IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

HELD AT MBABANE CASE NO. 567/20

In the matter between:

CHOWDHURRY INVESTMENTS (PTY) LIMITED
t/a PLAZA TANDOORI RESTAURANT Applicant

and

THE COMMISSIONER GENERAL FOR ESWATINI
REVENUE AUTHORITY Respondent

Neutral citation: *Chowdhurry Investments (Pty) Ltd t/a Plaza Tandoori Restaurant Vs The Commissioner General for Eswatini Revenue Authority (567/2020)[2020] SZHC 137(16/07/2020).*

Date heard :27/03/2020; 03/04/2020 and 25/04/2020.

Date delivered : 16/07/2020

Summary :

MAPHANGA J.

[1] This is an application brought under a certificate of urgency pursuant to an administrative measure by the Respondents to close and seal the applicants restaurant business and freeze its business bank account ostensibly in terms of Section 44 of the VAT Act as an enforcement action for the recovery of a tax liability declared against the Applicant.

[2] The applicant brings the motion in two parts. The first part (PART A) is aimed at an interim (interlocutory relief) pending the finalisation of the 2nd aspect (Part

B) as the application for the main relief for a declaratory whose stated intended effect is to attain a *declarator* by this Court that Respondent did not assess the Applicant to tax for a tax period between April 2012 to December 2012 (the tax period in review) and that consequently there is no legal basis for any tax liability for the tax period in review. In part applicant also seeks a declaration that a certain objection allegedly made by the Applicant to a VAT audit finding issued by the 1st Respondent be deemed and declared to have been allowed by operation of Section 35(7) of the VAT Act.

[3] As an alternative to these declaratory orders Applicant seeks a declaration that the Applicant is entitled to after an appeal to the Tax Tribunal or this Court against a decision of the 1st Respondent in 2015 disallowing Applicants objection describe above within 30 days of the order.

It goes without saying that the alternative prayer is sought in the event the sought declaratory relief is unsuccessful and the Court finds for the 1st Respondent therein.

[4] The immediate circumstances that have triggered this application as stated is the administrative action by the 1st Respondent and its drastic adverse effect on the Applicant. It began with the delivery of a notice of demand for payment of a sum of E3,648,650.23 (letter of demand) for certain outstanding taxes. That letter has been attached as 'ANNEX CH14' by the Applicant. I note that its caption or heading adverts to "DEMAND FOR OUTSTANDING TAXES (VAT,PROVISIONAL PAYE, PAYE RECON INCOME)" Invoked in the demand are sections 72(3) and 57 of the VAT Act of 2011 and Income Tax Order No.21 of 1975 (as amended) respectively.

[5] The demand was followed by the admin notice I referred to in the introduction of this judgment on the basis of which the Applicants business was being placed under closure and distress measures in terms of section 44 of the VAT Act. This Notice was issued by 1st Respondent as stated on 09/03/2020 accompanied by a Notice authorising certain offers of the Revenue Authority to carry out the action. It is also dated 09/03/2020.

Background Context.

[6] The key facts setting the backdrop to the present proceedings bear narration. The Applicant is registered as a retail company and a restaurantuer carrying out the business which is the subject of this application. In addition it also runs other two other businesses' interests or operations under the styles "Century Fashions" and "Swazi Bangla". They are all enterprises held and run by the Applicant under the corporate management of the entity Chowdhury

Investments as retail business units with separate dedicated tax references of TIN (Tax Identification numbers) for VAT registration and declaration purposes.

[7] It is common ground that during April 2012 the Applicant submitted Value Added Tax Returns in respect of the restaurant under its peculiar TIN. In this return it claimed VAT refund of input VAT. This was in respect of the difference yielded by the declared VAT input which exceeded the VAT output. In 2013 the Revenue Authority conducted a tax audit inspection at the Applicants business premises after giving due Notice for this process on Applicant. Pursuant to this audit the Revenue Authority produced what is termed a "VAT Inspection Report" bearing the Applicants' TIN number for the Restaurant business dated 20th June 2013.

[8] In it SRA made a series of adverse findings against the Applicant the thrust of which was to identify and allege a series of irregularities attributed to the Applicant. The Report sums into 9 pages. Its upshot was to inter alia disallow the Applicants' VAT input claims and to call for the provision of specified documents including tax invoices within a 7 day Notice period. On the face of this Audit Report other than the findings as to the state of the Applicants VAT account, no further statements as pertains to a projection of the liability is projected.

[9] I made this observation in the light of the assertions made by the Applicant in its founding affidavit to underpin the relief sought. Those appear central to the principal grounds or premis of the declarators sought. The critical assertions appear at paragraphs 17 and 19 of the Founding affidavit. Firstly there is reference to a finding that Applicant had under-declared its sales by E2,396 076.07 (for the period April to December 2012) and further that the Revenue Authority makes an estimation of the Applicants tax liability in the sum of E597,032.00 for the same period and finally, that the above sum had accumulated penalties and interest to make up the current tax liability of E3,466,335.85. I must say these assertions are not placed in dispute by the SRA in its answering affidavit and therefore are common cause.

It must be appreciated that a central plank to the applicants bid for the declaratory orders is the proposition that the tax liability attributed to the Applicant by the Respondent is predicated on the VAT Inspection Report (the Audit Report) and that in so far as the said report does not comply with the requirements of a tax assessment as set out in section 32 of the Act, the said Audit Report does not constitute a valid VAT assessment. I intend to deal with the significance of these contentious in light of the established facts further herein.

[10] After the publication of the Audit Inspection Report the Applicant alleges that it lodged an objection to the assessment of the Plaza Tandoori value Added tax on the 13th August 2013 and further provided further supporting tax invoices as documentary succour for its domestic input tax claims. It is further alleged this objection was hand delivered to one Mr. Kennedy Hlathini who was the then VAT Audit Manager of the Respondent. It is common cause that the said Mr. Hlathini was the lead manager supervising the Respondents team of officers who carried out the audit inspection and signed off the Inspection Report.

[11] The lodging of the said objection to the Audit Report is disputed by the Respondent who disavow Mr. Hlathini confirmatory affidavit deposed to in support of the Applicants allegations in this regard. What is further common cause is on either version there was no response to this 'objection'. From the point of view of the respondent this is probably because contrary to the applicants allegations none was lodged whilst the applicant insists otherwise. Thus there is a dispute of fact on the delivery or lodgement of the objection. I deal with the materiality or otherwise of such a dispute of fact to the issues germane to this application.

[12] The Applicants case is primarily predicated on the proposition that if the Court finds in its favour that the Respondents failed to timeously respond to the objection or at all, then the provisions of Section 35 (7) should come into effect and the Court ought to declare that the Respondent must be deemed to have allowed the objection.

It is further contended that by virtue of the Audit Report not qualifying as a valid assessment in terms of the act and by operation of the deeming clause the Court must declare further that the Applicant is not liable for any VAT for the tax period April 2012 to December 2012.

Scheme of the Act.

