MC LTD
versus
ZIMBABWE REVENUE AUTHORITY

FISCAL APPEAL COURT
KUDYA J
HARARE, 26 February 2015 and 20 October 2016

Value Added Tax appeal

AP de Bourbon, for the appellant
T Magwaliba, for the respondent

KUDYA J: This judgment deals with both the preliminary issues raised by the respondent challenging the validity of the main appeal lodged in the Fiscal Appeal Court by the appellant on 22 November 2011 and the merits of the main appeal.

THE PRELIMINARY ISSUES

The brief facts in regard to the preliminary issues are common cause. They are these.

1. The appellant was initially incorporated in the British Virgin Islands before it relocated registration to Mauritius on 26 September 2002. As a matter of commercial convenience, it contracted a related party in South Africa to manage its billing and backroom systems for its operations in the rest of Africa. It engaged SP Ltd, the franchisee, to interface with potential subscribers in Zimbabwe on commission. The franchisee did not wield any authority to conclude contracts with such subscribers. The contracts were executed between the local subscriber and the appellant. The subscribers paid the subscriptions directly to the appellant.
2. The respondent conducted an investigation into the income tax and value added tax affairs of the appellant. The franchise was originally held by a director and main shareholder of SP Ltd in his personally capacity, who with the approval of the appellant subsequently assigned it to the franchisee. The effect of the investigations was that the respondent deemed the appellant to be a local operator and on 11 February 2011 duly designated the director and main shareholder of the franchisee as the public officer of the appellant purportedly in terms of s 61 (4) of the Income Tax

Act [*Chapter 23:06*] with effect from 1 January 2006 and enclosed a copy of the investigation report in the format of a position paper with the appointment letter.

3. On 15 February 2011 the appellant appointed a firm of tax consultants to represent it in all the issues raised in the position paper. On 16 February 2011 the tax consultants sought permission to respond to the contents of the position paper by 11 March 2011. The response of 11 March was not availed to this court by either party.
4. In the meantime, the purported public officer's appointment was in consequence of a letter of objection from his legal practitioners of 10 March 2011 withdrawn on 21 March 2011. He was however re-appointed in the same letter on the basis that he was an agent of the appellant in Zimbabwe as contemplated by s 61 (9) of the Income Tax Act. He challenged the re-appointment by way of a High Court application dated 21 April 2011.
5. The position paper was submitted to the appellant through the designated public officer on 11 February 2011. The respondent alleged that careful analysis of the local activities and substance rather than the form of the transactions of the appellant as reflected in the franchise agreement formed the basis of the findings in the position paper[1]. The respondent contended in the position paper that the transactions conducted by the appellant with and through the franchisee and the South African entity on the one hand and with the local subscribers and banks on the other constituted a permanent establishment as contemplated in the Double Taxation Agreement between Zimbabwe and South Africa. It nailed its VAT claim on the mast of s 6 (1) (c) and s 47 (f) of the Value Added Tax Act [*Chapter 23:12*] and sought to levy the appropriate VAT on the appellant from income attributable to local subscribers from January 2006[2].
6. The appellant's response of 30 March 2011 was not filed of record by either party but was mentioned in the response of the respondent of 30 May 201, which was addressed to the tax consultant. The respondent maintained that the appellant had a permanent establishment in Zimbabwe. It further founded VAT liability on the supply of satellite television services in Zimbabwe by the appellant. The respondent contended that the appellant was a supplier of such services into Zimbabwe and was in that capacity liable for the payment of value added tax. The appellant contended that it did not have

[1] P 93-99 of the bundle
[2] P 99

a permanent establishment in Zimbabwe and further that VAT liability fell on local subscribers who were in reality the importers of its services. The respondent imposed on the appellant the obligation to charge and remit VAT for all the services it rendered in Zimbabwe and attached VAT schedules showing the amounts due and payable from the appellant in the sum of US$14 013 830.74 and inclusive of penalties and interest in the aggregate sum of US$22 920 484.54.[3]

