grounds". The judge further cited the case of *CSARS v Pretoria Motors (Pty) Ltd*[13], where it was held that the raising of additional assessment must be based on proper grounds for believing that there is undeclared income or a claim for a deduction or allowance that is unjustified.

[12] 2019(6) SA 196
[13] *2014 (5) SA 231*

21.7 The Tribunal is of the view that, in the present case as has been clearly explained above, the Respondent has not, with sufficiency shown why they believe there is underdeclared VAT on the part of the Appellant. The case of *Natal Estates Ltd v Secretary for Inland Revenue*[14] where an appeal was brought before the court against an additional assessment on undeclared income and the court analysed the situation thus;

> *''There must be some evidence before the special court that he (tax collector) was so satisfied, otherwise there is no displacement of the immunity conferred on the taxpayer by the proviso to S 79(1) and the opening word of para(a) thereof. A convenient time and place for indicating the Secretarial satisfaction would be in the additional assessment itself or in the covering letter or in the notice which the respondent is required by S 81(4) to send to the taxpayer if the latter's objection is disallowed. And it should state the particular conduct of the taxpayer to which it relates, i.e., whether fraud or misrepresentation or non-disclosure of material facts''.*

21.8 The Tribunal is of the considered view that, this contention is without any foundation and requires no further consideration because, the Respondent did not sufficiently raise pertinent issues that have become apparent as we delve further into the case, namely why would the Appellant be found to have made taxable supplies which they are not in the business of making. This would have cemented a fraud enquiry and justified the raising of an assessment on that basis.

21.9 Having determined that the Appellant's conduct does constitute administrative incapacity, it can be concluded that the Appellant's incorrect invoices in its VAT return had been the result of both a failure to exercise the diligence required in the circumstances and also indicates an element of non-compliance with the tax legislation. The Tribunal is in respectful agreement with the Appellant that the invoices considered as misclassified by Respondent were wrongly accounted as they belonged to sister company and this in the absence of proof to the contrary qualified as the misclassification that the Respondent categorised it to be.

[14] *1975 (4) SA 177(A*

21.10 The Tribunal's further conclusion is that the additional assessment and penalties (section 72 (6) of the Act was not correctly raised by the Respondent as there was no basis existed for raising the additional assessment on the Appellant since the supply in question did not relate to the Appellant's taxable business activities, hence unjustified. For all the aforegoing reasons, the appeal must succeed, and the tax assessment issued by the Commissioner-General against the Appellant for the relevant periods must be set aside.

22) ORDER

The Tribunal therefore makes the following orders:

1. The Tax assessment issued in term of section 33 of the Value added Tax, 2011 dated (30 November 2022) passed under the Value Added Tax Act, 2011 is hereby set aside.
2. Accordingly, section 72 (6) of the VAT act finds no application and therefore dismissed
3. Each party to pay its own costs of the appeal.

MR MBUSO SIMELANE
PRESIDENT OF THE TRIBUNAL

I Agree

MS FIKILE DLAMINI
MEMBER OF THE TRIBUNAL

I Agree

MR SANDILE DLAMINI
MEMBER OF THE TRIBUNAL

I Agree.

_____

MS NTOMBENHLE SHONGWE

MEMBER OF THE TRIBUNAL

I Agree

_____

MR JOHN HENWOOD

MEMBER OF THE TRIBUNAL

I Agree

_____

MRS KHETSIWE DLAMINI

MEMBER OF THE TRIBUNAL

Appearance

For Appellant: 1. Mr Siphamandla Dlamini

For Respondent: 1. Mr Bongisipho Dlamini

2. Mr Thandokuhle Khumalo

3. Ms Bongekile Nsingwane

4. Mr Sicelo Dlamini