**IN THE HIGH COURT OF ZAMBIA** **2009/HPC/0575**
**AT THE PRINCIPAL REGISTRY**
**HOLDEN AT LUSAKA**
***(Commercial Jurisdiction)***

BETWEEN:

**ZAMBIA REVENUE AUTHORITY** **APPELLANT**

AND

**STALLION MOTORS LIMITED** **1ST RESPONDENT**
**AFRICAN CARGO SERVICES LTD** **2ND RESPONDENT**

**BEFORE THE HON. MR. JUSTICE C. KAJIMANGA THIS 4TH DAY OF NOVEMBER, 2011**

**FOR THE APPELLANT:** Mrs. D. B. Goramota, Legal Counsel
**FOR THE RESPONDENTS:** Mr. E. S. Silwamba, SC and Mr. L. Linyama, Messrs Eric Silwamba & Co.

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# J U D G M E N T

**Cases referred to:**

1. Cape Brandy Syndicate v Inland Commissioners [1921] ALL ER 64
2. Canadian Airlines International Limited v The Commissioner of Customs and Excise LON/93/587A (1994).
3. R v Peters (1886) 16 QB D. 636
4. Camden (Marquis) v I. R. C. (1914) 1 KB 641
5. Sinkamba v Doyle (1974) Z. R. 1 (C. A.)
6. Shilling Bob Zinka v Then Attorney-General SCZ Judgment No. 9 of 1991

7. Attorney-General and Movement for Multiparty Democracy v Lewanika and Others (1993 – 1994) Z. R. 164

8. Wilheim Roman Buchman v Attorney-General SCZ Judgment No. 14 of 1994

9. Nkhata and Four Others v The Attorney-General (1966) Z. R. 124

10. Yonnah Shimonde and Freight and Liners v Meridien Biao Bank (Z) Limited SCZ Judgment of 7 of 1999.

**Legislation referred to:**

1. Value Added Tax Act Cap 331, Section 15(2)
2. Customs and Excise (Parts of Entry and Routes), Order No. 16 of 2003
3. Customs and Excise Act Cap 322, Section 53(1)
4. Value Added Tax General Rules, 1997, Gazette Notice No. 66 of 1997, Rule 18
5. Value Added Tax (Zero-Rating) (Amendment Order) No. 9 of 2003
6. Interpretation and General Provisions Act Cap 2, Section 20 (4)

**Works referred to:**

1. Oxford Advanced Learners' Dictionary 6th Edition.
2. Allan Schenk and Oliver Oldman, Value Added Tax, A Comparative Approach 2007, New York Cambridge University Press
3. Francis Benion, Interpretation of Statues 4th Edition

The Court regrets the delay in delivering this judgment.

This is an appeal by the Appellant against the ruling of the Revenue Appeals Tribunal ("the Tribunal) delivered on 23rd July, 2009 as decided that the 1st Respondent was legally justified in zero-rating their invoices to the 2nd Respondent and that the said zero-rating was in accordance with Section 15 of the Value Added Tax Act Chapter 331 ("the VAT Act") and the Second Schedule of the said Act.

Briefly, the facts are that the 1st Respondent is a registered Value Added Tax (VAT) supplier in Zambia and its principal business is bulk transportation and haulage supplies. The 2nd Respondent is a company registered in the United Kingdom with a foreign branch in Zambia. The Appellant undertook compliance inspection on the 1st Respondent to establish whether it was VAT compliant. The inspection covered the period November 2004 to April 2006. Consequently, the Appellant established that the 1st Respondent was zero-rating transportation services of copper from Mufulira to Kapiri Mposhi. The Appellant established that the invoices had been issued by the 1st Respondent to the 2nd Respondent in respect of the services rendered by the 1st Respondent for the transportation of copper from Mufulira to Kapiri Mposhi, then to outside Zambia by Tazara. As a result of this inspection, the Appellant applied the standard rate to the transportation services and consequently arrived at an assessment of VAT against the 1st Respondent in the sum of K43,689,599.00. The 1st Respondent objected to the assessment and on 14th June, 2006, the 1st and 2nd Respondents appealed to the Tribunal. On 23rd July, 2009, the Tribunal delivered a ruling in favour of the 1st and 2nd Respondents. The Appellant, being dissatisfied with the ruling has now appealed to this Court on four grounds. They are as follows:

1. That the learned members of the Tribunal erred in law and in fact when they based their decision on a repealed provision of the law.

2. That the learned members of the Tribunal erred in law and in fact when they held that the 1st Respondent was legally correct to zero-rate its invoices.

3. That the learned members of the Tribunal erred in law and in fact when they held that rule 18 of the Value Added Tax General Rules contained in Gazette Notice No. 86 of 1997 was complied with by the 1st Respondent.

4. That the learned members of the Tribunal erred in law and in fact when they held that the Respondents had discharged their burden of proof.

On the first ground of appeal, Mrs. Goramota, the learned legal counsel for the Appellant contended that the VAT Act provides for zero-rating of exports under Section 15(2) which reads:

> ***"A supply of goods or services that is described in the Second Schedule shall, unless it is an exempt supply, be a zero-rated supply."***

The learned counsel also referred the Court to the Second Schedule of the VAT Act which provides as follows:

> ***"GROUP 2 – EXPORT OF GOODS***
>
> ***(a) Export of goods from Zambia by or on behalf of a taxable supplier, where such evidence of exportation is produced as the Commissioner General may by rule require.***
>
> ***(b) The supply of ancillary services, which are provided at the port of exportation of the goods under paragraph (a) and includes transport and packaging.***
>
> ***(c) The supply of freight transport services from or to Zambia, including transshipment and ancillary services, that are directly linked to the transit of goods through Zambia to destinations outside Zambia."***

She submitted that the Tribunal erred in law by relying on an amended law to arrive at its decision. Counsel referred the Court to page 10 of the record of appeal where the Tribunal stated that:

***"Pursuant to the exercise of his powers under Section 15(3) noted above, the Minister of Finance and National Planning has proclaimed through statutory [instrument] No. 109 of 1996 in the Second Schedule thereof what the law deems as zero-rated supplies. Of particular relevance in the matter in casu is part 2 of the Second Schedule which provides as follows:***

***GROUP 2 – EXPORT OF GOODS***

***(a) Export of goods from Zambia by or on behalf of a taxable supplier, where such evidence of exportation is produced as the Commissioner General may by rule require.***

***(b) The supply of services, including transport and ancillary services, which are directly linked to the export of goods under sub-item (a).***

***(c) The supply of freight transport services from or to Zambia, including transshipment and ancillary services, that are directly linked to the transit of goods through Zambia to destinations outside Zambian."***

Mrs. Goramota also referred the Court to page 15 of the record of appeal where the tribunal stated that:

***"The relevant provision which zero-rates exports is paragraph (b) of Regulation 2 of Part III of the Second Schedule of Statutory Instrument No. 109 of 1996. It reads as follows:***

***"The supply of services, including transport and ancillary services, which are directly linked to the export of goods under sub-item (a).***

***We are of the view that the Appellants are on firm ground when they argue that the use of the word include in paragraph 2(b) connotes that all activities linked to the export of goods qualify for zero-rating."***

The learned legal counsel contended that the Tribunal totally disregarded the amendment to Group 2 paragraph (b) of the Second Schedule, although it was brought to its attention. She submitted that paragraph (b) of Group 2 of the Second Schedule that the Tribunal relied on to arrive at its decision was amended by the value Added Tax (Zero-Rating) (Amendment order No. 9 which came into operation on 1st February 2003 long before the Respondents filed their appeal before the Tribunal in 2006. She argued that since the assessment raised by the Appellant covered the period November 2004 to April 2006, the Tribunal should have relied on the correct law as amended and in which paragraph (b) of Group 2 of the Second Schedule now reads as follows:

***"The supply of ancillary services, which are provided at the port of exportation of the goods under paragraph (a) and includes transport and packaging."***

It was submitted that this being the correct law the Tribunal should have relied on; the question to be determined is whether the services provided by the 1st Respondent to the 2nd Respondent fall within the meaning of paragraph (b) of Group 2 of the Second Schedule as amended. The learned legal counsel stated that the 1st Respondent provided transportation services to the 2nd Respondent from Mufulira to Kapiri Mposhi. She contended that the law provides that supplies of ancillary services provided

at the port of export are zero-rated but the 1st Respondent did not provide its services to the 2nd Respondent at the port of export. Counsel referred the Court to the Customs and Excise (Ports of Entry and Routes) Order, No. 16 of 2003 which provides that:

> ***"2(1) Subject to the other provisions of this order, the places set out in Pat I of the First Schedule are hereby appointed to be the only ports for Zambia at or through which alone goods may be imported or exported.***
>
> ***(2) No goods shall be imported or exported by road, except at or through a port set out in Part II of the First Schedule."***

Mrs. Goramota submitted that Part II of the First Schedule, ***"PORTS OF EXPORTATION OF GOODS BY ROAD"***, lists down the names of the ports of export for goods by road and Kapiri Mposhi is not one of the ports listed. Counsel, therefore, contended that Kapiri Mposhi is not a port of export for goods exported by road, and as such the services that were provided by the 1st Respondent to the 2nd Respondent are not covered by paragraph (b) Group 2 of the Second Schedule. She argued that for this reason, the 1st Respondent could not zero-rate its services on the basis of paragraph 2(b) which only recognizes ancillary services provided at the port of exportation of the goods. Counsel finally submitted on the first ground of appeal that the services in this case were provided from Mufulira to Kapiri Mposhi, both of which are not ports of exportation for goods exported by road and urged the Court to hold that the Tribunal arrived at its decision using the amended law and that paragraph 2(b) of Group 2 of the Second Schedule does not cover the services that were supplied by the 1st Respondent.

On the second ground of appeal, Mrs. Goramota submitted that on pages 315 to 318 of the record of appeal, the Respondents contended that they

relied on the entire Second Schedule particularly Group 1(c) [Group 2 (c)] which was not affected by the amendment which reads as follows:

> ***"(c) The supply of freight transportation services from or to Zambia, including transshipment and ancillary services, that are directly linked to the transit of goods through Zambia to destinations outside Zambia."***

Counsel submitted that the comas placed after the words "Zambia" and "services" in paragraphs 2(c) are very important for its correct interpretation. She argued that paragraph 2(c) basically states that the supply of freight transport services, transshipment and ancillary services that are directly limited to the transit of goods through Zambia to destinations outside Zambia are zero-rated. Counsel submitted that the paragraph only covers the supply of freight transportation services including transshipment of ancillary services with regard to goods passing through Zambia to destinations outside Zambia. It was also her contention that even if the Respondents were to rely on the provisions of paragraph 2 (c) of the Second Schedule, the services provided by the 1st Respondent to the 2nd Respondent are not covered by paragraph (c) and this was therefore misconstrued by the Respondent. She submitted that in this case the copper was being transported from Zambia, and not through Zambia, to destinations outside Zambia; and that the transport services supplied by the 1st Respondents were not directly linked to the transit of goods through Zambia to destinations outside Zambia. According to counsel the services were supplied within Zambia by a registered supplier and were consumed within Zambia.

Mrs. Goramota also submitted that the correct construction of paragraph 2(c) is that it only applies to the supply of freight transportation services including transshipment and ancillary services that are directly linked to the transit of goods through Zambia to destinations outside

Zambia. On the meaning of "transshipment" counsel referred the Court to Section 2 of the Customs and Excise Act which reads:

> ***"transshipment" means the customs procedure under which goods are transferred under customs control from the importing means of transport to the exporting means within the area of one customs office which is the office of both importation and exportation."***

Counsel submitted that from the meaning of the word "transshipment", it is clear that paragraph 2(c) of the Second Schedule was only intended to cover services provided to goods being exported from one country to another transiting through Zambia to destinations outside Zambia.

