

**IN THE HIGH COURT OF ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Commercial Jurisdiction)**

2010/HPC/668

**IN THE MATTER OF: OF AN APPEAL FROM THE REVENUE APPEALS
TRIBUNAL PURSUANT TO THE PROVISIONS OF
THE REVENUE APPEALS TRIBUNAL ACT NO. 11
OF 1998**

**IN THE MATTER OF: THE CUSTOMS AND EXCISE ACT CHAPTER 322
VOLUME 18 OF THE LAWS OF ZAMBIA**

BETWEEN:

**CELTEL ZAMBIA LIMITED
(T/A ZAIN ZAMBIA)**

APPELLANT

AND

ZAMBIA REVENUE AUTHORITY

RESPONDENT

**Before the Hon. Mr. Justice A.M. Wood in Chambers this 16th day of
May 2011**

**For the Appellant: Mr. Eric Silwamba SC of Messrs. Eric
Silwamba & Company**

For the Respondent: Mrs. D.B. Goramota - Legal Counsel

JUDGMENT

Cases referred to:

- 1. IRC v Gittus (1920) KB 563**
- 2. Lord Suffield's V IRC (1908) IK.B. 865**
- 3. RV Wellington Income Tax General Commissioners Exp The
Tribunal V. Fysh (Inspector of Taxes) (1962) 40 TC225**
- 4. RE Althunley (1898) 2QB 551**

5. James v. Inland Revenue Commissioners (1977) 2 ALL ER 897

Legislation referred to:

- 1. The Customs and Excise Act Cap. 322**
- 2. The Zambia Revenue Authority Act Cap. 321, Section 11**
- 3. The Interpretation and General Provisions Act Cap. 2**

Works referred to:

- 1. Francis Bennion's Statutory Interpretation, 3rd Edition, pages 351 and 554**
- 2. Halsbury's Laws of England Volume 44(1) paragraph 1186**
- 3. G.C. Thornton's Legislative Drafting, page 400**

This is an appeal by the Appellant against the decision of the Revenue Appeals Tribunal dismissing its appeal against the Respondent's decision to charge, levy and collect Excise duty on talk-time in the absence of an inducing provision in the **Customs and Excise Act Cap. 322**, its decision not to adjust the valuation of voice calls to exclude any discounts given to the Appellant's customers and also its decision not to allow the Appellant have the funds erroneously paid to the Respondent with respect to Data Transmission Services.

The Respondent has cross-appealed on the ground that the Revenue Appeals Tribunal erred in law when it held that it would be unjust enrichment for the Respondent to keep the money and ordered that the Appellant and the Respondent should with the involvement of the regulator, Zambia Information and Communications Technology Authority (ZICTA), find modalities of how consumers could be compensated for their tax which was erroneously levied and collected from them from 2004 to 2008.

The Appellant has filed three grounds of appeal. The first is that the Revenue Appeals Tribunal erred in law when it held that the Seventh Schedule of the Customs and Excise Act, Chapter 322 of the Laws of Zambia formed an integral part of the Act even in the absence of an inducing section. In the alternative, the Revenue Appeals Tribunal erred in law when it failed to pronounce itself on the effect of the Customs and Excise (Amendment) Act No. 2 of 2009.

The second ground of appeal is that the Tribunal exceeded its jurisdiction and erred in law when it held that the refund of the Excise duty wrongly levied and collected by the Zambia Revenue Authority from the Appellant be superintended by the Zambia Information and Communications Technology Authority (“ZICTA”) instead of leaving the overpaid tax to the Appellant’s discretion.

The third ground of appeal is that the Tribunal erred in law and fact when it held that the discount offered by the Appellant to the distributor amounted to a distribution cost and a profit for the distributors, thus the Tribunal misdirected itself in its interpretation of the taxable value of the talk-time where the Appellant had granted discounts on the talk-time to its customers.

