



MALTA

**Administrative Review Tribunal
Magistrate
Dr. Gabriella Vella B.A., LL.D.**

Application No. 89/12VG

xxx

Vs

Commissioner for Value Added Tax

Today, 8th January 2019

The Tribunal,

After considering the Application submitted by Xxx on the 7th October 2010 before the Value Added Tax Appeals Board, subsequently transferred before this Tribunal, by means of which he requests that the tax assessments issued against him by the Commissioner for Value Added Tax for tax periods 01.03.08-31.07.08, 01.08.08-31.10.08 and 01.11.08-31.01.09 be reduced as follows: (a) the net sales @ 5% VAT for the above-mentioned tax periods be reduced to €1,221 and consequently VAT due reduced to €61.05 ; and (b) the net sales @ 18% VAT for the above-mentioned tax periods be reduced to €11,764 and consequently VAT due reduced to €2,117.50; with costs against the Commissioner for Value Added Tax;

After considering the documents submitted by the Applicant together with his Application, namely: the tax assessments issued by the Commissioner for Value Added Tax for the tax periods 01.03.08-31.07.08, 01.08.08-31.10.08 and 01.11.08-31.01.09, the calculation of net Output and Input Vat for the period 01.03.08-30.04.09 as calculated by the Applicant/his representative, the summary of sales variance resulting from the estimated sales and declared sales for the same said period also as calculated by the Applicant/his representative and the estimated turnover of the Applicant from his business for the period 01.03.08-30.04.09 as calculated by the Applicant/his representative;

After considering the Reply by the Commissioner for Value Added Tax by means of which he objects to the Applicant's appeal from the tax assessments issued against him for tax periods 01.03.08-31.07.08. 01.08.08-31.10.08 and 01.11.08-31.01.09 and requests that the said appeal be dismissed, with costs against the Applicant, on the grounds that for reasons set out in his decision dated 1st September 2010 the tax

assessments issued against the Applicant for tax periods 01.03.08-30.11.09 are correct and should be confirmed;

After considering the Credit Control Report dated 12th December 2009 submitted by the Commissioner for Value Added Tax together with his Reply;

After hearing testimony by Edward Zammit during the sittings held on the 8th April 2013¹ and on the 11th June 2013², considering documents submitted by him marked Doc. "EZ" at folios 22 to 33 of the records of the proceedings and at folios 45 to 51 of the records of the proceedings and considering the document submitted by the Commissioner for Value Added Tax during the cross-examination of Edward Zammit during the sitting held on the 11th June 2013 at folio 44 of the records of the proceedings, after hearing testimony by the Applicant during the sitting held on the 28th October 2013³ and considering the document submitted by him marked Doc. "JP" at folio 60 of the records of the proceedings, after hearing testimony by Laura Mamo during the sitting held on the 23rd January 2014⁴ and considering the exhibits submitted by her marked as Doc. "LM" at folio 71 of the records of the proceedings, after hearing testimony by Caroline Zammit during the sitting held on the 23rd June 2014⁵, by Roderick Vella during the sitting held on the 27th November 2014⁶ and by Jesmar Bilocca during the sittings held on the 27th April 2015⁷, 28th May 2015⁸ and 5th November 2015⁹ and considering the documents submitted by the Commissioner for Value Added Tax by means of a Note filed on the 13th November 2015 at folios 112 to 114 of the records of the proceedings, and after considering the Review Report dated 11th August 2010 submitted by the Commissioner of Revenue by means of a Note filed on the 2nd January at folios 141 to 150 of the records of the proceedings;

After considering the Note of Submissions filed by the Applicant at folios 117 to 120 of the records of the proceedings and the Reply filed by the Commissioner for Value Added Tax at folios 125 to 131 of the records of the proceedings;

After hearing final oral submissions by the parties;

Considers:

By means of tax assessments issued by the Commissioner for Value Added Tax for tax periods 01.03.08-31.07.08, 01.08.08-30.10.08 and 01.11.08-31.01.09¹⁰, the

¹ Folios 34 to 42 of the records of the proceedings.