Mrs. Goramota also referred the Court to the following definition of the word "through" in the Oxford Advanced Learner's Dictionary, sixth edition:

> "***from one end or side of something to the other; from the beginning to the end of a thing or period, past a barrier; or travelling through a place without stopping."***

Counsel submitted that from the dictionary meaning of the word "through", there is no doubt that the intention of the Legislature in paragraph 2 (c) was to restrict it to freight transportation services, transshipment and ancillary services provided to goods transitting or passing through Zambia, that is, entering from one border and exiting Zambia from another border. She contended that the paragraph was not meant to apply to services supplied from one point in Zambia to another point in Zambia.

Mrs. Goramota contended that Group 2 of the Second Schedule is unambiguous and should therefore be construed according to the intention expressed in the VAT Act. The Court was referred to the case of ***Cape***

***Brandy Syndicate v Inland Commissioners(1)*** where the Court stated at page 61 as follows:

> ***"In a taxing Act one has to look merely at what is said. There is no room for intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."***

She submitted that the VAT Act has clearly stated its intention in Group 2 of the Second Schedule and the law has to be ready and construed as it is. Counsel argued that the 1st Respondent was therefore not legally correct to zero-rate its services to the 2nd Respondent because they are outside the zero-rating law and thus are standard rated and further, that the transaction was a mixed or composite supply and not a single supply as was held by the Tribunal at page 15 of the record of appeal in the following words:

> ***"In any case the word ancillary in its ordinary everyday usage according to the 2nd edition of the Oxford Dictionary supply means "supplementary" or "supporting". We are therefore fortified in our finding that the transaction in the instant case is a single supply of different components chargeable at the rate applying to the main element of supply, which in this case is the transportation of goods meant for export, which is zero-rated, and so we hold."***

Mrs. Goramota submitted that if the Tribunal's decision were to be upheld it would expand zero-rating under the Second Schedule Group 2 on export of goods beyond the legislative intent. Counsel contended that the doctrine distinguishing single supply (with incidental minor supplies), from multiple supplies applies to supplies by a single supplier. In the instant case, she argued that the Tribunal applied the doctrine to allow the 1st Respondent

to combine multiple supplies by different suppliers (the latter transporting the copper outside Zambia) into a single international transportation for VAT purposes. Counsel submitted that this was an unwarranted extension of the doctrine.

The learned counsel for the Appellant also contended that the general conditions of zero-rating are that the transport company that takes the goods across the border is expected to obtain the documents and provide copies to the Commissioner General as proof that the goods were exported but the 1st Respondent is not in a position to do so.

She also referred the Court to ***Allan Schenk and Oliver Oldman***, in their book ***Value Added Tax, A Comparative Approach, 2007 New York, Cambridge University Press*** where they cite the case of ***Canadian Airlines International Limited v The Commissioner of Customs and Excise(2)*** to distinguish between a single supply and a composite supply. This was an appeal against assessment that limousine services supplied to full business class passengers on Trans Atlantic Flights formed a separate supply from zero-rated supply of the flights. The Appellant was a scheduled airline, transporting passengers between Canada and the United Kingdom, among others. During the period covered by the assessment, the Appellant offered its business class passengers paying full fare a limousine service consisting of a chauffeur driven limousine transport of them and their baggage between their home, hotel or office and Gatwick or Manchester airports. The Court held that the supply of the limousine element was a separate supply in the following words:

> ***"In our judgment the consideration was obtained by the appellant in return for supplying two elements, the flight and the transfer option. The transfer available under the option was not contemporaneous with the flight."***

It was Mrs. Goramota's submissions that in the same vein, the supply of transportation services by the 1st Respondent was not contemporaneous with the supply of transportation services by Tazara to the 2nd Respondent and thus, the chain of supply was broken. She contended that the export of copper is zero-rated and thus the transportation of copper from Mufulira to Kapiri Mposhi is a separate element and therefore a separate supply.

Counsel further submitted that the 2nd Respondent did not just make one payment for services rendered as the supply of services by the 1st Respondent and Tazara were separate and independent of each other and that it is loss of revenue for the 1st Respondent not charging VAT at the standard rate for services rendered to the 2nd Respondent.

She also contended that the international segment of the journey commences at Kapiri Mposhi because that is the time when the law deems the copper to have been exported. Counsel relied on Section 53(1) of the Customs and Excise Act which reads:

> ***"With the exception of goods exported from Zambia by post or by pipeline, the time of exportation shall be deemed to be the time when the bill of entry or other document required in terms of section forty-seven is delivered to an officer or the time when the goods cross the borders of Zambia, whichever shall be the earlier."***

She submitted that in this case the bills of entry in the record of appeal show that the goods were only declared in Kapiri Mposhi for purpose of exportation. Counsel contended that the only journey which is known to the customs authority is that from Kapiri Mposhi when the goods were actually declared by Tazara and not the one from Mufulira to Kapiri Mposhi which was

a domestic journey hence the service supplied was a domestic supply. She further submitted that when the copper was moved from Mufulira to Kapiri Mposhi it was still not exported and the whole movement was a domestic transportation which was not ancillary to the exportation of the copper in any way.