7. On 29 June 2011 the tax consultants of the appellant objected purportedly in terms of s 32(1) of the Value Added Tax Act to the letter issued on 30 May 2011 for the period January 2006 to March 2011. The appellant raised 5 grounds of objection. The first ground was that "no assessments have been raised. Instead our client has been furnished with a schedule". The appellant also raised the irregularity of despatching the objection to the tax consultant rather than to the appellant.
8. On 18 July 2011 the respondent indicated to the tax consultants that the letter objected to was not intended to be and was not an assessment but constituted a measured response to their earlier letter of 30 May 2011. It remained open to negotiation particularly on the computation of VAT liability and on the appropriate penalties and interest.
9. On 17 August 2011 the tax consultant insisted that the letter of 30 May 2011 constituted a decision subject to objection and maintained that though they did not meet the legal requirements of an assessment as the respondent treated them as assessments they had been properly objected to.
10. On 18 August 2011 the respondent conceded that the letter was an objection and undertook to avail its decision thereon. The decision was never made. In an undated letter filed with the Registrar of the Fiscal Appeal Court on 22 November 2011 that was served on the respondent on the same date the appellant deemed its objection to the VAT dismissed by the effluxion of time in terms of s 31 (4) of the Value Added Tax Act. On that date the appellant appealed against the deemed dismissal in terms of s 33 (1) and (2) of the Value Added Tax Act as read with s 13 of the Fiscal Appeal Court Act [*Chapter 23:05*].
11. The parties entered correspondence on 21 December 2011 and 11 January 2012 concerning the propriety of the VAT notice of appeal filed of record that allegedly

[3] Pages 116A-122 of the bundle

lacked material averments of fact and contentions of law as required by r 3 (1)((b) of Fiscal Appeal Rules SI 41/2002. The appellant sought to non-suit the respondent for failing to file its reply to the notice of appeal on 11 January 2012. This prompted the filing of the reply on 18 January 2012 and the eventual postponement of the matter *sine die* on 9 February 2012.

12. The matter resumed before me on 26 February 2015. I agreed to hear the arguments on the preliminary objections and the evidence on the merits and reserved judgment on both.

The legal arguments

In the pleadings and by letter dated 10 October 2014, the respondent took issue with the propriety of the notice of appeal filed of record[4]. It averred that the notice of appeal failed to meet the mandatory requirements of r 3 (1) (b) of the Fiscal Appeal Court Rules in that it did not specify in a separate document the material facts and contentions of law upon which the appeal was based. [5] The point was disputed by the appellant who contended that the notice of appeal satisfied both the provisions of s 33 (1) and (2) of the Value Added Tax Act on the one hand and r 3 of the Fiscal Court Appeal Rules on the other.

Section 33 (1) and (2) provide that:

> "**33 Appeals to Fiscal Appeal Court**
>
> (1) An appeal against any decision or assessment of the Commissioner, as notified in terms of subsection (4) of section *thirty-two*, shall lie to the Fiscal Appeal Court in terms of the Fiscal Appeal Court Act [*Chapter 23:05*]
>
> (2) Every appeal shall be by way of a notice in writing and shall be lodged with the Commissioner within thirty days after the date of the notice mentioned in subsection (4) of section *thirty-two* or, if the Commissioner has under subsection (4) of section *seventy-five* withdrawn the last-mentioned notice and sent it anew, the date of the notice so sent anew:"

The rule in question reads:

> "***3. Notice of appeal***
>
> (1) An appeal shall be instituted by means of a written notice which shall—
>
> (*a*) clearly identify the decision…… appealed against; and
>
> (*b*) specify clearly all the grounds of appeal and material allegations of fact and contentions of law on which the appeal is based:
>
> Provided that the material allegations of fact and contentions of law may be specified in a separate document; and
>
> (*c*) specify an address where service of any notice or document pertaining to the appeal may be effected.