² Folios 52 to 57 of the records of the proceedings.

³ Folios 61 to 69 of the records of the proceedings.

⁴ Folios 72 to 75 of the records of the proceedings.

⁵ Folios 84 to 87 of the records of the proceedings.

⁶ Folios 89 and 90 of the records of the proceedings.

⁷ Folios 100 and 101 of the records of the proceedings.

⁸ Folios 103 to 106 of the records of the proceedings.

⁹ Folios 108 to 111 of the records of the proceedings.

¹⁰ Folios 23 to 25 of the records of the proceedings.

Applicant is being requested to pay the following amounts: the total sum of **€4,594.88** representing value added tax due during the said tax periods, the total sum of **€918.97** representing administrative penalties and the total sum of **€585.06** representing interest. The Applicant felt aggrieved by these tax assessments and lodged an appeal therefrom before the Value Added Appeals Board, subsequently transferred to this Tribunal, requesting that the said tax assessments be reduced as follows: (a) the net sales @ 5% VAT for the above-mentioned tax periods be reduced to €1,221 and consequently VAT due reduced to €61.05; and (b) the net sales @ 18% VAT for the same said above-mentioned tax periods be reduced to €11,764 and consequently VAT due reduced to €2,117.50.

The Applicant finds his appeal on the following grounds: *vatable sales have been erroneously reported EXEMPT. Attached report of estimated sales analysis submitted to the Commissioner of VAT setting out the under-declaration of sales from EXEMPT to vatable at 5% and 18% net sales of €1,221 and €11,764 respectively. The allocations of unallocated sales by the Commissioner are excessive¹¹.*

The Commissioner for Value Added Tax, today the Commissioner for Revenue, objects to the Applicant's appeal from the tax assessments issued against him for tax periods 01.03.08-31.07.08, 01.08.08-31.10.08 and 01.11.08-31.01.09 and requests that the same be dismissed on the ground that as per reasons set out in his decision dated 1st September 2010, the tax assessments issued against the Applicant for tax periods 01.03.08-30.11.09 are correct and should be confirmed.

From the evidence submitted during the hearing of these proceedings, in particular from the Review Report dated 11th August 2010¹² and from the letter by the Commissioner for Value Added Tax addressed to the Applicant dated 17th August 2010¹³, it transpires that the Commissioner for Value Added Tax had issued **provisional assessments** against the Applicant for tax periods 01.03.08-31.07.08, 01.08.08-31.10.08, 01.11.08-31.01.09 and 01.11.09-30.11.09. Following a request for Review by the Applicant the following was concluded: *the provisional assessment for the VAT amount of €2,677.50 for the period 01-Nov-09 to 30-Nov-09 has been confirmed without applying the administrative penalty, in order to reverse completely the said return. The other three provisional assessments for the periods 01-Mar-08 to 31-Jul-08, 01-Aug-08 to 31-Oct-08 and 01-Nov-08 to 31-Jan-09 have been confirmed without exception. Reason being that the results of the various methods applied, including the one provided by your self, on which 50% discount has been applied, are very close. Consequently the global amount of the provisional assessment has remained the same, that is, €7,262.38, excluding interest and penalties.*

The Commissioner for Value Added Tax issued the tax assessments forming the merits of these proceedings, that is tax assessments for tax periods 01.03.08-31.07.08, 01.08.08-31.10.08 and 01.11.08-31.01.09, following a Credit Control

¹¹ Vide Application submitted by the Applicant on the 7th October 2010.

¹² Folios 141 to 150 of the records of the proceedings.

¹³ Folio 50 of the records of the proceedings.