Regarding the third and fourth grounds of appeal, Mrs. Goramota submitted that the Respondents did not comply with rule 18 of the Value Added Tax General Rules contained in Gazette Notice No. 86 of 1997 and in the premises they did not discharge their burden of proof. The said rule reads:

> ***"Proof of export***
> ***18(1) Unless the Commissioner-General shall otherwise allow, a taxable supplier claiming that a supply is zero-rated under the second schedule to the Act on the grounds that the supply is an exportation of goods, shall produce to an authorized officer:***
>
> ***(a) Copies of export documents for the goods, bearing a certificate of shipment provided by the Authority;***
>
> ***(b) Copies of import documents for the goods, bearing a certificate of importation into the country of destination provided by the customs authority for the country***
>
> ***(c) Proof of payments by the customer for the goods; and***
>
> ***(d) Such other documentary evidence as the authorized officer may reasonably require.***
>
> ***(2) Unless the Commissioner-General shall otherwise allow, a taxable supplier claiming that a supply is zero-rated under the second schedule to the Act on***

***the grounds that the supply is directly linked to exportation of goods from Zambia, shall produce to an authorized officer:***

***(a) the copies referred to in paragraphs (a) and (b) of sub-rule (1) in relation to the goods concerned;***

***(b) proof of payment by the customer for those goods and the services concerned; and***

***(c) such other documentary evidence as the authorized officer may reasonably require; and***

***(d.) if so required by an authorized officer, copies of import documents for the goods, bearing a certificate of importation into the country of destination, provided by the customs authority of that country."***

Counsel submitted that the export documents that have to be produced by a supplier are very cardinal because this is the basis upon which a registered supplier
claims input VAT for the zero-rated supplies made by the supplier but the 1st Respondent failed to produced export documents to the authorized officers as required by rule 18(2) (a). She contended that the Bill of entry documents (form CE20) appearing from pages 134 to 269 in the record of appeal are not in conformity with rule 18(2) (a) as they were not stamped by the revenue authority or did not bear a certificate of importation into the country of destination provided by the customs authority of that country.

Counsel also argued that the transporter recognized by the said documents for the purpose of zero-rating is Tazara and the 1st Respondent's

name does not appear as transporter of copper. She submitted that the only suppliers that can be allowed input VAT by the use of the document at pages 134 to 269 of the record of appeal are Mopani Copper Mines Plc that appears as the exporter and Tazara that appears as transporter and that the 1st Respondent does not come into the picture as it is not recognized by the documents. Counsel drew the Court's attention to a decision earlier made by the Tribunal in the case of ***Kasembo Transport Limited v Zambia Revenue Authority 2007/RAT/AT/11*** where it held that:

> ***"In our view the Appellant has failed to discharge its burden by failing to produce stamped copies of the export documents to show receipt by the customs authority of the goods exported from Zambia in accordance with Rule 18."***

It was counsel's submission that in the instant case the Tribunal totally overlooked the fact that the bills of entry presented were not stamped or certified by the customs authority of the country of destination to show receipt by the customs of authority of the goods exported from Zambia in accordance with rule 18. She contended that since the Tribunal gave two conflicting rulings, this is a proper portion of the case on which this Court can refer back to the Tribunal, in accordance with Section 6(2) of the Revenue Appeal Tribunal Act No. 11 of 1998, for rehearing in order for the Tribunal to reconcile its portion on the requirements of rule 18 of the VAT general rules.

Mrs. Goramota finally submitted that the whole of the Second Schedule which the Respondents seek to rely on does not cover the facts surrounding their case and therefore the services supplied by the 1st Respondent to the

2nd Respondent do not qualify to be zero-rated. She accordingly urged the Court to quash the whole ruling of the Tribunal and hold that the services supplied by the 1st Respondent are standard rated and that the assessed amount plus costs be paid to the Applicant.

For the Respondents, Mr. Silwamba, SC submitted on the first and second grounds of appeal that it is misconceived for the Appellant to submit that the Tribunal relied or based its decision on a repealed law as the Respondents clearly anchored the appeal in the Tribunal on the provisions of the whole of the Second Schedule to the Value Added Tax (zero-rating) (Amendment) Order, 2003 contained in Statutory Instrument No. 9 of 2003 and in particular, the provisions of Group 1(c) [Group 2(c)] which were not affected by the said amendment. The learned state counsel quoted the provisions of Statutory Instrument No. 109 of 1996 before it was amended by the Value Added Tax (zero-rating) (Amendment) Order, 2003 as follows:

***"2. Exports***

***(a) Export of goods from Zambia by or on behalf of a taxable supplier, where such evidence of exportation is produced as the Commissioner-General may, by administrative rule, require.***

***(b) The supply of services, including transport and ancillary services, which are directly linked to the export of goods under sub item (a).***

***(c) The supply of freight transport services from or to Zambia, including transshipment and ancillary services that are directly linked to the transit of goods through Zambia to destinations outside Zambia."***

He contended that after the amendment the Second Schedule now reads as follows:

> ***"2. Exports***
>
> ***(a) Export of goods from Zambia by or on behalf of a taxable supplier, where such evidence of exportation is produced as the Commissioner-General may, by administrative rule, require.***
>
> ***(b) The supply of ancillary services, which are provided at the port of exportation of the goods under paragraph (a) and includes transport and packaging;***
>
> ***(c) The supply of freight transport services from or to Zambia, including transshipment and ancillary services, that are directly linked to the transit of goods through Zambia to destinations outside Zambia."***

Mr. Silwamba, SC submitted that the provisions of paragraph 2(c) were not affected by the said amendment and therefore the Appellant's submission that the Tribunal relied on repealed law cannot be sustained. He argued that the Tribunal's ruling particularly at pages 15 and 16 shows that it was premised on the provisions of paragraph 2(c) when it interpreted the word "ancillary services" to mean supporting or supplementary to the export of goods which in this case was the journey from the mines on the Copperbelt to Kapiri Mposhi in the Central Province of the Republic of Zambia. It was his submission that the word "ancillary" appears in both paragraph 2(b) and 2(c) of the Second Schedule and the Appellant's submissions that the Tribunal relied on paragraph 2(b) when the ruling does not expressly state which particular paragraph was relied upon has no merit.