[4] P2-5 of bundle

[5] P 8 para 12 of respondent's reply and p 325—326 of case bundle

(2) An appellant shall cause his notice of appeal and, if there is one, the separate document referred to in the *proviso* in paragraph (*b*) of sub rule (1) to be served on the appropriate officer

(*a*) within sixty days after the appellant was notified of the decision appealed against, in the case of an appeal in terms of Part III of the Act; or

(*b*) ……not relevant"

The requirements for a valid notice of appeal are that it must be:

(i) Written,

(ii) Clearly identify the decision appealed against

(iii) Specify clearly

a. all the grounds of appeal and

b. the material allegations of fact and

c. the contentions of law

The appellant has a choice to set out the material allegations of fact and contentions of law in a separate document.

(iv) Specify an address of service;

The notice of appeal in issue is written and provides an address of service. It identifies the decision appealed against as the deemed dismissal of its objection of 29 June 2011, which objection was accepted as such on 18 August 2011 and against which the respondent failed to proffer a response within the 3 months provided in s 32 (4) of the Value Added Tax Act. The grounds of appeal, the material allegations of fact and the contentions of law were all conflated and concisely stated in a single document consisting of 9 paragraphs. On the face of it, the notice of appeal appears to be in compliance with r 3 of the Fiscal Appeal Court Rules. The respondent clearly misconstrued rule 3 (1) (b) as requiring the filing of a separate document capturing the material allegations of fact and contentions of law outside the grounds of appeal. The *proviso* to paragraph (b) of sub-rule (1) in question is couched in permissive rather than mandatory language. The appellant has a choice whether to include all the three requirements in one document or to file two separate documents capturing the grounds of appeal in one and the material allegations of fact and contentions of law in the other. Other than that misapprehension, the respondent did not specify the manner in which the notice failed to comply with the rules. The adequacy of the notice of appeal was demonstrated by the detailed Commissioner's case filed of record in response thereto. Mr *Magwaliba,* for the respondent, wisely disregarded the point both in his written heads and oral argument. I took it that he abandoned it. I dismiss the point for lack of merit.

The main point taken by Mr *Magwaliba* was that the appeal was nullified by an invalid and void notice of objection. He submitted that the decision appealed against was incapable of objection under s 32 of the Value Added Tax Act despite recognition of the objection by the respondent on 18 August 2011. Mr *de Bourbon* for the appellant submitted that the deemed decision of the Commissioner was appealable.

The relevant statutory provisions

This appeal was brought in terms of s 33 of the Value Added Tax Act as read with s 13 of The Fiscal Appeal Court Act against the deemed decision recognised by s 32 (4) of the Value Added Tax Act.

Section 13 of the Fiscal Appeal Court Act reads:

> "**13 Appeals from decisions of Commissioner**
> (1). Any person who is dissatisfied with a decision of a Commissioner given in terms of a tax Act may appeal to the Court against that decision.
> (2) Every such appeal shall be noted and prosecuted within the period and in the manner prescribed by rules:
> Provided that the Court may, on good cause being shown or by agreement of the parties, extend the said period."

The Value Added Tax Act is defined in the definition section, s 12 of the Fiscal Appeal Court Act as one of the two tax Acts. The right of appeal is granted to any person who is dissatisfied with a decision of the Commissioner given under, *inter alia,* the Value Added Tax Act. The appeal must comply with the provisions prescribed in the rules. The decision taken on appeal by the appellant was the deemed decision of the Commissioner. Section 32 (4) of the Value Added Tax Act provides that:

> "(4) After having considered the objection, the Commissioner may—
> (*a*) alter any decision pursuant thereto; or
> (*b*) alter or reduce any assessment pursuant thereto; or
> (*c*) disallow the objection;
> and shall send to the person upon whom the assessment has been made or to whom the decision has been conveyed or, as the case may be, to whom the reduction has been allowed, notice of the reduction, increase, alteration or disallowance:
> Provided that if the Commissioner has not notified the person who lodged the objection of his decision within three months after receiving the notice of objection or within such longer period as the Commissioner and the person may agree, the objection shall be deemed to have been disallowed."