[13] Before going into the issues I must outline the basic principles and core elements of the VAT system within the statutory framework. The acronym VAT(Value Added Tax) actually signifies tax on added value which implies an incremental tax incurred in the supply and distribution chain of goods and services in the conduct of commercial business. It is determined by ways of a proportion of the value appreciated at each step during the production, distribution or supply of commodities at each successive step in the chain. The Value Added Tax Act replaced and repealed the Sales Act regime that was operative before the latter's promulgation in April 2012.

[14] Section 3 (a) of the act sets out the relevant central axis of the act as follows:

> ***"3. A tax, to be known as value added tax, shall be charged in accordance with the provisions of this Act on-***
>
> ***(a) every taxable supply in Swaziland made by a taxable person;***
>
> ***(b) ……."***

[15] The matter at hand arises in respect of retail transactions involving the supply, purchase and sale of goods in retail being the line of business that he applicant in engaged in. The applicant is thus registered as a vendor and is a supplier in terms of the above section and thus liable to pay VAT on its sales in the distribution chain.

Conceptually, in the ordinary run of things in retail a vendor engages in a process of acquiring and is thus a recipient of goods from suppliers for on sale to his customers. Tax on the goods traded is calculated at eh prescribed rate (as a percentage of the price) at each successive transaction in the handling. It becomes payable at each step although the mechanism makes the trimming of the tax on each transaction notional as I shall seek to illustrate here.

[16] A core element of this system is predicated on the role of a vendors as being both a recipient and a supplier and section ……..of the Act imposes a liability on the vendor as both a collector and taxpayer and thus becomes liable to render VAT on each particular supply. As its name suggests in principle VAT is not levied on the full price of the commodity at each and every transaction and is also not cumulative in nature but is a means of skimming off tax on the added value the commodity gains during each stage or interval from the last supplier in the chain. Its central method or deriving the payable VAT on each supply transaction, the supplying vendor must deduct the VAT that was paid when the particular goods were supplied to him and upon on sale each successive vendor will work the payable VAT by deducting the VAN paid when the particular goods were acquired (input tax) from that paid to him on the sale (output tax).

[17] The system of collection and rendition of VAT is premised on an aggregation process, a mechanism defined in the act that entails a meticulous and detailed system of bookkeeping in the form of records by vendors and a periodic account of VAT accrued being made by the said vendor to the receiver. The Act requires the vendor to keep certain types of records and to periodically calculate, account for and pay over the derived VAT to the

Commissioner or SRA. The account is made by way of periodic returns accompanied by the requisite documentary supporting vouchers. Broadly the mechanism entails the deduction of input tax form output tax and also specifies the vouchers to be kept in the records. Theoretically this is to enable the ease of verification. The system prescribes how payments are to be made as well as the manner of the completion and filing of tax returns to the SRA.

[18] Of specific relevance to this case there exist certain fundamental duties imposed on the vendor by the Act which bear highlighting. They may be summarised as follows:

1. To correctly calculate and levy VAT on each supply of goods;
2. To calculate the output tax and input tax on that transaction precisely;
3. To keep proper records supported by the prescribed vouchers in regard to each transaction;
4. To periodically add up the sums of output and input taxes in any particular period and work out the deduction or differences; and to
5. Make due and timeous returns and payments of the VAT payable at each specified tax period.

[19] It becomes clear from the above that the Act places an enormous duty and utmost good faith on vendors as both a collector and remitter of tax. The Kingdom has adopted a systematically similar VAT system that almost mirrors others in the region amongst which is the South African VAT regime. The principles underlying and governing the systems are the same. The somewhat esoteric character of the VAT system and legislation, was eloquently elucidated by Kriegler J in the South African case of ***Metcash Trading Limited v The Commissioner SARS and Ano*** in his analysis of that country's VAT legislation there are parallels in their provisions which are generically comparable to ours. I can do no better than quote his dictum at paragraphs 16 and 17 of the Courts judgment where he said:

[16] *"……. The first significant point to note is that VAT, quite unlike income tax, does not give rise to a liability only once an assessment has been made. VAT is a multi- stage tax, it arises continuously. Moreover VAT vendors/taxpayers bear the ongoing obligation to keep the requisite records, to make periodic calculations of the balance of output totals over and above deductible input totals (and any other permissible deductibles) and to pay such balances over to the fisc. It is therefore a multi-stage system with both continuous self- assessment and predetermined periodic reporting/paying.*

[17] An even more important feature of VAT, particularly in contradistinction to income tax, is that vendors are in a sense involuntary tax-collectors. In principle VAT is payable on each and every sale; the VAT percentage, the details for its calculation and the timetable for periodic payment are statutorily predetermined, and it is left to the vendor to ensure that the correct periodic balance is calculated, appropriated and paid over in respect of each tax period. By like token the regularity of VAT payments on the one hand ensures a steady and generally more accurately predictable stream of revenue via a multi-staged taxation that is perceived as resting less heavily on the taxpayer, but on the other hand it does require a great deal of book-keeping by vendors and policing by the revenue authorities"

(my underlining)

[20] I think the above insightful remarks by the learned judge as well as the trenchant principles emphasised are most apposite and applicable to this case. There are however other immediately relevant provisions of the Act that deal with the enforcement, monitoring and investigative powers of the Commissioner in compliance oversight over vendors and taxpayers in the practice and conduct of VAT administration. Again in light of the similarities of the legislation in both countries I draw parallels in the summary of these powers by the Court in the Metcash case as they are again of equal validity and rigor in our law. In our legislation the first key provisions lie in section 33 of the VAT Act. The section confers powers on the Commissioner to make an independent assessment of the VAT and the amount which is payable in the event of failure by a vendor to make a VAT return or where the Commissioner is not satisfied with the return submitted or has cause to believe that the due VAT is unlikely to be paid.

[21] Most significantly apart from enabling an assessment by the Commissioner, a peculiar feature of our Act perhaps somewhat different from the South African legislation is that it empowers him in terms of section 35 (3) to make a preliminary estimate of the tax payable by a person liable to render VAT tax for purposes of making an assessment under section 33 (1) in the event the Commissioner is not satisfied and therefore does not accept the vendors account. This is an important provisions in light of the circumstances of this case to which I shall revert in the sense that I understand an estimate reached by the Commissioner in terms of section 35 (3) to come short of an assessment *per se*. This becomes evident in regard to the very clear and specific procedural and substantive provisions of the Act relating to the making of an assessment.

[22] Section 33 (6) of the Act requires the Commissioner to give a vendor written notice of the assessment made by him and in that notice must *inter alia* inform the vendor an objection to the assessment may be made whilst setting out the time place and manner of objection to the said assessment in the said notice.