The background leading to this appeal before the Revenue Appeals Tribunal was that at some point the Appellant came to the realization that it had been over-paying excise duty on its mobile telecommunication services due to an erroneous interpretation of the provisions of the Customs and Excise Act on the part of the Respondent. According to the Appellant, the aggregation of the gross value of the airtime (or talk-time) for both voice calls and data transfer services purposes of computing excise duty gave rise to the overpayment of excise duty by the Appellant.

State Counsel Silwamba has with respect to Ground one argued that the Tribunal erred in law in holding that a Schedule to a statute can exist in a statute without an inducing section. This was even after the Respondent conceded to amending the Customs and Excise Act by the Customs and Excise (Amendment) Act No. 2 of 2009, to specifically provide for an inducing section to anchor the seventh schedule to the Customs and Excise Act.

As an alternative argument he argued that the Tribunal failed to adjudicate or address the Appellant's strong argument as to why the Respondent found it fit to amend the provisions of the Customs and Excise Act mid-stream during the proceedings of the Appellant's internal appellate process if indeed it was convinced that a Schedule could exist without an inducing section. He submitted that it was an error not to have an inducing section and the Tribunal should have proceeded to hold that the Seventh Schedule to the Customs and Excise Act as it existed then could not be used to legally levy customs duty on airtime. His submission was fortified by the fact that immediately the Appellant raised the issue of the illegality of the Seventh Schedule as the basis of levying excise duty, the Respondent promptly caused an amendment to be made to the provisions of the Customs and Excise Act to introduce an inducing section through the provisions of Section 3 of the Customs and Excise (Amendment) Act No. 2 of 2009. Section 3 of Act No. 2 of 2009 introduced a new section in the Customs and Excise Act which now provides for section 88B as the inducing section to the Seventh Schedule. Section 3 provides as follows:

“3. The principal Act is amended -

- (a) by the insertion immediately after section eighty-eight A of the following new section:**

88B. the value for the purpose of assessing the amount of excise duty payable on services rendered in Zambia shall be

determined in accordance with the Seventh Schedule to this Act; and

(b) by the renumbering of section *eighty-eight B as eighty-eight c.*"

The mere fact the Respondent through the Executive and Legislature found it imperative to amend the law illustrated the point that the Appellant submitted to the Tribunal that the Seventh Schedule as it stood without an inducing section was illegal. There was a mischief which the Legislature intended to rectify. The mischief that the Respondent was trying to rectify through the legislature was the illegality and invalidity of the Seventh Schedule. This was also supported by the Parliamentary Speech of the Honourable Minister of Finance and National Planning in which he cited ambiguity as reasons for introducing the Customs and Excise (Amendment) Act No. 2 of 2009.

He submitted before the Tribunal that the decision to amend the Customs and Excise (Amendment) Act No. 2 of 2009 was mischievously done way after the Appellant had engaged the Respondent in the internal appellate process raising the two arguments of the definition of talk time and the absence of an enabling section for the Seventh Schedule. The Respondent effective 1st April, 2009 proceeded to amend the Customs and Excise Act by the Customs and Excise (Amendment) Act No. 2 of 2009 as follows:

4. Section *one hundred and thirty nine A* of the principal Act is amended by –

- (a) the deletion of the definition of “talk time”; and
- (b) the insertion in the appropriate place of the following new definition:
“airtime” means the minutes of voice calls, short message service (SMS), multi media service (MMS) or such other service as a subscriber may consume through a mobile cellular telephone.

5. Section *one hundred and thirty nine G* of the principal Act is amended by the deletion of the words “talk time” wherever they appear and the substitution therefor of the words “air time.”

6. Section *one hundred and thirty nine M* of the principal Act is amended by the deletion of the words “talk time” wherever they appear and the substitution therefor of the words “air time”.

12. The principal Act is amended by the repeal of the Seventh Schedule and the substitution therefor of the Seventh Schedule set out in Appendix IV to this Act”.

