Selected Judgment No.12 of 2019
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IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 94/2011**
HOLDEN AT NDOLA
(CIVIL JURISDICTION)

REPUBLIC OF ZAMBIA
SUPREME COURT OF ZAMBIA
JUDICIARY
10 APR 2019
SUPREME COURT REGISTRY 1
P. O. BOX 50067, LUSAKA

BETWEEN:

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

AND

ZAMBIA REVENUE AUTHORITY **RESPONDENT**

Coram: Chibomba, Hamaundu and Kaoma, JJS

On 4th June, 2014 and on 10th April, 2019

For the appellant : Mr J. Jalasi and Mr L. Linyama, Messrs Eric Silwamba, Jalasi and Linyama Legal Practitioners

For the respondent : Mrs D. B. Goramota and Ms S. Zimba, Legal Counsel

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JUDGMENT

Hamaundu, JS delivered the Judgment of the court

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Cases referred to:

1. **Inland Revenue Commissioners v Ayrshire Employers Mutual Association Limited [1946] 1 All E.R. 637**
2. **The People v Edward Jack Shamwana & Others (1982) ZR 122**
3. **Lord Suffields v IRC (1908) 1KB 865**
4. **Zulu v Avondale Housing Project (1982) ZR 172**

Works referred to:

1. **Halsbury's Laws of England, 4th Edition, Volume 44(1)**
2. **Legislative Drafting, G.C. Thornton, 4th Edition, Butterworths, London, 1996**
3. **Francis Bennion on Statutory Interpretation, 3rd edition**
4. **Maxwell on Interpretation of Statutes, 12th edition**

Legislation referred to:

1. **The Customs and Excise Act, Chapter 322 of the Laws of Zambia**
2. **The Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia**

This is an appeal from a decision of the High Court which dismissed the appellant's appeal from the Revenue Appeals Tribunal, but allowed a cross-appeal by the respondent.

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The background leading to this appeal is thus:

The appellant is a mobile telecommunications service provider while the respondent is the authority designated to collect tax on behalf of the Government. In 2004, the Government amended the **Customs and Excise Act, Chapter 322** of the **Laws of Zambia** by passing the **Customs and Excise (Amendment) Act, 2004**. We shall delve briefly into the amendments that are relevant to this appeal.

The definition of excise duty in **Section 2** of the principal **Act** was extended to include tax on particular services. There was inserted in the principal Act a new section referred to as **Section 76B**. That section provided:

> **"There shall be charged, levied, collected, and paid in respect of services rendered, imported into or provided within Zambia excise duties at the rates specified in the service excise tariff set out in the Eighth Schedule, in this Act referred to as the service excise tariff"**

A new part titled *"Management of Excise Duty on Services"* was introduced and it comprised new sections, namely; **Sections 139A** to **139M**. For the purpose of this appeal, we shall refer to only

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Section 139A. That section defined several terms relating to the provision of mobile cellular telephone services. The section provided:

> **"In this Part unless the context otherwise requires–**
> *'rendering a service'* **means providing a cellular mobile service**
> *'service'* **means a mobile cellular telephone service liable to excise duty**
> *'service provider'* **means a service provider licensed under section one hundred and thirty-nine D; and**
> *'talk time'* **means the minutes of calls a subscriber makes from a mobile cellular telephone"**

The amendment also introduced two new schedules, that is, the **Seventh** and **Eighth Schedules**. The **Seventh Schedule** was indicated to be premised on the new **Section 76B** of the **Act,** although the said section made no reference to it. Its purpose was stated to be the valuation of services for the purposes of assessing excise duty payable on excisable services. The schedule provided:

> **"The value of talk time for the purposes of section seventy-six B shall be the price at which the talk time is sold exclusive of excise duty surtax and value added tax by a service provider licensed under section one hundred and thirty-nine D"**

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The **Eighth Schedule** was also premised on the new **Section 76B**. Its purpose was to provide a service excise tariff. The schedule provided that excise duty on *"talk time"* would be charged at the rate of 10% of the value of the service per minute.