[23] Against this legislative backdrop the critical common cause facts in this case can be conveniently summarised. As stated earlier the restaurant business was registered and designated an unique TIN number 100212376. It is common ground that in respect of that business unit that Applicant rendered its VAT returns to the SRA for the period April 2012 to December 2012. With the said returns it also make certain claims for VAT input credit. Apparently dissatisfied with the returns the Commissioner through his VAT audit unit found it necessary to conduct its own investigation and audit of the applicants restaurant operation the outcome of which was the audit report dated 26 June 2013. As mentioned earlier the audit report findings were not complimentary but in fact made certain adverse credibility findings on the basis of which certain sums were determined to be the true VAT tax due in regard to the period under review. In the report the report concluded that the taxpayer was not issuing proper till slips or tax invoices, and had unclaimed domestic input for a certain transaction, disallowed input tax claim on domestic purchases, misallocated certain imports and had failed to record some sales in the cash registers as well as failing to provide input tax claim documents for the first and third quarter. The upshot of the report was not only reject the returns but also rejected the applicant's claim for VAT input whilst also determining that there was a VAT tax liability as derived from the audit findings. The inspection/audit report was delivered to the Applicant in July 2013.

[24] In its founding affidavit the applicant avers that after receipt of the inspection report and the Commissioners findings, it shortly submitted an objection letter dated 13th August 2013 to the contents and findings of the inspection report. It alleges that the said objection was handed together with certain supporting documents and vouchers that had not been furnished to the investigating audit team and specifically to one Mr Hlathini who was the then VAT Audit Manager. There is a dispute as to whether this letter was delivered and or received by the Respondent with the respondent refuting the submission of such an objection to it. It is in the circumstances beyond question that there was no response to this objection. The applicant seeks to rely on this as basis to infer that the respondent failed to make a decision on the said objection and therefore must be deemed to have allowed by invoking the statutory provisions of section 35 (7) of the Act.

Section 35 (7) provides that:

" If the Commissioner General has not made an objection decision within 90 days after receipt of the objection, the Commissioner General shall be deemed to have made a decision to allow the objection".

[25] It is necessary to consider the relevant statutory provisions in a comprehensive way in order to place the procedures for lodging of objections to decisions of the Commissioner General in the legislative context. Even more so the relevant provisions of the section bear closer examination in order to appreciate the issues as pertains the applicants contention that the dispute of fact as to whether the letter of the 13th August was delivered and received by the respondent must be decided in its favour.

The further key provisions can be summarised as follows:

Section 35 reads:

Objection to Decision

35. (1) A person who is dissatisfied with a decision of an officer may submit an objection to the decision to the Commissioner-General within thirty days after the service of the notice of decision.

(2) Where the Commissioner-General is satisfied that owing to absence from Swaziland, sickness or other reasonable cause, the person who is dissatisfied was prevented from submitting an objection within the time specified in subsection (1) and there has been no unreasonable delay by the person in lodging the objection, the Commissioner-General may accept an objection submitted after the time specified in subsection (1).

(3) The objection shall be in writing and shall specify in detail the grounds upon which it is made.

(4) Where an objection to, or a notice of appeal against an assessment has been submitted, the tax payable under the assessment is due and payable, and may be recovered, notwithstanding that objection or appeal.

(5) The Commissioner-General shall only consider an objection submitted under subsection (1) if the person has given sufficient security for the tax due under the assessment and any penal tax that may become payable.

(6) The Commissioner-General shall serve the person objecting with notice in writing confirming the receipt of the objection within 14 days of receipt of the objection.

(7) If the Commissioner-General has not made an objection decision within 90 days after the receipt of the objection, the Commissioner-General shall be deemed to have made a decision to allow the objection."

Assessment.

[26] The key provisions as pertains assessment of VAT under the Act relate to the power of the Commissioner General to reject an return by a vendor and instead, based on his own findings upon investigation and or information, issue his own assessment and determine the VAT payable. The provisions of section are as follows:

"*Assessments*

33. (1)

Where-

(a) a person fails to submit a return under section 32;

(b) the Commissioner-General is not satisfied with a return submitted by a person; or,

(c) the Commissioner-General has reasonable grounds to believe that a person will become liable to pay tax but is unlikely to pay the amount due, the Commissioner-General may make an assessment of the amount of tax payable by that person.

(2) An assessment under subsection (1)-

(a) where fraud, or gross or willful neglect has been committed by, or on behalf of the person, may be made at any time; or,

(b) in any other case, shall be made within 5 years after the date on which the return was lodged by the person.

(3) The Commissioner-General may, based on the best information available, estimate the tax payable by a person for the purposes of making an assessment under subsection (1).

(4) Where a person is not satisfied with a VAT return submitted by that same person under this Act, that person shall notify the Commissioner-General before making an adjustment of that return.

(5) A notification under subsection (4) shall be in writing and specify in detail the grounds upon which it is made and shall be made within five years after the date on which the return was lodged by the person.

(6) Where an assessment has been made under this section, the Commissioner-General shall serve notice of the assessment on the person assessed, which notice shall state-

(a) the tax payable;

(b) the date the tax is due and payable;

(c) an explanation of the assessment; and,

(d) the time, place, and manner of objecting to the assessment.

(7) The Commissioner-General may, within the time limits set out in subsection (2), amend an assessment as the Commissioner-General considers necessary, and the Commissioner-General shall serve notice of the amended assessment on the person assessed".

[27] I now turn briefly onto the import of the Audit Inspection Report which according to the applicant elicited the 'objection' that is in part the subject matter of this application. It is necessary to examine closely the nature and object of the so-called objection in the context of the audit inspection report in relation to the VAT provisions in the act and the incidence of liability as defined in the legislation. Applicant contends that the inspection report purports to be an assessment but disputes this on the basis that no formal notice of an assessment has ever been given to it by the Commissioner General. Firstly there is no evidence that a formal notice as contemplated in terms of section 33 (6) of the act. The next question becomes whether the said inspection report in so far as it purports to make a determination as to the applicant's VAT tax liability for the period under review, constitutes an assessment or purports to be an assessment. In my view the applicant appears to misconceive the nature and import of the Audit Inspection Report. There is nothing in the report that refers to a tax assessment nor is there any reference therein to any such assessment. It clearly does not conform to the provisions as to notices of assessment as referred to above.

[28] From its contents it is quite evident that the VAT audit report was not an assessment in terms of section 35(6) nor does it purport to be one. It is my considered view that the figures given in the VAT Inspection Report as part of the Commissioner's adverse findings against the applicant were no more than an estimation based on the said findings upon entering into the enquiry as to the credibility of the returns rendered or other information for purposes of tax assessment as envisaged in section 33(3). An 'estimate' of tax liability may be made by the Commissioner and in this regard he is entitled to do so as part of his findings which estimate may inform an assessment. That does not render such an estimate in the context of the report a 'purported

assessment'. I therefore find no basis for the applicants assertion that the said figure given in the report as pertains the applicants VAT liability was intended to be an assessment. In fact the Applicant itself acknowledges these figures to be an estimation of the VAT tax liability in its own founding affidavit where at paragraph 19 it is stated:

> ***"19. The outcome of the audit report was an estimation of tax liability in the sum of E597 052.00 for the period April 2012 to December 2012. This amount has accumulated penalties and interest to date, arriving at the current outstanding tax liability E3, 466 335.85".***

[29] Finally although much has been made by the applicant as to the purport of the VAT inspection report being relied on as the determination of its VAT liability no evidence has been placed before this court either by the applicant or the respondent that in the proceedings and the course of dealings between the parties over the VAT dispute a formal VAT assessment was in fact make as contemplated by the relevant sections I refer to as pertains the making of such assessments.