Although Counsel for the Respondent submitted that there was no rule or law which prevented Parliament from amending the law at any time, the only inference that can be drawn from the circumstances of this case is that the legislature noticed that there was a defect in the law which needed to be corrected. The amendments were only made when the issue of the definition of “talk time” and the inducing section were raised. I therefore agree with State Counsel Silwamba that these amendments were made as a direct result of these issues being raised with the Respondent. The issue as I see it goes further. The issue is whether in view of this apparent admission by the Respondent and the Legislature, the claim for excise duty was null and void and of no legal effect.

Francis Bennion on **Statutory Interpretation, 3rd Edition (1)** when dealing semantic obscurity and the ‘corrected version’ states as follows at page 351:

“When the text is thus semantically obscure, the interpreter’s first task is to remedy the obscure, by notionally putting the words into the grammatical form most likely to have been intended (the ‘correct version’). This may be straight forward

when the error is a simple one such as the mere transposition of words. Often the task may be very difficult, but it still has to be done. Then, having arrived at the corrected version, the interpreter goes on to apply the interpretative criteria to it in the usual way.

Example 155.1 Section 10(2) of the House of Commons Disqualification Act 1975 says that the enactments ‘specified in Sch 4 to this Act’ are repealed. The Act contains no Sch 4. It does however have Sch 3, which is headed ‘Repeals’. Other internal evidence confirms that Sch 3 is the one intended. The court will not frustrate Parliament’s intention by applying the literal meaning of s10 (2). Instead it will apply a corrected version referring to the enactments ‘specified in Sch 3.’

At page 554 Bennion states as follows:

“inducing words A Schedule is attached to the body of the Act by appropriate words in one of the sections (known as inducing words). In the margin at the head of the Schedule the inducing section or sections are specified. Occasionally, an error is made in doing this, but that does not affect the validity of the Schedule.

Example 241.3 In the official version of the Crown Proceedings Act 1947, the head of Sch 1 omits a reference to one of the inducing sections, s13.

It was formerly the practice for the inducing words to say that the Schedule was to be construed and have effect as part of the Act. This is no longer done, being regarded as unnecessary. If by mischance the inducing words were

omitted, the Schedule would still form part of the Act if that was the apparent intention.”

At page 555 Bennion quotes Lord Sterndale who held in ***IRC v Gittus (1)*** at page 576 that:

“As to conflicts between a Schedule and the inducing section: ‘If the Act says that the Schedule is to be used for a certain purpose and the heading of the part of the Schedule in question shows that it is prima facie at any rate devoted to that purpose, then you must read the Act and the Schedule as though the Schedule were operating for that purpose, and if you can satisfy the language of the section without extending it beyond that purpose you ought to do it. But if in spite of that you find in the language of the Schedule words and terms that go clearly outside that purpose, then you must give effect to them and you must not consider them as limited by the heading of that part of the Schedule or by the purpose mentioned in the Act for which the Schedule is prima facie to be used. You cannot refuse to give effect to clear words simply because prima facie they seem to be limited by the heading of the Schedule and the definition of the purpose contained in the Act.’

From the above, it seems to me that even if the amendments were made by Act No.2 of 2009 to remedy the errors in the earlier legislation, the court should not frustrate Parliament’s intention by applying the literal meaning of Section 76B of the Customs and Excise Act. Instead, it should apply a corrected version. The error was manifest and beyond denial but it did not make the Seventh Schedule null and void and of no legal effect. The apparent intention was that the Schedule should form part of the Act. The argument that the amendment by way of Act No.2 of 2009 made any claims

under the earlier legislation by the Respondent null and void and of no legal effect must therefore fail.

Submissions were made to the effect that the Respondent could not act retrospectively to erase the appellant's rights which accrued prior to the amendments which took effect on the 1st of April, 2009. The Respondent submitted that this was a proper case to hold that the amendment had a retrospective effect.

To start with, Article 79 (7) of the Constitution Cap. 1 makes provision for retrospective legislation.

It reads:

“A law made by Parliament shall not come into operation until it has been published in the Gazette, but Parliament may postpone, the coming into operation of any such law and may make laws with retrospective effect.”