We will state here that, at this point in time, the statute only referred to *"talk-time"* and made no mention of excise duty payable on the provision of data transmission services such as *e-mails, SMS etc.*

For three years, the appellant integrated excise duty in the prices for its services as required by **Section 76B** of the **Act**. The respondent collected duty on *"talk time"* irrespective of whether or not that time was used on *voice calls, SMS etc.* In other words, the respondent collected duty on all the services that the appellant rendered, i.e, inclusive of data transmission services under the category of *"talk time"*.

The dispute started from the following issue: The appellant wrote to the respondent on 2nd November, 2007 pointing out that in terms of the **Sixth Schedule** to the **Act**, the calculation of excise duty

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on the services provided by the appellant should be on the price that the appellant sold its scratch cards to its distributors, and not on the price that the scratch cards were sold to customers. The respondent replied on 26th November, 2007 that the appellant's discount to its distributors did not come under the **Sixth Schedule** because that discount did not extend to the customer. In 2008, the dispute took a new turn. This time, the appellant's advocates demanded from the respondent, through the latter's Commissioner for Taxes, a claim for refund of excise duty allegedly levied erroneously on the appellant. In a long letter which contained legal arguments, the appellant's advocates contended that the charging of excise duty itself was not sanctioned by the law in that the **Seventh Schedule** which defined the value of *"talk time"* on which duty was to be charged did not have an inducing section in the main part of the **Act**. The advocates also contended that on the correct reading of **Sections 76B**, **139B** and the **Eighth Schedule**, excise duty was only chargeable on voice calls and not on data transmission services. The final contention was on

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the earlier dispute, namely, that excise duty should be chargeable only on the discounted price that the appellant's distributors paid for the scratch cards.

In February, 2009 the respondent replied that according to its interpretation, the **Seventh Schedule** was part of the **Act**, so that it was legal for the respondent to rely on it to charge duty. In short, the respondent rejected the claim.

Not long thereafter, the **Customs and Excise Act** was amended by **Act No.2 of 2009**, effective 1st April, 2009. The significant amendments which are relevant to this appeal are these: The term *"talk time"* was replaced by the term *"air time"*, whose definition now included data transmission services; the **Seventh Schedule** was now induced by a new section, **section 88B**.

The appellant appealed to the Revenue Appeals Tribunal on the following grounds:

1. **That the respondent illegally charged, levied and collected excise duty on talk-time notwithstanding that the purported charging schedule at the material time, the *Seventh Schedule*, was not anchored by an inducing provision in the Customs and Excise Act,**

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Chapter 322, of the Laws of Zambia and, as such, was null and void ab initio;

2. **In the alternative to the above, that the respondent illegally charged, levied and collected excise duty on data transmission services provided by the appellant on the basis of the purported *Seventh Schedule* which only provided for levying of excise duty on voice calls or services and not data transmission services such as short messaging system (SMS), fax or internet; and**
3. **Further in the alternative, that the Customs and Excise Act, Chapter 322 of the Laws of Zambia, until the 1st April, 2009, did not provide for the valuation and consequently taxation of the appellant's data transmission services and as such the valuation of voice calls for excise duty purposes should have been adjusted to exclude any discounts given to customers.**

The respondent readily conceded the second ground.

In its arguments before the tribunal, the appellant altered its third ground. This now read as follows:

> **"The respondent collected Excise Duty without adjusting for discounts granted to customers, which discounts reduced the price and therefore the value on which Excise Duty may have been leviable, resulting in an overpayment of Excise Duty."**

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The ground, as altered, now correctly reflected the initial dispute. The appellant argued the first ground on essentially three points; namely;–

(i) what is the legal effect of a schedule without an inducing section;