As pertains evidence of assessment the following provisions of the Act are pertinent:

> ***"General provisions relating to assessments***
>
> ***34. (1) The production of a notice of assessment or a certified copy of a notice of assessment is receivable in any proceedings as conclusive evidence of the due making of the assessment, and except in proceedings relating to objections and appeals relating to the assessment, that the amount and particulars of the assessment are correct."***

[30] Applicant seeks a declarator that the Respondent did not assess the Applicant to the tax for the VAT period April 2012 to December 2012. It is common cause or at least it is not disputed that since the inception of the dispute between the parties over the VAT tax liability, in the Answering affidavit the respondent contents himself with merely denying the averment that no assessment was ever rendered in terms of section 33 (1) (b) of the act in respect of the VAT liability in respect to the tax period in consideration. It is a bare denial without any substantive factual averments as to countervail the allegation. I do not think there is any basis for a dispute as to the veracity of the applicant's averments in this regard. It is unclear whether save for the estimates given in the VAT Inspection Report as to a determination of the Applicant's liability a formal notice of an assessment was issued by the

respondent at the time or in the course of events over the years as pertains the applicants VAT liability. No evidence was placed before me on this aspect. I leave the matter open for present purposes. It is one of the issues for consideration by a specialist tribunal on appeal from the Commissioner Generals decision. I deal with the appeals aspect separately in this judgment. I therefore make no order as regards the declarator in this regard.

[31] Does the Report constitute a Decision as per Section 35(1)?

Section 35(1) reads:

Objection to Decision

> *35(1) A person who is dissatisfied with a decision of an officer may submit an objection to the decision to the Commissioner-General within thirty days after the service of the notice of decision.*

[32] The section further deals with and refers to objections to assessments and outlines the procedures and requirements to be met in such proceedings. It appears that the wide terms of section 35(1) in its reference to "*a decision of an officer"* are broad enough to include any adverse decision that a taxpayer may be aggrieved by to want to lodge an objection thereto and is not necessarily confined to assessments. That means in my view the applicant would have been perfectly entitled to object to the findings of the VAT audit report, its various adverse findings, the rejection of his VAT input claims and the estimated tax liability sought to be determined therein. But that is quite a different matter from an objection to a VAT assessment.

Did the Applicant Submit an Objection to an Assessment*?*

[33] I am mindful that the applicant seeks this court to make a favourable determination of what it terms a dispute of fact as pertains whether the alleged objection by letter of 13th August 2012 was in fact delivered on the respondent. I think this submission glosses over the material issues that are germane to this application. At paragraph 20 of the Applicants heads of arguments, It seeks to invoke section 35(1) of the Act as basis for its objection thus:

> *"Where a taxable person is dissatisfied with the assessment, an objection against the decision may be submitted. Such objection must be in writing and specify in detail the grounds on which it is made" Applicants counsel further submits that the letter of the 13th August 2013 constituted such an objection to an assessment"*

[34] In the same vein It has been further contended by Applicant's counsel in his written submissions that as applicant has not been properly assessed to tax for the VAT periods April to December, 2012 therefore no tax liability arises. I find this argument to be tautologous. If the Audit Report did not constitute a valid assessment it follows that there could be no objection to an assessment whose validity in law was in question. The applicant could not presume to object to a tax assessment that was yet to be made and it follows that the declarator it seeks to achieve in reference to the deeming clause of section 35 (7), would not necessarily extinguish any tax liability. This leads me to the question as to how tax liability arises in the context of the VAT statutory regime.

[35] It is clear that section 35(1) as read with section 35(4) and the subsequent subsections specifically cater for objections against assessments. Although section 35(1) adverts to decisions in general the rest of the subsections address the conditions and procedural requirements for objections against assessments. A vendor who is aggrieved with an assessment by the Commissioner General may by lodging an objection under section 35 and further under section 36 an appeal compelling the Commissioner General to reconsider the assessment or have its merits reconsidered by the tax tribunal. There is an emphasis as to the specificity of an objection against an assessment. It must in terms of section 35 (3) specify the grounds relied on for objecting to the assessment in detail.

[36] Invariably the vendor bears the onus of showing that the Commissioner General's assessment where it is the assessment that is sought to be impugned, was either wrong or excessive. That is spelt out in section 38 of the Act. The onus is premised on the principle that VAT is in essence a system of self-assessment based on the vendors own records; hence it stands to reason that the discharge of the onus turns on a demonstration of the credibility of the vendors records, return, averments and vouchers. It is for this reason that Kriegler J makes the observation in the Metcash that so onerous is the burden that "unless the vendor can show that the Commissioner's credibility findings were wrong the consequential assessment will stand". These principles and statutory provisions apply only in regard to genuine objections to the correctness of an assessment where the same is averred to have been made. By all accounts in casu there is no evidence that such an assessment as would give rise to an objection to an assessment could be made.

[37] A pertinent enquiry for purposes of the sought relief has to be:

a) whether the applicant's letter of the 13th August 2012 (if proven to have been lodged) was indeed an objection to a decision by officers of the revenue authority as envisaged by section 35(1); and if so

b) whether it constituted an objection to an assessment by the Commissioner General (the respondent).

As I have said the answer to the first question is resoundingly in the affirmative. However to the second question it has to be no because the respondent's officers' Audit Inspection Report and its contents could not constitute an assessment by any account in the plain meaning of the Act. That much is clear.

[38] It is therefore my considered view in light of the above that only an objection to an assessment as contemplated in section 33(6) of the Act could possibly (if allowed or deemed to be allowed by inference and reference to section 35(7) could have the effect contended by the Applicant – that of extinguishing its VAT liability.

The objection if anything would have been against the Commissioner General's adverse credibility findings coupled with the estimated VAT liability stated in that report. If rejected by the respondent it would only give rise to a right to the Applicant to make the Applicant entitled to challenge that decision and the adverse findings on appeal to the Tax Tribunal.

[39] I am of the firm view in the circumstances that a challenge to a decision of the Commissioner General will only have a bearing on the question of the applicants vat liability by application of section 35(7) in so far as it was directed at impugning the correctness or otherwise of an assessment. By any stretch the applicants letter of the 13th August 2013 even in proven to have been lodged could not constitute an objection to a tax assessment where one was not in place. Its contents are telling in so far as they seek to engage the Commissioner as to the methods of analysis, investigation and credibility findings made in the inspection report. It makes no reference to any assessed tax liability. It simply questions the assumptions or adverse conclusions reached by the investigating officers of the respondent.

[40] In his answering affidavit the respondent has disputed the applicant's assertion that the said letter of 13th August 2013 was either submitted or if it was, that it constituted an objection at all. He disputes that the document referred to as ANNEX CH3 in the founding affidavit was delivered on the SRA on the said 13th August 2013 as alleged in the absence of service notwhithstanding Hlatini's veru general confirmatory affidavit. He questions the claim that the

said document and the supporting documents were delivered to the authority in light of certain inconsistencies and incongruous averments in the applicants affidavit and the absence of any other proof in the form of acknowlegement of receipt by the Authority. I must say ANNEX CH3 other than documents generated as copies of electronic mail (e-mail) the document stands out as being the only one without a date stamp of the SRA on it.