Mr. Silwamba, SC submitted that the Court should not be persuaded by the Appellant's focus on the provisions of paragraph 2(b) of the Second Schedule based on ancillary services that are zero-rated on the premises that the supply takes place at the port of export as the transactions in issue are actually zero-rated on the basis that they are transshipment and ancillary services that are directly linked to the transit of goods from Zambia to destinations outside Zambia. He contended that paragraph 2 (c) does not restrict the ancillary services to goods that are from other jurisdictions but also includes transportation of goods from or to Zambia and the submission that the presence of commas in the said paragraph actually isolates all the instances, that is to say, freight transportation services, transshipment and ancillary services are not canvassed by any authority at all. The learned state counsel contended that the Appellant has omitted in its submissions to demonstrate that paragraph 2(c) of the Second Schedule also provides that it is not only goods that are passing through Zambia that will be zero-rated but the same shall also apply to goods that are being exported from Zambia. He submitted that the Appellant's interpretation is misleading and misconceived as the provisions of paragraph 2 (c) are not ambiguous and urged the Court to give the ordinary interpretation which is that all freight transportation services including transshipment and ancillary services that are directly linked to the transit of goods from or to Zambia to destinations outside Zambia must be zero-rated. He relied on the case of ***R v Peters(3)*** where Lord Coleridge stated at page 641 that:

> ***"I am quite aware that dictionaries are not to be taken as authoritative exponents of the meanings of words used in Acts of Parliament, but it is a well-known rule of courts of law that words should be taken to be used in their ordinary sense, and we are therefore sent for instructions to these books."***

The Court was also referred to the case of ***Camden (Marquis) v I. R. C. (A) (4)*** where the above position was upheld by Cozen Hardy, M. R. at page 647 in the following words:

> ***"It is for the court to interpret the statute as best it may. In doing so the court may no doubt assist themselves in the discharge of their duty by any literally help they can find, including of course the consultations of the standard authors and reference to well known and authoritative dictionaries."***

Mr. Silwamba, SC also cited the case of ***Sinkamba v Doyle(5)*** where Doyle, C. J., stated at page 6:

> ***"Thus in one sense it could be said that there is little value in debating what is the 'plain', or 'ordinary', or literal', or 'grammatical' meaning of any word or phrase. Dictionary meanings and 'ordinary' meanings are, however, properly used as working hypotheses, as starting points, although in the final analysis these must always give way to the meaning which the context requires."***

The learned state counsel submitted that the record of appeal shows at pages 56 to 269 that the Respondents were engaged to move copper cathodes from Mopani Copper Mines Plc and copies of the Road Consignment Notes and loading sheets are exhibited thereto clearly satisfying the requirement that the goods are from Zambia; Secondly the transportation of the copper cathodes is a transshipment of the goods through Zambia; and lastly, there is evidence on record indicating that the goods actually left the jurisdiction. He also submitted that the Appellant's interpretation that the word "transshipment" only relates to goods coming from outside Zambia and

excludes those from Zambia is misconceived and it just goes to show that the legislation may be ambiguous, in which case the Court must find in favour of the tax payer. The learned state counsel relied on the case of ***Spectra Oil Corporation Limited v Zambia Revenue Authority 2002/RAT/21*** where the Tribunal held that any doubt in the provisions of the law imposing tax shall be construed in favour of the tax payer.

It was also Mr. Silwamba's submission that according to the Oxford Dictionary 8th Edition, the word "ancillary" means "providing essential support". He accordingly contended that the transportation by road from Mufulira to Kapiri Mposhi and subsequently to Dar-es-Salaam is an essential support for the export of any cargo outside Zambia; the same to be said about the off loading and reloading charges at Kapiri Mposhi. According to Mr. Silwamba, SC these services as far as the Respondents' interpretation is concerned are 'ancillary' to the export of the cargo. He accordingly submitted that the Tribunal was on firm ground when it interpreted that term "ancillary services" correctly and he prayed that this ground of appeal be dismissed. Mr. Silwamba, SC also submitted that even if the Tribunal had made its ruling based on the provisions of paragraph 2(b) which he said was not the case, this Court has jurisdiction to make a determination that the correct provision that should have been invoked and relied upon was paragraph 2(c) which clearly captures the transaction herein in the category of zero-rated supplies for purposes of VAT and he relied on the case of ***Shilling Bob Zuka v The Attorney-General(6).*** The learned state counsel contended that the Court must interpret the law to satisfy the core intention of the Legislature which was the promotion of exports and cited the case of ***Attorney-General and Movement for Multiparty Democracy v Lewanika and Others(7)*** where the Supreme Court held that:

***"…Acts of parliament ought to be construed according to the intention expressed in the acts themselves. If the words of the statute are precise and unambiguous then no more can be necessary to expand these words in their ordinary and natural sense. Wherever a strict interpretation of a statute gives rise to an absurdity and unjust situation the judges should and can use their good sense to remedy it…"***

He also relied on the learned authors of ***Benion on Interpretation of Statutes 3rd edition*** who state at page 637 as follows:

***"It is a principle of legal policy that a person should not be penalized under a law that is not clear.***

***The Court when considering in relation to the facts of the instant case, which of the opposing construction of the enactment would give effect to the legislative intention, should presume that the legislation intended to observe the principle. It should therefore strive to adopting a construction which should not penalize a person where the intention to do so is doubtful or penalizes him or her in a way which is not made clear.***

***In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be ready in, nothing is to be implied. On can only look fairly at the language used."***

It was also Mr. Silwamba's submission that the case of ***Canadian Airlines International Ltd v The Commissioner of Customs and Excise*** which is not completely cited as the law report is not indicated by the Appellant is distinguishable from the present case as the transportation of passengers by road to the airport was treated as a separate supply and not as a single supply or ancillary service. He stated that he was fortified by the Tribunal's ruling in the case of ***Kasembo Transport Limited v Zambia Revenue Authority 2007/RAT/AT/11*** where it was stated as follows:

> ***"By way of obiter dictum we wish to comment on the argument by the Respondent that for purposes of Value Added Tax that the freight transportation charges facilitating an export should be split into two portions i. e. the inland portion to be charged Value Added Tax at standard rate and the rest of the journey to the destination of export to be charged at zero-rate. Our view is that the intention of the legislature to zero-rate freight transportation charges was to promote exports. In our view the inland portion of the freight transportation should be charged at zero percent."***

The learned state counsel submitted that from the foregoing, it is clear that the Tribunal has already adjudicated over this issue and determined how these supplies must be treated for purposes of VAT. He accordingly prayed that both grounds one and two of this appeal be dismissed with costs.