(ii) lack of legal basis for the imposition of the 10 percent excise duty; and

(iii) effect of the Customs and Excise (Amendment) Act No.2 of 2009

On the first question, the appellant relied on **section 9** of the **Interpretation and General Provisions Act, Chapter 2** of the **Laws of Zambia** which provides that every schedule or table in any written law is construed and has effect as part of such written law. The appellant also relied on **Halsbury's Laws of England, 4th edition, paragraph 1260** which provides that a schedule is attached to the body of an **Act** by inducing words in one or more of the sections. The appellant further cited the work of the learned author **G.C. Thornton Butterworths, London, 1996** in his book titled **Legislative Drafting, 4th Edition**, in which the author says that a schedule is

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merely a device for clearer presentation and more efficient communication of the content of the legislation. It was argued that in view of the foregoing authorities, there is no schedule that can stand on its own without an inducing section; and that for that reason, the **Seventh Schedule** was *void ab initio* and not part of the **Customs and Excise Act**.

On the second question, the appellant's argument was that a taxing statute must not leave room for doubt and controversy. The appellant cited a few cases decided by the Tribunal which all applied the said principle as stated in the case of **Inland Revenue Commissioners v Ayrshire Employers Mutual Association Limited**[1]. The appellant also relied on the literary work: **Francis Bennion on Statutory Interpretation, 3rd edition**.

With those authorities, the appellant argued that the 10 percent excise duty provided for in the **Eighth Schedule** had no basis for the valuation of *"talk time"* since the **Seventh Schedule** existed in the **Customs and Excise Act** without an inducing section. This,

according to the appellant, raised serious doubts as to the clarity and certainty to impose excise duty on *"talk time"*.

The third question was based on the **Customs and Excise (Amendment) Act No.2 of 2009**. The appellant's arguments here were two-fold: First, that by the amendment of the **Act**, the respondent was admitting that there had been a defect in the law prior to the amendment. Secondly, that in any case, the new law could not be applied retrospectively so that the excise duty on data transmission services that the respondent had wrongly charged could now be legalized. In the first limb of the arguments, the appellant submitted that it is an established rule that when the law is amended, it is intended to remedy an existing defect in the law. Authorities on the mischief rule of interpretation of statutes were relied on, namely, **Maxwell on Interpretation of Statutes, 12th edition** and a High Court decision in the case of **The People v Edward Jack Shamwana & Others**[2].

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On the second limb of the arguments, the appellant submitted that by the amendments of April, 2009 the respondent was now legalizing the **Seventh Schedule** and the charging of excise duty on data transmission, which had both been illegal prior to the amendment; and that the respondent was now applying the amendments retrospectively. The appellant cited a few authorities which state the rule that fiscal legislation is subject to the presumption against retrospection. Some of the authorities are: **Halsbury's Laws of England, 4th edition,** and the case of **Lord Suffields v IRC**[3].

On the third ground, the appellant argued that the **Sixth Schedule** which the respondent had relied on to determine the price applicable on valuation of talk time did not apply to services, but to goods; and that it was infact the **Seventh Schedule** which defined the price at which duty was chargeable for provision of services.

The respondent's position on the first ground was this: the **Seventh Schedule** was part of the **Customs and Excise Act** by virtue of **Section 9** of the **Interpretation and General Provisions**

Act, even if it did not have an inducing section. That, in fact, it was **Section 76B** and the **Eighth Schedule** that formed the legal basis for charging duty on *"talk time"*, while the **Seventh Schedule** was merely there to interpret the **Eighth Schedule**.

On the third ground, the appellant's position was that excise duty is chargeable on consumption; meaning that duty is charged at the price sold to customers that will consume the value of the scratch cards. It was argued that the appellant's distributors were not customers because they did not use the cards, but sold them to the ultimate customers; that the appellant and the distributors were not independent of each other, so that the discount that the appellant gave to the distributors became merely a distribution cost; which in effect was a profit for the distributors over which they did not pay excise duty.

Resolving the first ground, the tribunal quoted **Section 9** of the

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Interpretation and **General Provisions Act**, which provides:

> **"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 quoted a passage from the work of the learned author *G.C. Thornton* referred to by the appellant. The passage states:

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

On the strength of those two authorities, the tribunal found that the **Seventh Schedule**, as it existed prior to the amendments, with its defect, did form part of the main statute; and that the respondent had been empowered under the **Act** to charge excise duty on *"talk time"*.