[41] It is the applicants averments regarding Annex CH3 that warrant closer examination. It makes its case on the alleged filing or delivery of the objection from paragraphs 21 to 27. In it Mr Mohammed Chowdhury deposes in some detail to circumstances pertaining to events wherein his father Mr Badrul Chowdhury was the interlocutor. He does not say how he came about to know these facts as there is nowhere in his lengthy affidavit where he either says he was present or came to learn of these facts. I am mindful that the applicant has made a latter day dash after the close of the sets of affidavits to introduce an unattested and un-notarised copy of a 'confirmatory affidavit' by the said Mr Badrul Chowdhury in Bangladesh where he is currently confined due to the covid pandemic travel restrictions. That said, the averments by Mr Mohammed Chowdhurry from paragraphs 21-27 have been vigorously denied by the respondent who questions the veracity of the allegations contained therein.

[42] What Mohammed Chowdhury says makes for an interesting and insightfull reading as pertains the logic and sequence of the events he narrates in particular as pertains the circumstances of the said 'objection'. The critical averments are as follows:

> ***'21. The applicant received the draft audit report in mid-July 2013. The applicant responded on the 13th August 2013. No response ws forthcoming form the SRA."***

Curiously Mr. Mohammed Asraful Chowdhury then goes on to say the following:

> ***'22. The applicant arranged a meeting with the VAT audit manager, Kennnedy Hlatini, when my father was back in the country. The purpose o fhte meeting was an attempt to resolve the dispute amicably by providing the SRA with the documentation that ahd not previously been provided to them and to engage the SRA officials on the methodology adopted to arrive as the estimated laibility. My father attended the meeting with Mr Hlatini on or about the 13th August 2013 and served him with the same.***

23. At this meeting it it was agreed between the Applicant and Hlatini that the Applicant shall submit all the missing documents for he respondent's consideration. Indeed, the missing documents were supplied or submitted to the respondent's audit team at a meeting requested by them to discuss their findings, in he same month of August 2013.

24. The letter of objection set out the reasons why the applicant did not agree with the report's findings, a copy of which is annexed marked 'CH 3'. This letter which constituted the objection against the estimated tax liability in the draft report clearly sets out that clearly sets out that the estimation of under-declaration of sales was incorrect as the SRA officials had not taken into account the petty cash.

25. At the meeting, Mr Hlatini and the audit team undertook to consider all the documentation provided to the SRA within seven days and revert to Applicant. This did not happen.

26. In annnexure 'CH3' the applicant requested that the respondent's officials spend time in the business to observe its operations at close hand to determine the real sales made ty the business. This request was never taken up by the respondent.

27. There was never a response from the respondent to the objection of 13th August 2013"

[43] The VAT Act sets out provisions as pertains form and procedure for the lodging and reception of objections to decisions of the SRA. Of keen significance are sections 35(3) and (6). The Act stipulates that an objection shall be in writing setting out in specific detail the grounds of the objection and further that the Commissioner General 'shall serve a person objecting with noticein writing confirming the receipt of the objection within 14 days of receipt of the objection.

[44] As regards the reception of the document there is no evidence that the receipt referred to in section 35(6) was ever given or procurred by the applicant. It is also clear that the relevant provisions envision a formal single document being delivered in regard to which a receipt would be elicited. Having said that the content of the alleged letter of the 13th August does not address the specifity required by section 35 (3). Its opening lines purport to be a presentation 'a propos' and a follow up to earlier correspondence. Secondly it appears to be a presentation of the applicants representations and complaints to the method

adopted by SRA staff in the estimation of the sales. It expressly purports to be a follow up (or supplementary submission) to 'the report the company submitted to the SRA in response to the VAT Inspection Report' prepared and delivered by the SRA"

[45] Not much is said in the founding affidavit or elsewhere (even in Mr Badrul's 'confirmatory affidavit') about the report the applicant seems to allude to in the said letter of objection as a submission aginst the findings of the VAT Inspection Report. Further the Commissioner General is entreated in the same letter to come and make a further inspection 'to determine the real amount of sales.This is in fact a recurring refrain of the applicant in the correspondence that has been placed before us suggesting the applicant's effort in the course of consultations between was devoted to persuading the respondent to re-open the audit to review its adverse findings as regards the authenticity or the sales figures. Even more obscure are the circumstances regarding the delivery of he letter and the further supporting documents which applicant alleges were given to Mr Hlatini by Mr Badrul Chowdhury upon his return to the country from Bangladesh. It is clear from the founding affidavit that the letter of 13th August is alleged to have been given in person to Mr Hlatini in a meeting held on the same date. I have noted a further element emerging further from applicant's own affidavit as sworn to by Mr Badrul's son, Mohammed being that there was a subsequent meeting on an undisclosed date 'in the same month of August' when the 'missing documents' were supplied or submitted to the respondent's audit team".

From a plain reading of sectin 35 of the ACT what is certain as pertains the form and manner of making an objection is that what is required is a concise written submision setting out the detailed grounds therefore in a single document. If the objection is a challenge to an assesment made by the Commissioner General (which by all accounts the applicant's alleged objection was not) it is reasonalbe that the objection would be accompanied by what documentary or supporting evidence that the applicant relies on . All said section 35(6) adverts to a receipt of 'the objection' in the sense of a single event or document. From the content of the applicant's founding papers it is evident that the objection referred to cmoprises not only of the Annex CH3 letter, but a series of oral consultation and other transactions in the form of prior and subsequent meetings, interactions and delivery of various documents. It is in a word a 'transactional or anecdotal account' of dealings between the parties at the conclusion of which applicant says it awaited a final report or response. Considered from any perspective the 'objection' or represenations referred to were, as I mentioned earlier, intended to rebutt the respondent's credibility findings in the Audit Inspection and to engage him to reconsider the same. What it is not is an unequivocal objection to an assesment for purposes of eliciting a decision. In any event when pressed in 2015 to make a final and

definitive decision in the saga the Commissioner General gave it in the letter of the 15th April 2015 disallowing the 'objection' in more certain and clear terms. The applicant may well felt aggrieved by that decision to want seek to lodge a challenge or appeal to that decision. Apart from a review or setting aside of that decision, one of the avenues is the statutory process of appeal to a Tax Tribunal. That is an aspect I return to later in this judgment.

[46] In my view the sought declaratory order as to the status of the letter of the 13 August 2013 in relation to an objection decision of the respondent would not avail the applicant on the contentions it seeks to make in relation to the deeming section of section 35(7).

Incidence of Tax Liability.

[47] The applicants premise proceeds from an incorrect proposition that VAT liability only arises by way of an assessment by the Commissioner General. Whilst it is correct that the Commissioner General may be inclined to reject a vendors VAT returns in respect of a particular tax period and exercise his powers in terms of the act to make an independent assessment of the VAT due, this is not the only basis in regard to which VAT tax liability may arise.