Exercise which was initiated following a request for de-registration submitted by the Applicant on the 5th November 2009. The Credit Control Exercise was carried out with regard to the Applicant's claims for input vat on capital goods, purchases for re-sale, services and overheads and the VAT Inspectors charged with the said Credit Control Exercise considered and concluded the following:

Taxpayer was asked to produce the Purchases Ledgers and related Tax Invoices for tax returns covering period: 01/03/08-31/07/08, 01/08/08-31/10/08, 01.11.08-31.01.09. No physical visit onsite was carried out. Stock: Taxpayer was asked to produce a list of the closing stock. It transpired that the closing stock mainly consisted of printed matter which attracts a vat rate of 5%. Adding to this it was also noted that the closing stock of goods @ 18% totals to an insignificant amount. Sale Analysis: Taxpayer was enquired re low sales. Mr. Xxx explained that he decided to close his business way back in April 2009 and sold most part of the goods for re-sale at a price lower than the cost price. Mr. Xxx was asked to prove the aforementioned statement, however he replied that he is unable to do so. The P&Ls for year 2009 & 2010 were produced. Upon cross checking P&Ls with the vat returns it transpired that there are some discrepancies. The hereunder table illustrates the data presented to the Vat Department.

	Vat Return	P&L	Discrepancy
Sales	118203.41	116166	(plus)2037.41
Purchases	106825.04	105851	(plus)974

After an examination of the EU global return it was established that the ratios are as follows: i) Purchases for re-sale @ 18% -47.05%; ii) Purchases for re-sale @ 0% +48.06%.

A reasonable markup for this type of business is 14% on taxable goods and 10% on exempt goods as suggested in a similar file no. 1882-0506 at Red 8. The taxpayer was asked to produce all purchase invoices related to mobile cards and cigarettes which attract a different mark-up; 5% and 3% respectively. Mr. Xxx submitted only one invoice of mobile cards with a gross amount of €249.37 (vide Red 28b).

Workings re sales:

Taxable Goods @ 18%

Start Date	Purchases	Mark up	Deemed Sales	Declared Sales	Difference	Vat Due
01/03/2008	21856.72	14%	24916.66	10744.86		
01/03/2008	201.27	5%	211.33	211.33		
Total for 01/03/2008	22057.99		25127.99	10956.19	14171.8	2550.92

01/08/2008	9132.09	14%	10410.58	3236.01	7174.57	1291.42
01/11/2008	4258.48	14%	4854.67	2029.72	2824.95	508.49

Capital Goods Analysis: The ledgers were checked and it was verified that the vat amounts tally with those declared in the vat return. The capital goods consisted of chest freezers, IT equipment, air conditioners, furniture & fittings.

Services and Overheads: The ledgers were checked and it was verified that the Vat amounts tally with those declared in the vat return. The services and overheads checked were found to be correct, directly relating to the activity. The expenses have been found to be professional fees, telephone bills and stationery amongst other things. A 100% check of services and overheads invoices was carried out. It was noted that two invoices issued by water services pertains to another person.

Intra-community acquisitions: No intra-community acquisitions have been declared in the vat returns covering the periods under investigation. The Vies system has been checked and it transpired that no amounts have been recorded in the respective quarters.

Purchases for re-sale: The ledgers were checked and it was verified that the vat amounts tally with those declared in the vat return. A 100% check of the purchases invoices for re-sale was carried out and it was noted that three vat amounts were wrongly recored.

Recommendation: In view of the above stated, it is recommended that file should be monitored to check if taxpayer declared the adjustment in favour of the Vat Department with regard to closing stock and to capital goods as per LN 318/04. Furthermore, provisional assessments should be issued as follows:

Period	VAT (€)
01/03/2008-31/07/2008	2550.92 re taxable sales
01/08/2008-31/10/2008	56.57 Purchases for re-sale (recorded wrong amounts)
01/08/2008-31/10/2008	1291.42 re taxable sales
Total	1347.99
01/11/2008-31/01/2009	183.48 Expenses (invoices bear a different name)
01/11/2008-31/01/2009	4.00 Purchases for re-sale (recorded wrong amounts)
01/11/2008-31/01/2009	508.49 re taxable sales
Total	695.97

From a proper analysis of the Applicant's appeal, of evidence submitted by him, namely the testimony by Edward Zammit, and of the submissions put forth, it clearly transpires that the Applicant is contesting that part of the assessments concerning sales of vatable goods, that is he is **contesting the Output VAT element of the said assessments**. From a proper analysis of the Credit Control

Report it clearly transpires that the Commissioner for Value Added Tax **limited the Credit Control Exercise to the sales of taxable goods @ 18%**.