On the second ground which the respondent conceded, the tribunal found that in fact, the duty that was wrongly collected belonged to the consumers, or subscribers, from whom it was ultimately collected. It held that it would be unjust enrichment for

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either the respondent or the appellant to keep that money. The tribunal therefore resolved that the appellant, with the involvement of the regulator, the Zambia Information and Communications Technology Authority, should find modalities of how consumers could be compensated.

On the third ground, the tribunal examined a clause in the appellant's Exclusive Zonal Distributorship Agreement which provided:

> **"Prices of the products purchased from Zain shall be fixed on the basis of the quotation list as from time to time prepared and furnished to the Distributor by Zain"**

The agreement was a standard agreement which the appellant gave to its distributors. The tribunal observed that the appellant had continuing managerial control over the products that were in the hands of the distributors and, consequently, the sale of *"talk-time"* between the appellant and its distributors was not a fair market value. For that reason, the tribunal agreed with the respondent that

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the discount which the appellant offered to its distributors merely amounted to a distribution cost.

The tribunal, therefore, dismissed the appeal.

The appellant appealed to the High Court. The respondent also cross-appealed to the High Court on the tribunal's holding that the consumers should be refunded the duty that was erroneously levied.

The appellant brought the same three issues to the High Court, except that the second issue regarding the levying of duty on data which had succeeded now took a new turn. This was that in the appellant's view, the tribunal should have left the distribution of the overpaid tax to the appellant's discretion.

With regard to the issue concerning the **Seventh Schedule**, the appellant before the High Court, relied *Mutatis Mutandis* on its submissions filed before the Revenue Appeals Tribunal. In other words, the issues and arguments were still essentially the same. Supplementing those arguments, the appellant took issue with the Tribunal for holding that a schedule could exist in a statute without an inducing section. According to the appellant, by so holding, the

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Tribunal ignored the fact that by amending the **Customs and Excise Act** in 2009, when the appellant had raised the issue of illegality of the **Seventh Schedule**, the respondent was conceding that the **Seventh Schedule** could not exist without an inducing section. The appellant also argued that the amendment could not act retrospectively to erase the appellant's rights which accrued prior to the amendment. In other words, the respondent could not legalize the excise duty that had been illegally collected during the period that the defect existed.

According to the appellant, the Tribunal should have held that the **Seventh Schedule** as it existed at the material time could not be used to legally levy excise duty even on *"talk time"*.

To buttress its argument further, the appellant repeated the argument it had advanced before the Tribunal as regards the mischief rule. The appellant went on to argue that the Tribunal, by not holding that the amendment of the **Customs and Excise Act** in 2009 was an acknowledgement of the illegality of the **Seventh**

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Schedule, failed to adjudicate on the issue of the retrospective effect of the **Customs and Excise (Amendment) Act No.2 of 2009**; and that this was a failure to adjudicate on all issues in controversy between the parties, contrary to our holding in **Zulu v Avondale Housing Project**[4] and other subsequent cases.

In view of the approach that we have adopted in this appeal, which will be seen in the course of this judgment, we will comment on this argument right away. The Tribunal could not be said to have failed to adjudicate on the effect of the amendment of the **Customs and Excise Act** in 2009 because the real issue or question was whether the **Seventh Schedule**, in terms of the law as it existed prior to the amendment of the **Act**, was properly part of the **Act**. In that regard there was no dispute that there had been a defect in the law, but what was in issue was whether the legislature had intended the **Seventh Schedule** to be part of the **Act**; and to be induced by **Section 76B**. The fact that the amendments of 2009 did not discard the **Seventh Schedule**; but, instead, made provision for an inducing section is indicative of the fact that it had, all along, been the

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intention of Parliament that the **Seventh Schedule** should be part of the Act: and not that the amendments should have retrospective effect. The Tribunal dealt with the real issue and was on firm ground to ignore the arguments regarding the amendment.