[48] I have referred to Justice Krieglers analysis of the incidence of VAT liability and am impelled to advert to his statement in the judgement in the METCASH case on this point where he states:

> *"It would be convenient to pause at this point to recapitulate and fill in some details before moving on to the next phase of the Act, which deals with assessments by the Commissioner and what they may set in train. The first significant point to note is that VAT, quite unlike income tax, does not give rise to a liability only once an assessment has been made. VAT is a multi- stage tax, it arises continuously"*[1]

[49] As I have indicated earlier the Commissioner General is entitled in the context of making adverse credibility findings as to VAT liability to estimate such tax as payable by a taxpayers without necessarily making an assessment. It is my considered view that even if a favourable finding on the dispute of fact as pertains the lodging of the objection to the VAT Inspection Report were to be made for the applicant, that in itself would not have the effect of ,as it contends, lead to the inference that there was thus no tax liability. Likewise applicant's contention that in the event the court were to find there was no objection decision to its 'objection' therefore by deeming the objection allowed there would be no tax liability must fail. I therefore find it unnecessary

[1] Paragraph 16 of Metcash judgement

to determine whether the alleged letter of objection was in fact lodged or received.

[50] It is therefore clear upon the examination of the mechanisms for the assessment and final determination of liability by way of independent assessment of the vat liability in terms of the commissioner's powers that a challenge directed at attacking the assessed tax liability will only arise where an assessment for VAT has been made. It is only an objection to a tax assessment that could possibly give rise to the application of section 35(7) of the Act to set aside or correct a VAT tax liability determination by the Commissioner General. I am satisfied that the applicants 'objection' if at all to the SRA decision in the form of the VAT Inspection Report did not go into matters of assessment for VAT liability purposes as envisaged in section 35. For this reason the sort of relief in the form of the declarators sought by the applicant is not only incompetent but not supportable from a procedural point of view. The Act clearly prescribes the statutory procedures and mechanisms for challenging the Respondents decision under the Act. This leaves the question as to what remedial avenues if any arise in the absence of a tax assessment.

Collection Action in the Absence of Assessment.

[51] I now turn to the contents of the said objection and its claimed effect if allowed. It states expressly that its intent is to follow up on 'a report by the company in response to the VAT inspection report'. It also makes reference to a course of correspondence as pertains the VAT Inspection report without much reference to the detail in the said correspondence. The correspondence itself is not attached. But its upshot lies in the remonstrations imploring the respondent to make an inspection to observe further operational practices and to verify the methods in the conduct by applicant of its business. It is hardly an objection to an assessment. In it the applicant also makes a series of representations seeking to clarify its record keeping methods protesting bona fides. In a nutshell the letter essentially engages and seeks to rebutt the credibility findings of the VAT Inspection Report.

[52] There are other considerations that render the enquiry a wild goose chase. It lies in the timeline and the long history of this matter and the sequence of events that have come to pass in its wake. Applicant claims to have addressed the objection on 13th August 2013 but alleges to have given the letter to the Respondents then employee Mr Hlathini on or about the same date. It claims there was a long lull and no response to the letter although there were exchanges in a course of correspondence between the parties. Nothing it seems came of this until further precipitous events in 2015 when the SRA, it is common cause, brought distress enforcement action to close

the business and freeze the restaurant bank accounts which caused the applicants to address a letter to the respondent on the 13th March 2015 in which reference is made to an 'objection' without specifying any details. That letter was followed by a response by the Commissioner General wherein the filing of any objection to the inspection report is disputed by the Respondent and a decision is purportedly made therein formally disallowing the applicants objection. Thereafter there was another course of correspondence spanning the years 2015 to February 2020 when the applicant sought to engage the respondent in negotiations to resolve the matter of the VAT liability. In all these developments and the respondents action in bringing enforcement proceedings to collect the VAT levies the applicant made no attempt to challenge the legality of respondents actions on the basis of the alleged 'allowed objection'.

[53] This discourse demonstrates a settled acceptance by the applicant that there was the VAT tax liability issue that lingered unresolved. It is a far cry from the mind-set that for want of an assessment by the respondent, no tax liability existed. In any event the flawed reasoning that VAT liability arises only on the basis of an assessment as opposed to being a continuous liability is addressed separately in this judgment as an untenable proposition.

Declaratory Order that No Assessment was made by the Respondent.

[54] I was referred by the Applicants Attorney Mr Simelane to judgment in the South African case of ***Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd*** **(237/2004) [2005] ZASCA 50; [2006] 1 All SA 103 (SCA) (30 May 2005)** as reference to the applicable principles on declarator and the prerequisite conditions for the superior courts' exercise of this power in causes. For this I am indebted. In that case the principles which have been relied on countless times by this court in our jurisdiction were restated by reference to the dictum of Watemeyer JA in ***Durban City Council v Association of Building Services*** 1**942 AD at 27** where he said:

> ***'***'*The question whether or not an order should be made under this section has to be examined in two stages. First the Court must be satisfied that the applicant is a person interested in an "existing, future or contingent right or obligation", and then, if satisfied on that point, the Court must decide whether the case is a proper one for the exercise of the discretion conferred on it".*

[55] In the exercise of its discretion whether to grant a declaratory order the court is thus required to establish on a two-pronged enquiry, firstly whether the applicant is interested in an 'existing future or contingent right or obligation' and to consider whether it is competent to grant such an order regard to the

substantive issues involved and then consider whether it should refuse or grant the order. The enquiry ultimately must meet the test whether the matter is a proper one for the exercise of the discretion. I think this is a wholesome consideration both on locus standi (interest) and the appropriateness of the relief sought regard being had to the nature of the proceedings and the surrounding circumstances (see ***Martha Nokuthula Makhanya, Jenneth Tholakele Sihlongonyane, Cecelia Gcinaphi Makhanya, Isaac Jiva Dlamini N.O vs Sarah B Dlamini (53/16) [2017] SZHC 48 (2016)*****;*** ***Reinecke v Incorporated General Insurances*** **1974(2)SA84(A)at 93 and 95**).

[56] I discern that the principal relief sought in the form a declarator is not contingent upon (does not hinge) on the validity or otherwise of an assessment in the sense that it is not a challenge to an assessment nor does it relate to a purported assessment. For the reasons canvassed elsewhere the tax estimate in the Audit Inspection report does not purport to be an assessment at all. In any event the relief is not to review or set aside such an estimate or determination as to tax liability or for the setting aside of any of the consequent section 44 distress proceedings. It is purely premised on a declarator that no assessment was made and on that basis that no liability for VAT arises. All the applicant seeks in terms of the alternative 6th Prayer is a declaratory order to the effect that the Respondent did not assess the Applicant to tax for the VAT periods April 2012 to December 2012 as a correlative to an order that the Applicant is not liable for any tax liability for the VAT period April 2012 TO December 2012, To make a finding on the question of whether an assessment was made turns on a factual enquiry and as I have stated no facts pertaining to this question have been specifically and directly placed before me on the affidavits. It is raised as an incidental issue in the alternative. In any Applicants main preoccupation and the crux of this application is a declaratory order to the effect that no decision on the objection was made and therefore on that basis advances the contention that the objection must be deemed allowed *ergo* the liability for VAT is also discharged.