From testimony by Roderick Vella during the sitting held on the 27th November 2014¹⁴ and testimony by Jesmar Bilocca during the sittings held on the 27th April 2015¹⁵, 28th May 2015¹⁶ and 5th November 2015¹⁷, it transpires that the Commissioner for Value Added Tax calculated tax due on sales of taxable goods @ 18% for the tax periods in issue, that is 01.03.08-31.07.08, 01.08.08-31.10.08 and 01.11.08-31.01.09, by applying a **14% mark-up** on taxable goods @ 18%, which mark-up according to the Commissioner is reasonable for this type of business, and a 5% mark-up on sales of mobile cards to the relative **declared purchases** during the said periods, thereby determining the figure of **deemed sales** which were then compared to the **sales declared** in the Vat Returns for the same periods resulting in **undeclared sales of taxable goods @ 18%** and consequent **under-declared Output Vat** of €2550.92 for tax period 01.03.08-31.07.08, €1,291.42 for tax period 01.08.08-31.10.08 and of €508.59 for tax period 01.11.08-31.01.09.

From testimony given by Edward Zammit¹⁸, the Applicant's representative during the Department's investigation in his regard, and from the workings submitted by him¹⁹, it transpires that the said Edward Zammit for the Applicant acknowledges and accepts the **methodology** used by the Commissioner for Value Added Tax to determine the sales for the tax periods in issue, however he argues that the ultimate results reached by the Commissioner are **excessive, when compared to the Applicant's particular circumstances**.

When testifying during the sitting held on the 8th April 2013²⁰, Edward Zammit explained his workings in the following manner: *having gone through the exercise of numbers because at the end of the day it was a question of VAT office sending e-mails and accompanying spreadsheets to Mr. Xxx and we prepared a spreadsheet ourselves, which I am sure you have a copy of, were we had to. We knew what he bought, that was no problem, the purchases were there but it was a question of establishing his sales, his turnover. The values which were stated in his VAT return matched his records. The only thing was that his split for VAT between 0%, 5% and 18% was wrong. He coded most of his sales as exempt, zero VAT. So with let's say the discussion we had at the VAT office was, let's work backwards, let's try to estimate the possible sales at 0%, at 5% and at 18%. It could be done because the purchases themselves indicate whether at 0, 5 or 18. So working from that basis we could extrapolate the sales. So in my exercise what I did was, first we established the amount of purchases at 0, at 5 and at 18, then we agreed with the VAT office (agreed let's say there was like a consensus that a certain margin had to be applied) and there was an assumption made that there was a percentage*

¹⁴ Folios 89 and 90 of the records of the proceedings.

¹⁵ Folios 100 and 101 of the records of the proceedings.

¹⁶ Folios 103 to 106 of the records of the proceedings.

¹⁷ Folios 108 to 111 of the records of the proceedings.

¹⁸ Vide testimony given during the sittings held on the 8th April 2013, folios 34 to 42 of the records of the proceedings, and on the 11th June 2013, folios 52 to 57 of the records of the proceedings.

¹⁹ Folio 27 of the records of the proceedings.