On the second issue, the appellant's argument was that it should have been allowed to retain the duty collected on data transmission services on the ground that it was the one that had lost a component of its revenue because of the incorrect interpretation that excise duty was payable on such services.

On the third issue, the appellant argued that the Tribunal read clause 8.1 of the Distributorship Agreement out of context; that clauses 8.2 to 8.4 clarified the matter better because, in those clauses, the agreement instructed how the distributors would process the payments for their purchase.

In resolving the issue regarding the **Seventh Schedule**, the court below quoted, quite extensively, some passages from the book of the learned author **Francis Bennion** already referred to. We wish

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to cite some of these passages. The court below quoted the following passage from page 351 of the book:

> **"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 interpretor 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 S 10(2). Instead it will apply a corrected version referring to the enactments** *'specified in Sch 3'* **".**

The court below also cited another passage at page 554 of the book.

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This reads:

> "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."**

Guided by this authority, the court below held that, although the error in the **Customs and Excise Act** was manifest, it did not make the **Seventh Schedule** null and void because the intention of Parliament to make the schedule part of the **Act** was apparent. For that reason, the court below concurred with the tribunal's holding that the **Seventh Schedule** was not null and void.

We must state that enroute to the conclusion above, the court below did consider the appellant's argument that the amendments of 2009 were being made to apply retrospectively. We shall not delve into that portion of the judgment as we have already stated our view of the appellant's arguments on the issue.

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As regards the imposition of excise duty on data services, the court agreed with the Tribunal that the excise duty was collected from users who subscribed to the appellant's network. The court however took judicial notice of the fact that the subscribers purchased airtime from various sources, that is, supermarkets, service stations, street vendors and son on. This, according to the court, posed practical difficulties to find modalities of how the consumers could be compensated. Instead, the court found the money to be *bona vacantia* and ordered it to be escheated to the State.

On the issue that the excise duty should be charged on the price that the appellant sells to its distributors, the court agreed with the respondent's submission that exercise duty is a tax on consumption, just like value added tax. The court agreed again with the respondent that the excise duty in this 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 in collecting tax. The court said that a consumption tax is not intended to be a cost to a business as it is shifted to the customer. The court, like the

Revenue Appeals Tribunal, also found that the discount offered by the appellant to its distributors was a distribution cost which in effect amounted to a profit for the distributors.

For the above reasons, the court dismissed the appellants appeal while it allowed the respondent's cross-appeal.

The appellant appealed to this court on seven grounds, couched as follows:

> **"Ground 1**
>
> **The learned Puisne Judge erred in law and fact when, having found that there was an error in law that necessitated an amendment to the Customs and Excise Act through the Customs and Excise (Amendment) Act No.2 of 2009, the learned Puisne Judge contrary to his own findings proceeded to hold that the Excise duty levied and collected on talk time for the period prior to the amendment was collected and retained legally.**
>
> **Ground 2**
>
> **The learned Puisne Judge erred in law and fact when he refused to allow Ground 2 of the appeal after he had found as a fact in his holding that the tribunal fell in error by exceeding in its jurisdiction when it ordered that Zambia Information and**

Communications Technology Authority (ZICTA) and the respondent (Zambia Revenue Authority) should find modalities of how consumers could be compensated for the tax which was illegally and erroneously levied and collected from consumers from 2004 to 2008.

Ground 3

The learned Puisne Judge erred in law and fact when he allowed the respondent's cross-appeal which was for all intents and purposes an admission to Ground 2 of the appeal.

Ground 4

The learned Puisne Judge erred in law and fact when, having found that tax was illegally and erroneously levied and collected from subscribers during the period 2004 to 2008, he still allowed the respondent to retain illegally levied and collected taxes purportedly under the doctrine of escheat.

Ground 5

The learned Puisne Judge erred in law and fact when he misdirected himself and held that the illegally levied tax should remain with the Treasury when there are no legal provisions entitling the state through the respondent to collect the tax in dispute.