For a law to be retrospective, the wording of the retrospective effect must be clear. There is no such clarity in Act No. 2 of 2009. The submission by the Respondent that the Court should generally hold that Act No. 2 of 2009 had retrospective effect is untenable since it does not state so with sufficient clarity in any of the sections. Even though I have held that it is not retrospective, it does not affect the earlier legislation which I have held is not illegal. I must however acknowledge State Counsel Silwamba's useful submissions with regard to the law on retrospective legislation when he cited ***Halsbury's Laws of England Volume 44(1) at paragraphs 1186*** and the cases of ***Lord Suffield's V IRC (2)***, ***R V Wellington Income Tax General Commissioners Exp The Tribunal V. Fysh (Inspector of Taxes) (3)*** and ***Re Althluney (4)*** These authorities are of the general view that fiscal legislation is subject to the presumption against retrospection. These authorities should be contrasted with ***James v. Inland Revenue***

Commissioners (5) in which Slade J., held that Parliament has the power to enact by statute any fiscal law, whether of prospective or retrospective nature and if the wording of retrospective legislation was clear, the Court had to give effect to it. In addition, Article 79 (7) of the Constitution makes provision for retrospective legislation. While I accept the argument that generally statutes should not be retrospective because the law looks forward not back, there are circumstances when it may be necessary to have retrospective legislation.

The Appellant argued at great length that a Schedule without an inducing section was illegal.

The Tribunal held that a Schedule to an Act forms an integral part of the main statute and agreed with the Respondents interpretation of Section 9 of the Interpretation and General Provisions Act which provides that:

“Every Schedule to or table in any written law, together with notes thereto, shall be construed and have effect as part of such written law.”

The Tribunal also agreed with the learned author G.C. Thornton in his book, **Legislative Drafting at page 400** where he states:

“The position of the law is that in as much as a schedule forms part of the statute, it is merely a device for clearer presentation and more efficient communication of the content of the legislation.”

In view of the foregoing, the Tribunal agreed that a schedule forms an integral part of the main statute and that the Respondent was empowered

under the Customs and Excise Act to charge levy and collect excise duty on talk-time.

I agree with this holding by the Tribunal and see no reason to depart from it even in the light of the amendment to the Customs and Excise Act to introduce an inducing section. This is so because as earlier stated, the Court will not frustrate Parliament's intention by applying the literal meaning of S.76B. Instead it will apply a corrected version referring to the enactment specified in the Seventh Schedule. The arguments with regard to invalidity due to the absence of an inducing table must accordingly fail.

I agree with the submissions so ably prepared by State Counsel Silwamba that a statute must not leave room for doubt and that any doubt in the provisions of law imposing tax should be construed in favour of the tax payer and that it is a principle of legal policy that a person should not be penalized except under clear law. There must however be a basis for applying these well settled principles of law. While there is no dispute that there was in fact an error, this does not nullify the legislation for reasons stated above. Even if the Tribunal did not pronounce itself on the ambiguity caused by the lack of an inducing section to introduce the Seventh Schedule it ultimately arrived at a correct decision when it held that a Schedule to an Act forms an integral part of the main statute.

The Respondent has also argued that there was no legal basis for the imposition of the 10 percent Excise Duty provided for in the Eighth Schedule as there was no basis for the valuation of talk-time. The lack of basis on which to impose the 10 percent excise duty on talk-time raised serious doubts as to the clarity, certainty and ambiguity on the Respondent to legally impose the tax of excise duty on talk-time. This was so because if the Seventh Schedule raised the ambiguity then the 10 percent duty provided in the Eighth Schedule could not be applied without leaving room for doubt and

controversy. The submission cannot succeed on the ground that allowing it to succeed would frustrate Parliament's intention.

While the Tribunal quite properly asked itself who was entitled to a refund of the excise duty paid in respect of data transmission services, it fell into error when it ordered that the Zambia Information and Communications Technology Authority together with the Appellant and Respondent should find modalities of how consumers could be compensated for their tax which was erroneously levied and collected from them from 2004 to 2008.