²⁰ Folios 34 to 41 of the records of the proceedings.

markup on those purchases. Obviously with that markup we came up with sales values and the respective VAT due. One has to bear in mind one thing though, that when Mr. Xxx punched/registered his sales (whatever they are) the amount of money he keyed was the amount of money he received. So one difficulty was that no matter what the retail price of that product should have been, Mr. Xxx did not sell it at that proper price. So no matter how much one would say a product should have been sold for €2 when he bought it for €1 and he sold it for €1.5, no one in my opinion can claim that the proper VAT has to be paid on the proper retail price. In my opinion, this is a personal opinion, that the VAT due is on what Mr. Xxx actually received. ... This schedule which I called estimated turnover for the period 1st March 2008 to 30th April 2009²¹. In drawing up this schedule a major assumption was made. The assumption is that all purchases were correctly reported for VAT in the sense that the amount of purchases actually reported in VAT returns, in total they were correct. It is even the VAT content so much so that he, Mr. Xxx had credits and the VAT department actually paid him I think 1 or 2 cheques I don't know. The second assumption was that the markups were 25% on exempt goods, 20% on 5% VAT goods and 35% on 18% vatable goods. ... These markups were actually re-established after sampling of documents which Mr. Xxx provided as with. It was a sample, not a huge sample but not a small sample either, of different suppliers and we established an average sort of from each supply. As far as I know, as far as I recollect, the VAT inspector did not remark about those percentages. ... In terms of calculations all we have here the purchases which were actually declared in VAT returns as declared, we mark them up (percentage markup on purchases), once the markup was established we establish the selling price which we estimated a selling price which brings up a total of 77,791, the VAT content thereto and the sales which estimated would add up to, sorry; the sales here is what he declared, the €50,718 for the first period is what Mr. Xxx declared in his VAT return and as you can see in terms of exempt goods 38,929 he declared them as exempt, zero VAT. When we compared that actual declaration to our estimation he get the variance. The variance on exempt goods for instance, he over declared in this case 5,328 sales which shouldn't have been coded as exempt. On the 5% there was an extra 146, on the 18% he under declared 3,388 under, this is under. We did this for each period. At the end of the day, the total turnover which was estimated amounted to 18,827 total sales and the VAT content on that should have been 5,647. When a net result against what he should have claimed for purchases, my net was 986 (net due to the VAT office. In summary, if we go to this next page this is why I have to make some explanations. I need to explain this now. Mr. Xxx was running his business at a loss. He knew it and there was a time in I think 2011 or 2010, he decided to sell as much as he could because he had too many debts to pay, he couldn't pay off his debtors/his suppliers. So he just decided he had to sell as much as he could of his stock at a 50% discount, at least that's what Mr. Xxx told me and that's what Mr. Xxx told the VAT inspector as well. So in this second page analysis for the whole period you will find that there are 2 amounts were I had to write these did not materialise. So Mr. Xxx declared €15,164 worth of sales where they shouldn't have been completely exempt the 15,000. 5% and 18% there was a value of 3,617 and 30,374

²¹ Folio 27 of the records of the proceedings.

sales which were supposed to happen but they did not happen. ... Mr. Xxx was not selling. The stock was there but he didn't sell. So what happened was that the VAT content on the right totalling 5,647 could not possibly be VAT due and the reasoning is this. The only item out of all these sales which really materialised in our opinion and in Mr. Xxx opinion is the 15,164. That 15,164 at the bottom you have a schedule. That was split by ... how much of that value really should have been at 5% and at 18%, we remember that he coded this all as exempt so as such the end result would be that the VAT due which Mr. Xxx owes in respect of these sales is 2,179.

After explaining his workings regarding deemed sales - which, it is being reiterated, follow the same methodology adopted by the Commissioner for Value Added Tax with the difference that the mark-up applied by Edward Zammit to sales of taxable goods at 18% is of 25% and not 14% as applied by the Commissioner - Edward Zammit proceeded to explain why in his opinion the Applicant cannot be taxed on the basis of deemed sales. In this regard he declared that: *during the discussion with the VAT office, it was agreed, both sides agreed, that there was an element of fifteen thousand, one hundred sixty four euro worth of sales which was a projected figure and there was no doubt about that, both sides agreed about it. The only difference was that the VAT department deemed that value was all sales at a rate of 5 per cent and at part eighteen per cent because of the reallocation from exempt to taxable and that is the split we have here. The only thing is that the split in the five per cent and eighteen per cent, Mr. Paulson confirmed it to me, I had no way of confirming it myself but Mr. Paulson declared to me that in no way those sales were actually materialised. It is a projected figure because it was established from purchases jgifieri this figure was projected out of purchases. He did buy the stock, he did buy, it is there and the VAT office confirmed it, they had seen the invoices. The only thing is that they were not sold at that value. He decided to dispose of the stock had by cutting it down by fifty per cent. But this figure does not include these sales. ... These discounted sales. This is where the VAT department and the tax payer and myself disagreed²².*