Ground 6

The learned Puisne Judge erred in law and fact when he held that the Exclusive Zonal Distributorship Agreement showed the prices of products purchased from Celtel Zambia Plc T/A Zain Zambia which were fixed on the basis of a quotation list as from

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time to time prepared and furnished to a Distributor and that therefore the discount offered by the appellant to a distributor is a distribution cost which in effect amounts to a profit for the distributor.

Ground 7

The learned Puisne Judge erred in law when he failed to adjudicate on all the issues in controversy."

We will not lose sight of the fact that this is a second, if not third, appeal. Two competent fora have already dealt with the issues that the appellant has brought to this court. It is for this reason that the appellant had to seek leave of the High Court in order to appeal to this court. In our approach to this appeal, we would like to avoid a situation where we shall have three fora passing judgments which are merely repetitive of each other. In this case, therefore, we will examine the grounds advanced by the appellant to see whether there is real substance in them worth pursuing in detail; or whether the whole appeal is merely routine, and intended only to provide the appellant another bite at the cherry.

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We shall start with the seventh ground of appeal in which the appellant contends that the learned judge in the High Court failed to adjudicate on all the issues in controversy. There were only three issues before the Tribunal and the High Court. Before the latter, the issues were as follows:

(i) **whether, prior to the amendments of 2009, it had been the intention of Parliament that the Seventh Schedule be part of the Customs and Excise Act; and induced by** *Section 76B* **thereof**

(ii) **whether or not the tax overpaid during the period that no duty was chargeable on data transmission services should have been left to the appellant's discretion: and,**

(iii) **whether excise duty on the appellant's scratch cards should be charged at the price that the appellant sells to its distributors or at the price that the customer ultimately pays for them.**

Now, just from the background that we have given, it is clear that the High Court addressed all the three questions. So, the seventh ground of appeal is totally without merit.

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Equally without merit, on their face, are the fourth and fifth grounds of appeal. For example, in the fourth ground, the appellant faults the court for allowing the respondent to retain the excise duty that was illegally collected from subscribers during the period prior to the amendment of 2009, under the doctrine of escheat. The appellant is a private entity while the respondent is a public institution that is designated by law to collect tax on behalf of the Government. If, as the appellant seems to concede in this ground, the tax was wrongly levied on subscribers, who, between the two entities, is legally entitled to hold that tax? The answer is simple; it is the respondent.

The fifth ground is on the same issue. The appellant's contention is that there are no legal provisions entitling the State, through the respondent, to collect the tax wrongly charged to the subscribers. In our view the appellant, not being a subscriber that was wrongly taxed, has no locus standi to even make that argument.

Coming to the other grounds of appeal, we bear in mind that the dispute herein is just about the three issues that we have set out

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above. The arguments that were advanced before us by both parties, both written and oral, are the same arguments that were before the Tribunal and the High Court, except that they have been put forward in slightly different words.

When we look at the first issue, the question that was before the Tribunal and the High Court was simple: Had it been the intention of Parliament that the **Seventh Schedule** should be part of **the Customs and Excise Act**; and should be induced by **Section 76B** prior to the amendments of 2009? The Tribunal held that it was. The High Court concurred with the Tribunal. A glance at the provisions in issue, namely, **Section 76B**, the **Seventh Schedule** and the **Eighth Schedule** shows that **Section 76B** had provided the legal authority to charge excise duty on telecommunication services rendered, at the tariff set out in the **Eighth Schedule**. According to the tariff in that schedule, excise duty on *"talk time"* was chargeable at the rate of 10% of the value of the service per minute. Now, the question was, how was the value of the service going to be

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determined? Clearly, without that value, it was difficult to ascertain the excise duty that was due; and, consequently, it was difficult to implement **Section 76B**. So, that is where the **Seventh Schedule** came in. Although the schedule had not been mentioned in **Section 76B**, it nevertheless had proclaimed to be premised on that section. The schedule had provided the value of *"talk-time"* upon which the 10% prescribed in the tariff in the **Eighth Schedule** was to be charged so that when both schedules were applied, **Section 76B** became whole and implementable. It was on that reasoning that both the Tribunal and the High Court came to the conclusion that it had been the intention of Parliament that the ***Seventh Schedule*** should be induced by **Section 76B**: This meant that the **Seventh Schedule** had not been illegal; and that the charging of excise duty on *"talk time"* prior to the amendment of 2009 had been legal. We do not see how one can fault that reasoning. Our view, therefore, is that, on this issue, the appeal is without merit.