Regarding grounds three and four, Mr. Silwamba, SC submitted that the Appellant is inviting the Court to hear matters that did not arise in the appeal before the Tribunal. He contended that the Appellant's submissions at pages 303 to 308 of the record of appeal do not address the issue of

compliance with the provisions of rule 18 of the Value Added Tax General Rules contained in Gazette Notice No. 86 of 1997; and that a cursory perusal of the record of appeal reveals that the Appellant did not raise the proposition that the Respondents herein did not provide proof of exports. He submitted that matters that are not raised at the hearing cannot be raised on appeal and therefore, both grounds three and four are incompetent before this Court. The learned state counsel relied on the case of ***Wilheim Roman Buchman v Attorney-General (8)*** where our Supreme Court held that:

> ***"Mr. Shamwana has raised before us some matter which was not raised before the Commissioner. Mr. Shamwana has not supported his complaint that the learned Commissioner should have rescued himself. If he had done so in the lower court then the Commissioner would have made a ruling. This matter was not raised before the Commissioner; it cannot be raised in this court as ground of appeal before this court. The record, however, shows that the learned Commissioner was never biased in any way. In the first instance he granted an extension. Later he refused to extend the period but when the appellant appealed, he granted an indefinite stay in Zambia. The ground raised by the appellant in this court cannot succeed."***

Mr. Silwamba submitted that from the foregoing authority both grounds three and four must be dismissed.

He also contended that in any event, the Tribunal at page 36 of the record of appeal held that there was evidence that the copper cathodes were exported and the Tribunal stated that there was no dispute on goods leaving

Zambia. He contended that at pages 133 to 269, the record of appeal contains copies of the Customs and Excise Declaration Form CE20 which is proof of export of the copper cathodes and that the Tribunal made its findings of fact after evaluating the evidence before it. The Court's attention was drawn to page 13 of the record of appeal where the Tribunal stated that:

> ***"It is not a dispute that the 1st Appellant transported the copper from Mufulira to Kapiri Mposhi and that the same copper was transported out of jurisdiction, i.e. from Kapiri Mposhi to Dar-es-Salaam by another transporter, TAZARA"***

According to the learned state counsel, these facts were uncontroverted in the Tribunal and the Appellant did not make any objection. He contended that the findings were not perverse and urged the Court not to reverse the same. Mr. Silwamba relied on the case of ***Nkhata and Four Others v The Attorney-General(9)*** where the Court of Appeal stated as follows:

"***A trial Judge sitting alone without a jury can only be reversed on fact when it is positively demonstrated to the appellate court that:***

> ***(a) by reason of some non-direction or mix-direction or otherwise the Judge erred in accepting the evidence which he did accept; or***
>
> ***(b) in assessing and evaluating the evidence the Judge has taken into account some matter which he ought not to have taken into account, or failed to take account some matter which he ought to have taken into account; or***
>
> ***(c) it unmistakably appears from the evidence itself, or from the unsatisfactory reasons given by the Judge for***

***accepting it, that he cannot have taken proper advantage of his having seen and heard the witnesses; or***

***(d) In so far as the Judge had relied on manner and demeanour,***

***there are other circumstances which indicate that the evidence of***

***the witnesses which he accepted is not credible, as for instance, where those witnesses have on some collateral matter***

***deliberately given an untrue answer."***

Mr. Silwamba, SC further submitted that the Appellant's argument that it is the duty of the Respondents to produce proof of export duly stamped by the tax authority of a country of export is misplaced as it is an attempt to impose extra-territorial application of the provisions of the VAT Act. He referred the Court to **FRANCIS BENION** in his book, **INTERPRETATION OF STATUTES 4TH Edition** where it is stated at page 275 that:

***"Although an enactment may be expressed in general terms, the area for which it is law must exclude territories over which Parliament lacks jurisdiction. It also excludes territories over which Parliament did not intend to legislate. Parliament has no jurisdiction to legislate for any other territory."***

The learned state counsel submitted that rule 18(2) in so far as it compels a tax payer to direct that the revenue authorities of the country of destination stamp documents in the manner in which the Appellant wishes the documents stamped intends to place an extra-territorial obligation on the tax payer. He contended that it was not the intention of Parliament that the provisions of the VAT Act shall have extra territorial effect.

Mr. Silwamba, SC also submitted that in the same vein, Parliament did not intend that the subsidiary legislation under the VAT Act should seek extra-territorial application. It was his submission that any subsidiary legislation which purports to have extra-territorial effect is ultra vires the constitution of Zambia and the principal or enabling Act and the Court's attention was drawn to Section 20 (4) of the Interpretation and General Provision Act, Chapter 2 of the Laws of Zambia which provides as follows:

> ***"Any provision of a statutory instrument which is inconsistent with any provision of an Act, Applied Act or Ordinance shall be void to the extent of the inconsistency."***

The Court was also referred to the case of ***Yonnah Shimonde and Freight and Liners v Meridien Biao Bank (Z) Limited(10)*** where our Supreme Court stated that:

> ***"The decisions of this Court, such as Bank of Zambia v Anderson, SCZ Judgment Number 13 of 1993, Attorney-General v General V. Mooka Mubiana, Appeal No. 38 of 1993 made it clear that the provisions of an Act of Parliament could not be ignored or overridden by a mere Statutory Instrument."***

Mr. Silwamba, SC accordingly prayed that this Court holds that the provisions of rule 18(2) cannot compel a taxpayer to force a revenue authority of a foreign country to stamp documents in the manner the Appellant requires and that they are void as they exceed the powers conferred in the VAT Act which is the principal legislation.