In answer to the question *in coming to the assessments, the department based itself on the assumptions?* Edward Zammit replied in the affirmative and in answer to the question *can you identify which assumptions?* he declared: *Well these assumptions are, first of all Mr. Paulson didn't have all the documentation ok, in terms of purchases he did, but in terms of sales we had to go by with the VAT returns declared and the cash register readings, the X readings, però when it comes to sales, since there was this error in the calculation of the price itself, even in the price tag on the shelve was wrongly, one had to go back to assumptions that the cost of the product from the supplier is according to the document, to the invoice but then as far as sales, as far as the mark up, one had to go by an assumption that on average Mr. Paulson marked up his product in an average, I mean if I remember correctly, exempt sales at twenty five per cent and five per cent sales at, il-kumplament ma niftakarx, but there were assumptions. Initially these*

²² Vide testimony under cross-examination during the sitting held on the 11th June 2013, folios 52 to 57 of the records of the proceedings.

assumptions were made to establish the mark ups which the VAT inspector, VAT officer tended to agree. There was a time when he said probably it should be a bit lower. Fine, if it was lower it was ... but at the end of the day there was a talk of fourteen per cent mark up, when I had calculated them twenty-five per cent mark up, but this is all let us say a question of opinions. ... The other thing was and I wrote it down that these sales which the VAT department was deeming and understated. I insisted that it was understated and never materialised and in their calculations they actually added VAT on top of it and in real terms the value of understatement, let's say fictitious understatement included VAT itself. It is not a question of sales plus VAT but sales inclusive of VAT, but again that is something which I insisted it did not happen²³.

From this testimony it transpires that the arguments put forth by the Applicant in support of his claim that the tax assessments issued by the Commissioner for Value Added Tax with regard to Output Vat are excessive, are: (i) when pricing his goods he erroneously quoted the Malta Lira figure as Euro, thus selling his goods at below-market values; (ii) since business was not going as expected he sold most of his goods at substantially reduced prices, in most cases applying a discount of up to 50%; and (iii) he erroneously inputted non-exempt items as exempt items.

The Applicant reiterates these arguments in his Note of Submissions, wherein he submits that: *the appellant exercised effective managements and control of his business JP Self Service. This business was situated within Xitwa Street in San Pawl il-Bahar and its principal economic activity was that of supply of goods involving food stuff. The appellant started making supplies of goods in March 2008 and was registered under Article 10 of the VAT Act within thirty days from the date on which supplies for a consideration started to take place. **The prices in Euros of the goods for resale wrongly reflected the Maltese Liri prices on the purchase invoices**²⁴. This confusion stemmed from the fact that the purchases invoices had prices both in Maltese liri and also in Euros. During these tax periods, **the declared sales were misallocated by the cash register as zero rated supplies, even though they were meant respectively to be taxable supplies at the standard rate of 18% and at the reduced rate of 5%. The inputted sales prices aslo did not reflect the retail price of the goods sold. This is because of rebates and other price reductions allowed directly by the appellant to the customer**²⁵.*

In his Note of Submissions the further Applicant argues that: *whereas Item 2(2) of the Ninth Schedule to the VAT Act provides that in VAT appeals ex officio assessments not involving any criminal charges (AB v. Kummissarju tat-Taxxa (Rikors No. 99/14AG) “the onus of proving that any taxable value assessed by the Commissioner is excessive ... shall lie on the appellant”. However, as held by this Honourable Tribunal in an analogous case XXX v. Kummissarju tat-Taxxi Interni*

²³ Vide testimony under cross-examination during the sitting held on the 11th June 2013, folios 52 to 57 of the records of the proceedings.