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On the second issue, it must be noted that the respondent had conceded before the Tribunal that its charging of excise duty on data transmission services between 2004 and 2008 was without legal backing. Now, the Tribunal properly found that the party that was detrimentally affected by the erroneous charge was the customer, that is, the tax payer. The Tribunal ordered the appellant and the respondent to find modalities of re-imbursing the customer. The appellant appealed that part of the judgment, claiming that the distribution of the wrongly surcharged tax should have been left to its discretion. The High Court, of-course disagreed with the appellant. It also disagreed with the approach taken by the Tribunal; holding, instead, that the wrong surcharge had escheated to the State. The appellant has appealed against that order.

Before the court below, the appellant had feebly argued that it was the one that had lost a component of its revenue. In our background to this matter, we have said that from 2004 to 2008, the respondent was collecting excise duty on *"talk time"*, which included data transmission services. It follows that the appellant was passing on the excise duty to the customer, whether it was for *"talk time"* or

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"data transmission services". Surely, the appellant cannot today be heard to say that during that period it was only passing the excise duty on "talk time" to the customer and not the duty that was charged on data transmission services. Hence, the conclusion by the Tribunal and the High Court that the erroneous charge of excise duty on data transmission services was ultimately borne by the customer is unassailable. In any case, the appellant's argument was totally in conflict with its ground of appeal on the issue. The words with which the ground was couched suggested a concession by the appellant that indeed, it was the subscribers who suffered the wrong tax. So, the appeal has no merit on the second issue as well.

With regard to the third issue, both the Tribunal and the High Court took note of the distributorship agreements which the appellant had entered into with its distributors. The agreements were on record. Both fora observed that by those agreements, the appellant had total control over its distributors; and over the price at which the distributors would sell to the customer. It was on those grounds that both fora below held that excise duty should be

chargeable on the price at which the scratch cards are sold to the customer, so that the difference between the price that the appellant sells to its distributors and the price that the customer pays is merely a distribution cost to the appellant. Again, we do not see how one can fault that reasoning. Although the appellant argued that the Tribunal read clause 8.1 of the agreement out of context when it arrived at its conclusion, there are several other clauses that support the Tribunal's conclusion in the appellant's Exclusive Zonal Distributorship agreements. For example, the issue of exclusivity itself. *Clause 4* prohibits the distributor from entering a similar agreement with any other telecommunications service provider; it prohibits the distributor from selling products from any other telecommunications provider; and, it prohibits the distributor from selling outside his designated zone. *Clause 5* entitles the distributor to a discount on total airtime purchases. *Clause 6* entitles a distributor to commission. We must add, and take judicial notice, that scratch cards are printed with a pre-determined price set by the appellant; and that, therefore, the prices at which the customers buy the scratch cards are not fixed by the distributors. Clearly, the

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distributors are agents of the appellant who, presumably, are intended to enable the appellant have a wider reach to the customer. One cannot therefore fault the conclusion by the two fora below that the incentives given by the appellant to its distributors were a distribution cost. So, our view, yet again, is that the third issue has no merit.

Overall, there was nothing of serious substance that the appellant intended to bring to this court on this second appeal. This was a mere routine appeal by which the appellant wanted a third forum to hear exactly the same issues that had previously been ably resolved by two competent fora. In our view, the appellant should not even have been granted leave to appeal to this court. This appeal stands dismissed, with costs here and below to the respondent. These will be taxed in default of agreement.

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H. Chibomba
SUPREME COURT JUDGE

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E. M. Hamaundu
SUPREME COURT JUDGE

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R. M. C. Kaoma
SUPREME COURT JUDGE