The learned state counsel further contended that the case of ***Kasembo Transport Limited v Zambia Revenue Authority***

***2007/RAT/AT/11*** where it was held that a tax payer has to produce proof of export duly stamped by a tax authority was a subject of appeal in the High Court under cause number 2007/HPC/207 and the Honorable Madam Justice P. Nyambe allowed the appeal, reversing the decision of the Tribunal. He accordingly prayed that the appeal be dismissed with costs as it lacks merit.

The parties' written submissions were augmented by oral submissions. I have considered the submissions on record, the authorities cited and the Tribunal's ruling which is the subject of this appeal. I am indebted to counsel from both sides for their industry as evidenced by the quality of submissions and the various authorities cited.

The first and second grounds of appeal are intertwined and will be considered together. The first issue for determination is whether the Tribunal based its decision on the repealed provision of the law. It is not in dispute that paragraph (b) of Group 2 of the Second Schedule of Statutory Instrument No. 109 of 1996 was amended by the Value Added Tax (Zero-Rating) (Amendment Order), No. 9 of 2003. Prior to the amendment, the paragraph read as follows:

> ***"The supply of services, including transport and ancillary services, which are directly linked to the export of goods under sub-item(a)."***

After the amendment, the paragraph now reads:

> ***"The supply of ancillary services, which are provided at the port of***
> ***exportation of the goods under paragraph(a) and includes transport and packaging."***

It was contended on behalf of the Respondents that the ruling does not expressly state which particular paragraph was relied upon. This is not entirely true. At page 15 of the record of appeal in paragraph two, the Tribunal stated in relevant part that:

> ***"The relevant provision which zero-rates exports is paragraph (b) of Regulation 2 of Part II of the Second Schedule of Statutory Instruments No. 109 of 1996…"***

After quoting the paragraph, the Tribunal went on to state that:

> ***"We are of the view that the Appellants are on firm ground when they argue that the use of the word "include" in paragraph 2(b) connotes that all activities linked to the export of goods qualify for zero-rating…"***

I cannot agree more with the Appellant's submission that from the foregoing, the Tribunal relied on the repealed provisions of the law. However, this to me is peripheral. At issue and the kernel of this appeal is the second question, namely, whether the 1st Respondent was legally correct to zero-rate its invoices for freight services provided to the 2nd Respondent.

According to paragraph (b) of Group 2 of the Second Schedule as amended, the services supplied to be zero-rated must be provided ***"at the port of exportation of the goods."*** Part II of the First Schedule of the Customs and Excise (Port of Entry and Routes) Order, No. 16 of 2003 contains a list of names of the ports of export for goods by road. As aptly submitted by the Appellant, the said Schedule does not include Kapiri Mposhi. Stated differently, Kapiri Mposhi is not one of the ports envisaged in

paragraph (b) of Group 2 of the Second Schedule. It logically follows that since the 1st Respondent provided transportation services to the 2nd Respondent from Mufulira to Kapiri Mposhi, both of which are not ports of export the 1st Respondent was not legally correct to zero-rate its services on the basis of paragraph (b) of Group 2 of the Second Schedule.

The Respondents submitted that in the Tribunal they relied on the entire Second Schedule including paragraph (c) – which was not affected by the amendment. As I see it the issue here is one of interpretation. Both parties contend, and I agree with them, that paragraph 2(c) is not nebulous and it must be given the ordinary interpretation.

It was submitted on behalf of the Appellant that the intention of the legislature in paragraph 2(c) was to restrict the freight transportation, transshipment and ancillary services in respect of goods entering from one border and exiting from another border, adding that it was not meant to apply to services supplied from one point in Zambia to another point in Zambia. On the other hand, the Respondents' position is that paragraph 2(c) does not restrict the ancillary services to goods from other jurisdictions but also includes those from or to Zambia.

My understanding of paragraph 2(c) is this: that to be zero-rated the supply of freight transportation services should be either from Zambia or coming into Zambia and include transshipment and ancillary services *"... that are directly linked to the transit of goods through Zambia to destinations outside Zambia."*

In my judgment the Respondents' interpretation of paragraph 2(c) is more appropriate. I am satisfied that this paragraph is not only restricted to goods transiting through Zambia from other jurisdictions; even goods from

Zambia being transported to destinations outside Zambia are also covered in paragraph 2(c) for purposes of zero-rating. However, on the facts of this case the freight transportation services provided by the 1st Respondent to the 2nd Respondent are standard rated and not Zero-rated. The view I take is that contrary to the Tribunal's holding, the transaction is question was not a single supply but a mixed or composite supply. As correctly submitted by the Appellant the supply of the services by the 1st Respondent was not contemporaneous with the supply of the services by Tazara to the 2nd Respondent. This simply means that the chain of supply was broken and this is not had to discern as will be noted below.

I agree with the Appellant that the movement of copper from Mufulira to Kapiri Mposhi was a domestic transportation. If I may add, the 1st Respondent was contracted by the 2nd Respondent to transport the cargo from Mufulira to Kapiri Mposhi within Zambia. Regardless of whether the cargo was ultimately exported, I am of the firm opinion that its transportation from one point in Zambia to another point in Zambia must or ought to be taxable at the standard rate as it is a local supply. On the facts of this case only TAZARA could zero-rate its freight transportation services because it can show proof of exportation. The international segment of the journey started at Kapiri Mposhi where the copper cathodes were declared for purposes of exportation in accordance with the provisions of Section 53(1) of the Customs and Excise Act as evidenced by the bills of entry in the record of appeal. It is not in dispute that the movement from Kapiri Mposhi to the destination outside Zambia was by Tazara, by which time the chain of supply had been broken. In my view the transportation by the 1st Respondent was a separate supply from that by TAZARA and to this extent this case cannot be distinguished from the ***Canadian Airlines International Limited*** case. The Respondents relied on the obiter dictum in ***Kasembo Transport Limited*** case. This Court is not bound by that decision for two

reasons. First, the except relied upon was a mere obiter dictum. Second, the obiter dictum was given by an inferior tribunal. Of course the situation would have been different if the 1st Respondent had continued with the transportation up to Dar-es-Salaam. Therefore, the argument by the Respondents that the transportation of the copper cathodes from Mufulira to Kapiri Mposhi is ancillary to the export of the cargo cannot be sustained. The net result is that the first and second grounds of appeal must succeed.