[57] I have already given my reasons why I think the applicants approach in this regard is misplaced. Most significantly from a remedial point of view the most appropriate forum for a challenge either to an assessment or any decision viewed by the applicant to be prejudicial and incorrect; which turns on credibility findings by the Commissioner General in his regard or rejection of the applicants VAT tax returns is a matter that belongs to the purview of the specialist tribunal. As to the jurisdictional questions that arise I can put it no better than the following remarks of the Court in the Metcash case where the court held:

"As has been observed about the special nature of VAT and VAT returns, assessment under section 31 (comparable to our section 33) is tantamount to a finding by the commissioner that the returns rendered by the vendor have not been truthful. Credibility disputes of this kind belong to the Special Court where the procedure is geared to deal with them"[2]

[58] The appeals process under the Act is designed precisely to deal with all credibility findings including findings such as the like made by the Commissioner General in the Audit Report in casu. It is called appeal by name only because in essence it entails a full hearing by the tribunal which is better equipped or tooled to enquire fully into the forensic aspects of the matter and adjudicate thereon to either uphold , interfere with or set aside decisions of the Commissioner General. I am mindful that in our legislation no provision is made for a fully-fledged specialist tax court or tribunal nor are the requisite provisions for its establishment and procedure for conduct of its business in place. However this should not preclude steps for the provision of facilities even as I have stated elsewhere on an ad hoc basis until the proper legal and institutional framework to establish the Tribunal is put in place.[3]

[59] The applicant seeks a raft of declaratory orders not as interim or interlocutory but final relief. I am inclined to consider that the declarators and in particular one as pertains the status of assessments and incidence of tax liability are not competent within the framework of the VAT regime and the mechanisms for ventilating issues of the kind. In the Metcash case where the court recognised the jurisdiction of the South African Courts to grant appropriate relief in tax issues it qualified this position by holding that the jurisdiction could only be exercised in circumstances where the relief sought is of an interlocutory nature or where the exercise by the court of its inherent powers of review to set aside an assessment or other decisions of the receiver was sought as the ultimate relief[4].

[60] In my considered view this is not a proper case for the declarator sought relief does not advance nor assist the applicant In the circumstances I make no order for the alternative prayer for declarator as set out in Prayer 6 of the Notice of Application.

Assessment as A Prerequisite to Collection Action under section 44.

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[2] Metcash ibid Paras 47 and 55.

[3] See Pitro Rossi and 2 Others v The Commissioner for The South African Revenue Service …..

[4] paragraphs 44 and 45 of Metcash judgment.

A peculiar feature of this application lies in the application being one of a series of declarators in the main as opposed to review. The approach taken by the applicant is not to seek the review or setting aside of the respondents decisions leading to and including the summary distress proceedings with the ultimate object of seeking absolution in a sense from the VAT tax liability without setting aside the Commissioners decision in whatever form of imposition of the said tax liability or his decision in making the adverse credibility findings against the applicants VAT returns and account. Applicant contends that as the respondent had not delivered a notice of assessment as required by Section 33(6) of the VAT Act, no liability for VAT can arise. 'Absent a valid assessment there is no tax liability to collect.

[61] For the above proposition Applicant has relied on the South African supreme court judgment in ***Commission South African Revenue Services v Singh*** **2003 (4) 520 (SCA).** It is contended further therefore that without an antecedent valid tax assessment, there is no liability. I think this argument misconceives the purpose of an assessment. VAT liability does not necessarily only arise upon the issuing of an assessment. Put another way in the ordinary run of the VAT system tax liability arises upon continuously upon the cumulative flow of the supply chain in the hurly burly of commercial activity. The liability to remit tax arises upon the appropriation of VAT by the vendor and after the deduction of the input tax it ensures to the benefit of the revenue authority. In certain circumstances the Commissioner may reject the returns or account tendered by the vendor and make an assessment but this is not necessary in all transactions[5]. The Singh judgment is only persuasive authority by reason of the analoguos tax regime in the Kingdom in relation to the South African system, for the proposition that any assessed VAT is only collectible upon delivery of an assessment notice on the vendor in order words the Commissioner General is precluded from enforcing the collection of outstanding VAT unless he has set in motion the assessment process in terms of section 33 of the Act. In my view it would be an oversimplification that despite the unresolved dispute over the Applicants returns and the adverse credibility findings no tax liability arises simply because there is no evidence of an assessment having been made before us.

[62] Were this an application for an interdict to forestall and hold over the summary proceedings and the review and setting aside of the decision by the respondent to invoke the section 44 proceedings without delivery of an assessment then the issue of the assessment as a pre-requisite condition to collection becomes live.

[5] See Kriegler J's dictum in Metcash

On the basis of the authorities I find no support for the applicants proposition or the prayer under 7 of the Notice of Motion that the Applicant is not liable for any VAT for the period under review between April 2012 and December 2012.

Applicants Statutory Remedies and Alternative Prayer

Alternative Prayer for Leave to Appeal

[63] The Applicant inserts as an 8th and alternative prayer to its sought relief declarator application, an application for an order directing that the Applicant is entitled to file an appeal against the disallowance of the objection dated 13th August 2013 in respect of the VAT periods April 2012 to December 2012 to the Tax Tribunal or to this court within 30 days after grant of the sought order.

It is to this prayer I now seek to turn and to the parties respective contentions in this regard. The crux of the applicants case in this regard is that were the respondents letter dated the 15th April 2015 to stand as a decision on its objection then it is entitled in terms of section 33(1) of the Act to appeal further to the Tax Tribunal and challenge the said decision. In a nutshell the respondents contention in rebuttal is that where such a right of appeal existed it has expired in light of the requirement in terms of section 36 (1) to the effect that such an appeal must be lodged with a Tax Tribunal within 30 days of the Commissioner Generals decision on an objection.

[64] I am satisfied on the facts that the respondent's letter of the 15th April 2015 constitutes a 'decision' albeit an adverse one, against the applicant and its representations on the merits of its objection as disclosed and indicated in its letter dated 17th March 2015 (Annex CH4). In it the Commissioner General conveys in unequivocal terms his decision disallowing the objection and discloses an intention to enforce the collection of the levied VAT liability inclusive of interests and penalties thereon.

[65] On account of this 'decision' it is without question that the applicant was entitled in terms of section 36(1) to lodge an appeal to the Tax Tribunal which is conferred with the statutory authority to reconsider any appeal and representations made by the taxpayer.

The provisions of section 36 warrant recapitulation. The section reads as follows:

"Appeal to the Tax Tribunal

36. (1) A person dissatisfied with an objection decision may, within

30 days after being served with notice of the objection decision, submit a notice of appeal with the Tax Tribunal and serve a copy of the notice of appeal on the Commissioner-General.

(2) The Tribunal may admit an appeal after the expiration of 30 days if it is satisfied that the appellant has a good and sufficient reason for not submitting the notice of appeal within the time specified in subsection (1).