²⁴ Emphasis by the Tribunal.

²⁵ Emphasis by the Tribunal. Para 1.1 to 1.3 of the Applicant's Note of Submission, folio 117 of the records of the proceedings.

(Rikors No. 17/11VG) this burden may be shifted where an ex officio assessment issued vis-à-vis the taxpayer is not reasonable. This provision should also be interpreted in the ambit of principles of good administrative behaviour, which in terms of Article 3(2)(c) of the Administrative Justice Act provides inter alia that “an administrative tribunal shall ensure that there shall be procedural equality between the parties to the proceedings.” Therefore, where the normative standard of proof yields an excessive burden on the appellant in light of uncertainty; a prima facie proof is not enough to shift the burden onto the Commissioner in terms of the legal maxim reus in excipiendo fit actor²⁶.

The Tribunal however is of the opinion that in the light of the particular circumstances of this case it is the Applicant who bears the main onus of proof that is, the onus of proving that the tax assessments issued by the Commissioner for Value Added Tax for the periods 01.03.08-31.07.08, 01.08.08-31.10.08 and 01.11.08-31.01.09 are excessive.

The Tribunal reiterates that from the records of the proceedings and evidence submitted it transpires that the Commissioner for Value Added Tax determined the deemed sales on the basis of purchases as declared by the Applicant and the Applicant’s representative, Edward Zammit, acknowledges and accepts the methodology used by the Commissioner in order to determine the deemed sales and indeed applies a higher mark-up than that applied by the Commissioner. Once it is the Applicant who, against this scenario, claims that the end result of deemed sales cannot apply in his case because of a number of reasons pertinent to his business, it is necessarily follows that he must prove to a satisfactory degree his claims and arguments against the deemed sales as determined by the Commissioner and the subsequent tax assessments as issued against him by the Commissioner.

The Tribunal is of the opinion that the Applicant did not manage to satisfy the onus of proof with which he is burdened in this case. Even though he claims to have erroneously priced his goods he did not put forth any tangible proof of this bar the testimony by Edward Zammit who however clearly emphasised that *I was never his accountant, he had another two people before who carried out all the book keeping so our task was very much limited to what the client presented us with, in the sense that he had spreadsheets, paperwork...*²⁷ Similarly the Applicant did not satisfactorily prove that he was selling his goods at prices which did not reflect the real market price and at substantially discounted prices, in most cases even at a 50% discount. Even though during the sitting held on the 23rd January 2014, the Applicant summoned as a witness Laura Mamo²⁸, purportedly one of his customers during the periods in issue, the Tribunal deems that her testimony is not sufficient and neither does it qualify as the best evidence which the Applicant could produce. The Applicant tries to justify his total lack of sufficient and satisfactory evidence in support of his claims on the grounds that his laptop, where he claims to have kept all his trade records, was stolen during a burglary at his business premises. Even though the theft of this laptop is supported by a Police Incident Report exhibited as

²⁶ Para. 2.1 to 2.4 of the Applicant’s Note of Submissions, folio 118 of the records of the proceedings.

²⁷ Vide testimony given during the sitting held on the 8th April 2013, folios 42 of the records of the proceedings.

²⁸ Folios 72 to 75 of the records of the proceedings.

Doc. "JP" a folios 59 and 60 of the records of the proceedings, the Tribunal notes that the report was lodged on the 1st October 2008, which means that if the Applicant really lost all trade records up until that date, he was duty and legally bound to retain trade records of the periods following the 1st October 2008, which periods, at least up until the 31st January 2009, form the basis of the tax assessments issued against and the merits of these proceedings, but for reasons known only to the Applicant these trade records were not provided to the Commissioner for Value Added Tax and neither have they been submitted in the records of these proceedings.