The third and fourth grounds of appeal are also interlinked and they will be considered together. The question here is whether the Respondents had discharged their burden of proof by complying with the provisions of rule 18 of the Value Added Tax General Rules contained in Gazette Notice No. 86 of 1997.

It was submitted on behalf of the Respondents that grounds three and four are incompetently before this court because the Appellant did not raise this issue before the Tribunal in its submissions at pages 303 to 308 of the record of appeal. I do not agree. At page 308 of the record of appeal, the Appellant's submissions read, inter alia, from paragraph two:

> ***"This Tribunal has stated on diverse instances that the burden to discharge an assessment lies on the tax payer. In the case of STAR MOTORS LIMITED, STAR COMMERCIAL LIMITED, COMMERCIAL MOTORS V ZAMBIA REVENUE AUTHORITY the Tribunal restated this proposition of the law as was emaciated [enunciated] in the English case of Moll v IRC (1955) T. C. 384. It was held in that case that:***

***"if the Appellant fails to lead evidence before the Commissioners, he cannot have the assessment reduced or displaced."***

***This principle was again followed in the case of TRANS ZAMBEZI LIMITED V ZAMBIA REVENUE AUTHORITY – 1998/RAT/02.***

***The Respondent submits that the Appellant has failed to disapprove the Assessment and whatever has been adduced in the Appellant's affidavit only go to further proof [prove] that the Appellant was correctly assessed for a local taxable supply…"***

And at page 12 of the record of appeal the ruling reads, inter alia, in paragraph three as follows:

***"On behalf of the Respondent, Mrs. Kampata argued that the services rendered by the 1st Appellant were provided at Kapiri Mposhi and not Nakonde. She submitted that Tazara was the right entity to zero-rate their services because it is Tazara that takes the copper from Zambia through Nakonde and eventually outside the jurisdiction. Consequently, it is only Tazara that is able to provide documentary proof of exportation as provided by Gazette Notice No. 560 of 1995, rather than the 1st Appellant whose evidence only shows transportation of goods from one point in Zambia, i.e. Mufulira to another point in Zambia, i.e. Kapiri Mposhi…"***

I would like to believe that Gazette Notice No. 560 of 1995 is the precursor of Gazette Notice No. 86 of 1997. From the foregoing excepts, it is clear to me that the Appellant's allegation that the 1st Respondent did not provide documentary proof of exportation in the manner envisaged by rule 18 was raised in the Tribunal. I can only assume that the Respondents having been alive to this fact, they proceeded to make submissions on the third and fourth grounds of appeal.

The sum and substance of rule 18 is that a taxable supplier claiming that a supply is zero-rated because it is an exportation of goods must produce documentary proof that the goods have been exported, by way of a certificate of importation into the country of destination. It was submitted on behalf of the Appellant that the Tribunal overlooked the fact that the bills of entry presented were not stamped or certified by the country of destination to show receipt by the customs authority of the goods exported from Zambia. This, according to the Appellant, is the basis upon which a registered supplier can claim input VAT for zero-rated supplies.

There is no dispute that the copper cathodes left Zambia and no one can fault the Tribunal in making such a finding. However, in so far as rule 18 is concerned a registered supplier must produce export documents stamped by the customs of authority of the country of destination to claim input VAT for zero-rated supplies made by a supplier. In the instant case it is incontrovertible that the Respondents did not provide such documents. The bill of entry documents at pages 134 to 269 of the record of appeal clearly show that they were neither stamped nor do they bear a certificate of importation provided by the customs authority of the country of destination. Furthermore, the transporter recognized by these documents for purposes of zero-rating is TAZARA and not the 1st Respondent and Mopani Copper Mines Plc appears as the exporter.

The Respondents contended that in so far as rule 18(2) compels a tax payer to request customs authorities of the country of destination to stamp the documents imposes extra-territorial application of the VAT Act. I agree with the Respondents that it was not the intention of Parliament that the VAT Act and its subsidiary legislation shall have extra-territorial effect. In my considered view, the import of rule 18 is that it does not impose any obligations on the customs authorities of the country of destination. Rather, it imposes an obligation on a Zambian suppliers claiming that a supply is zero-rated on the ground that it is an exportation of goods, to have the export documents stamped by the customs authority of the country of destination. There is, therefore, no way that rule 18 can be considered to have extra-territorial effect. In the same vein, I do not agree that rule 18 is void on the ground that it exceeds the powers conferred in the VAT Act. The view I take is that when goods are transported into another country, it is or it ought to be a routine procedure to have the export documents stamped by the customs officials at the point of entry. I believe that this is the best way to prove that the goods have left the jurisdiction or have indeed been exported.

It was also submitted on behalf of the Respondents that the decision in the case of ***Kasembo Transport Limited v Zambia Revenue Authority 2007/RAT/AT/11*** which held the same view was reversed by the High Court under cause number 2007/HPC/207. Needless to underscore, this Court is not bound by that decision as the two courts are of equal jurisdiction. I accordingly conclude that the Respondents had not discharged their burden of proof. I think that grounds three and four must also succeed.

In the result, I will allow this appeal, quash the whole ruling of the Tribunal and order that the assessed amount be paid to the Appellant. In

view of this conclusion, it is unnecessary for the Court to refer back to the Tribunal for rehearing in the manner and to the extent suggested by the Appellant as regards the Tribunal's two conflicting decisions on rule 18.

Costs shall follow the event and will be taxed in default of agreement. Leave to appeal to the Supreme Court is granted.

**DELIVERED THIS 4TH DAY OF NOVEMBER, 2011**

**C. KAJIMANGA**
**JUDGE**