(3) In an appeal to the Tax Tribunal against an objection decision, a person is limited to the grounds set out in the objection, unless the Tribunal grants the person leave to add new grounds.

(4) In deciding an appeal, the Tribunal may make a decision-

(a) affirming, reducing, increasing, or varying the assessment under appeal; or,

(b) remitting the assessment for reconsideration by the Commissioner- General in accordance with the directions of the Tribunal. "

[66] It is common cause that since the promulgation of the Act to date no Tax Tribunal has been appointed. It goes without saying that no such Tribunal was in place at the time of the purported decision by the respondent to disallow the applicants objection. Consequently there was no viable recourse for redress availing the Applicant as envisaged in the Act and as a result it was denied of the very statutory mechanism for ventilating disputes under the legislation. This in my view represents a dire failure of proper administration of justice particularly in light of the absence of recourse to the course to the ordinary courts outside of the specialist tax mechanisms for remedies in the legislation.

[67] I must point out that the mechanism for redress afforded vendors under section 36 are analogous to the procedural and institutional arrangements for appeals to specialist tribunals and ultimately the course under section 33 of the South African VAT Act. Of the comparable mechanism in that country's Act the Constitutional Court had this to say in the Metcash case:

"***The Act calls the proceedings before the Special Court/board (as well as the subsequent resort to a court of law) an appeal. The Commissioner is not a judicial officer and assessments and concomitant decisions by the Commissioner are administrative,***

not judicial, actions; from which it follows that challenges to such actions before the Special Court or board are not appeals in the forensic sense of the word. They are proceedings in terms of a statutory mechanism specially created for the reconsideration of this particular category of administrative decisions and appropriate corrective action by a specialist tribunal.

Then the Court went on to say:

"[33] It is important to have clarity about the effect of the mechanism created by sections 33 and 33A of the Act. Were it not for this special appeal procedure, the avenues for substantive redress available to vendors aggrieved by the rejection of their objections to assessments and decisions by the Commissioner would probably have been common law judicial review as now buttressed by the right to just administrative action under section 33 of the Constitution, and as fleshed out in the Promotion of Administrative Justice Act. Here, however, the Act provides its own special procedure for review of the Commissioner challenged decisions by specialist tribunals. But, and this is crucial to an understanding of this part of the case, the Act nowhere excludes judicial review in the ordinary course. The Act creates a tailor-made mechanism for redressing complaints about the Commissioners decisions, but it leaves intact all other avenues of relief. "

[68] I am in agreement with the above proposition as equally applicable and valid an analysis of the jurisdiction of our High Court in relation to the statutory mechanisms under our VAT Act. Thus the High Court retains its common law powers in its inherent jurisdiction to grant appropriate relief including judicial review of the Commissioner General's decisions and administrative actions which power is reaffirmed under the administrative justice provisions enshrined in section 33 of the Constitution of eSwatini.

[69] In the existing scheme of things outside the judicial review remedy there is no recourse to the taxpayer against a decision or assessment of the Commissioner General on the basis of which such decisions could be challenged as the Tax Tribunal does not exist. Consequently the avenue to appeal to the Court in terms of section 37 of the VAT Act which lies only against a decision of the Tax Tribunal is fictional in light of the non-existence of the Tribunal forum. This state of affairs underscores the prejudice suffered by the applicant in not being availed access to due process and the justice as envisaged by Parliament. It is an abject failure of justice in its basic form.

[70] I am inclined to note that whilst the applicant could not challenge the decision to

disallow its objection the chain of events that have precipitated this application continued in spin culminating in a further decision by the respondent in the form of the enforcement and collection mechanisms referred in the Act as distress proceedings under the respondents section 44 statutory powers. In my view the applicant was equally entitled to challenge this decision in terms of section especially in the light of the absence of a valid assessment in terms of section 33(6) of the Act but again the door was firmly shut in the absence of an appeal process to the Tax Tribunal and ultimately to the court. I am mindful that outside of the statutory remedial procedures and mechanisms applicant could have sought to have the action impugned, reviewed and set aside for want of an antecedent valid tax assessment pre-requisite to triggering the collection procedures, however, this remedy has its limitations in so far as the conventional grounds for review would not address the fundamental question of the VAT tax liability in its fullness on the merits.

[71] All said this leads me to conclude that it would be a failure of justice were the applicant be denied the statutory redress and only avenue availing it to challenge the decisions of the respondent before the appropriate specialist forum under the Act. It would be a travesty in so far as there is no alternative remedy available to this mechanism. As regards the inevitable delays and lapses occasioned by the absence of the institutional framework to operationalize the statutory appeals mechanisms it is clear that section 36(2) of the Act makes adequate provisions to address the issues of delay or lapses by conferring a discretion on the Tax Tribunal to consider and admit a late appeal on good cause shown for the failure in submitting the appeal within the time limits prescribed under the Act. I can think of no better reason than the fact that due to no fault of its own the applicant could not access the Tribunal as none was in place.

Tax Tribunal.

[72] The Act does not define the Tax Tribunal and there are no dedicated provisions for the constitution, appointment and establishment of the Tax Tribunal in the body of the statute or the Revenue Authority Act of 2008. In my view however, this should not serve as an impediment from the appointment of such a specialist Tribunal even on an ad hoc basis to deal with this and or other pending appeals until such time as the framework and creation of a permanent Tribunal is fleshed out and put in place. I think an appropriate order is warranted in this case.

[73] To give pragmatic effect and efficacy to this order it is necessary to make and give an ancillary direction in the form of interim order that the Commissioner

General in accordance with the powers conferred in his august office under the SRA Act to procure the appointment of a tax tribunal and, pending the finalisation of any appeal by the applicant to the tribunal against the decisions of the Commissioner General, interdict and hold over the distress proceedings including the closure and sealing of the applicants business and suspension of his business bank account. This will entail the opening of the business and the unfreezing of the account pending the appeals procedures.

[74] In the circumstances of this matter and for the reasons I have set out above I now make the following orders:

ORDER:

1. The Applicant is granted leave to appeal the decision of the respondent to the Tax Tribunal within 60 days of this order;

2. In the interim and pending the finalisation of the appeals process under the mechanism of the VAT Act;

    2.1. the respondent is interdicted from proceeding with the administrative action for the enforcement of the VAT liability collection in respect of the April 2012 to December 2012 period and directed to lift the seal on and open the applicants business operations at the Shop No.2 Swazi Plaza premises and also to lift the suspension of and unseal the applicants business bank account no 0200 00661709 held at Nedbank (Swd) Ltd; and within 30 days

    2.2. the respondent is ordered and directed to procure the establishment and appointment of an independent tax tribunal to receive and adjudicate the applicants appeal in terms of section 36 of the VAT Act of 2011.

3. The matter is remitted to the Tax Tribunal to hear and determine the matter of the tax proceedings in terms of the provisions of the VAT Act.

4. The respondent is ordered to pay the costs of this application.

MAPHANGA J

Appearances:

For the Applicant : K. Simelane

For the Respondent : Mr. H. Mdladla