The excise duty was collected from users who subscribe to the Appellant's network. The Court takes judicial notice of the fact that the Appellant's subscribers purchase airtime from supermarkets, service stations, street vendors at traffic lights and circles to mention but a few. Most of these traders do not issue receipts to purchasers of airtime. The Court also takes judicial notice that some of the Appellant's subscribers live in far flung places such as Lukulu and some may have left Zambia and may not return. Some may have also passed on. This poses the practical difficulty of ordering the Appellant, the Respondent and ZICTA to find modalities of how consumers could be compensated.

The net effect is that the tax which was erroneously levied and collected from subscribers during the period 2004 to 2008 is *bona vacantia* and should be escheated to the state so that it forms part of the general revenues of the State. I therefore set aside the order that modalities be found relating to compensation and order that the money be escheated to the State on the ground that it is *bona vacantia*. The second ground of appeal accordingly fails.

I accept the submission that the functions of the Respondent are outlined in Section 11 (l) of the Zambia Revenue Authority Act Cap. 321 which states that:

“The functions of the Governing Board shall be -

- (a) to assess, charge, levy and collect all revenue due to the Government under such laws as the Minister may, by statutory instrument specify;**
- (b) to ensure that all revenue collected is, as soon as practicable, credited to the Treasury;**
- (c) subject only to the laws specified under paragraph (a) to perform such other functions as the Minister may determine.”**

While I accept that it is a mandatory requirement to ensure that all revenue collected is as soon as reasonably practicable credited to the Treasury, I do not accept the general submission that since the money was credited to the Treasury it could not be claimed back. Section 92 of the Customs and Excise Act makes provision for refunds of duty paid in excess or in error. The Respondent is obliged by virtue of this section to make refunds of duty paid in excess or in error whether or not the revenue has been credited to the Treasury. Even assuming that there was no provision in the Customs and Excise Act for refunds, refunds could subject to proof, still be claimed by a taxpayer as money paid under a mistake of fact. The Respondent would in turn claim from the Treasury. A refund is in my view only possible where a tax payer can be identified and not in the present case where it is virtually impossible to do so. It follows therefore that the cross-appeal succeeds.

I agree with the Respondent's submission that excise tax is a tax on consumption like VAT and that excise duty on data transmission in the present case was imposed on the consumers as and when they consumed the services provided by the Appellant and that the Appellant was merely an agent of the Respondent and collected tax on data transmission services on

behalf of the Respondent and remitted it to the Appellant. I also agree with the Respondent's submission that a consumption tax by its very nature is not intended to be a cost to a business as it can be shifted to the consumer. The Respondent has demonstrated how for instance airtime worth K50, 000.00 for voice calls includes excise duty and value added tax. This computation shows that VAT then at 17.5% was K7, 446.81 and Excise Duty at 10% was K3, 868.47 and the Appellant's base price was K38, 684.72. There was therefore no revenue loss by the Appellant due to excise duty and VAT and as a result the Appellant cannot claim a refund where it did not suffer a revenue loss.

A perusal of clause 8.1 of the Exclusive Zonal Distributorship Agreement shows that prices of products purchased from the Appellant are fixed on the basis of a quotation list as from time to time prepared and furnished to a Distributor. I therefore agree with the Respondent's submission that the discount offered by the Appellant to the distributor is a distribution cost which in effect amounts to a profit for the distributor. I therefore agree with the Tribunal on this point. The third ground of appeal fails as a result.

In passing I note that submissions in this appeal were altogether 83 pages long and that they contained a lot of repetition. While there is no bar to repeating an argument or to prolixity, brevity should be deployed when drafting submissions.

It follows from above that the Appellant's appeal is dismissed and the Respondents cross-appeal succeeds. Costs to the Respondent to be taxed in default of agreement.

DELIVERED IN CHAMBERS THIS 16TH DAY OF MAY, 2011

J15

A.M.WOOD
JUDGE