In so far as concerns the Applicant's claim that he was selling his goods at substantially discounted prices, in most cases at a 50% discount, and that he erroneously inputted vatable sales as exempt sales, the Tribunal refers to the findings by the Review Officer Jesmar Bilocca in his Review Report, namely that: *with regards to the other provisional assessments (i.e. the assessments for tax periods 01.03.08-31.07.08, 01.08.08-31.10.08 and 01.11.08-31.01.09) Mr. Xxx stated that he declared all the output VAT in his declarations according to law. Mr. Xxx was asked to provide the departments with data to work out the mark-up percentages, but he could not provide us with such data because , way back in October 2008, had his laptop, containing the date, including stock movement and selling prices, stolen ... and since then did not keep such records. Despite the latter, Mr. Zammit produced projections based on the mark-ups provided by Mr. Xxx and worked out the difference between the result of the projections and the sales actually declared according to the VAT returns. The result showed €15,164 over declaration of exempt sales, and €3,617 and €26,672 under declaration of taxable sales at 5% and 18% respectively. Hence the under declaration of taxable sales is made up of two elements: (1) the wrong allocation of sales as reflected in the over declaration of exempt sales; and (2) the actual under declared sales. Nevertheless the accountant reallocated the over declared exempt sales to taxable goods but ignored the remaining difference of the under declared taxable sales. As note in the workings produced by Mr. Edward Zammit, during the period Feb 09 to May 09, taxable goods, which were slow moving, were sold at a discount of 50%. This, however, has not been taken into account directly in the workings of the accountant, hence the result of the VAT still due on taxable sales post the re-allocation amounted to €2,179. In order to analyse the whole picture, using the same mark-ups provided by Mr. Zammit, the 50% discount has been applied on the purchases at 18% declared in the tax periods starting 01-Nov-08 and 01-Feb-09, as an allowance for stock purchased prior to Feb-09. Vat due on under-declared sales at 18% amounted to €4,388.15, that is close to the aggregate amount of the provisional assessments for under declared sales, which is €4,250.83.*

From the findings of the Review Officer it clearly results that the Commissioner for Value Added Tax accepted, and still accepts, the re-allocation of the over declared exempt sales as worked out by Edward Zammit but argued, and still argues, that the resulting under-declared sales for the tax periods in issue, **which under-declared sales are the crux of these proceedings**, cannot be ignored and simply written off in the way Edward Zammit did but must be duly addressed and justified, something which the Applicant failed and persistently fails to do. It also clearly

results that when applying a 50% discount as claimed by the Applicant, even though such substantial discounts were not duly proven by him, the end result did not vary by much from the provisional assessments thus not providing any reason why the provisional assessments had to be reviewed, revised or revoked.

During the hearing of these proceedings the Applicant did not submit any evidence which satisfactorily disproves, contrasts or contradicts the observations made and conclusions reached by the Review Officer Jesmar Bilocca and consequently he did not satisfactorily show that the tax assessments issued against him by the Commissioner for Value Added Tax for tax periods 01.03.08-31.07.08, 01.08.08-31.10.08 and 01.11.08-31.01.09 are excessive.

Following the above considerations the Tribunal is of the opinion that the appeal lodged by the Applicant from the tax assessments issued against him by the Commissioner for Value Added Tax for tax periods 01.03.08-31.07.08, 01.08.08-31.10.08 and 01.11.08-31.01.09 is unfounded and therefore cannot be upheld.

For all of the above-mentioned reasons, the Tribunal dismisses the appeal lodged by the Applicant from the tax assessments issued against him by the Commissioner for Value Added Tax for tax periods 01.03.08-31.07.08, 01.08.08-31.10.08 and 01.11.08-31.01.09, and instead confirms the above-mentioned tax assessments.

Costs are to be borne entirely by the Applicant.

In terms of Sections 2(4) of the Ninth Schedule of Chapter 406 of the Laws of Malta, the Tribunal orders that a copy of this judgement be served on the Applicant.

MAGISTRATE

DEPUTY REGISTRAR