The decisions taken on appeal under the Value Added Tax Act are set out in s 33 (1). These constitute decisions or assessments that arise in s 32 (4). These are initiated by lodging an objection in terms of s 32 (1), which reads:

"**32 Objections to certain decisions or assessments**

(1) Any person who is dissatisfied with—

(*a*) any decision given in writing by the Commissioner—

(i) in terms of subsection (7) of section *twenty-three* notifying that person of the Commissioner's refusal to register that person in terms of this Act; or

(ii) in terms of subsections (6) or (7) of section *twenty-four* notifying that person of the Commissioner's decision to cancel any registration of that person in terms of this Act or of the Commissioner's refusal to cancel such registration; or

(iii) in terms of subsection (8) of section *forty-four* of the Commissioner's refusal to make a refund;

or

(*b*) any assessment made upon him under sections *thirty-one*, *sixty-six* or *sixty-seven*; or

(*c*) any direction or supplementary direction made by the Commissioner and served on that person in terms of subsections (3) or (4) of section *fifty-two*;

(*d*) ……not relevant

may lodge an objection thereto with the Commissioner."

In our law, a value added tax appeal to the Fiscal Appeal Court is founded on an objection raised against either a decision or an assessment prescribed by s 32 (1) of the Value Added Tax Act. The parties and counsel were agreed that I was here concerned with the provisions of s 32 (1) (a) and (b). These authorise a dissatisfied taxpayer to object to either a specified decision or an assessment made by the Commissioner. I am therefore required to determine whether the objection raised on 29 June 2011 falls within the ambit of these provisions. It was common cause that the objections of a taxpayer are limited to the Commissioner's decisions, directives and assessments prescribed in s 32 of the Value Added Tax Act. Any objection outside the four corners of this section and any subsequent appeal based on such an objection is a nullity. See *Gwalazimba* v *PG Merchandising Ltd and Anor* 1993 (2) ZLR 215 (S) at 216B-C.

The decision made by the Commissioner in the letter of 30 May 2011 was that even though the appellant was not incorporated in Zimbabwe it had a permanent establishment in Zimbabwe from which it was deemed a registered operator liable for the payment of value added tax in the sum of US$22 920 484.54 inclusive of penalties and interest for the period from January 2006 to February 2011. The computations of the principal, penalties and interest were set out in schedules attached to that letter.

I turn to consider whether the written decision falls within the ambit of s 32(1).

(i) was it a decision given in writing by the Commissioner in terms of s 23 (7) notifying that person of Commissioner's refusal to register that person in terms of this Act?

It was common cause that the letter of 30 May 2011 from the Commissioner was not a decision contemplated by s 32 (1) (a). The appellant did not apply for registration. Even if it were deemed registered after failing to apply by virtue of s 23 (4) (b); s 32 (1) (a) (i) remains inapplicable for the reason that the appellant was not refused registration.

(ii) was it a decision in terms of s 24 (6) or (7) notifying that person of Commissioner's decision to cancel any registration of that person in terms of this Act or Commissioner's refusal to cancel such registration

An operator may be registered after submitting the requisite application to the Commissioner. The Commissioner is, however, empowered to cancel such registration if he is satisfied that the registered operator has no fixed place of business or does not keep proper books of account of his trade or does not have a bank account or has failed to perform the duties prescribed under the Act. He is obliged to give such an applicant written notice of the cancellation which cancellation stands suspended until any objection is conclusively determined. The letter of 30 May 2011 did not cancel the deemed registration of the appellant nor did it concern refusal to cancel such registration.

(iii) was it a decision made in terms of s 44(8) of the Commissioner's refusal to make a refund?

The letter of 30 May 2011 was not concerned with the denial of any refunds and did not constitute a notice of such refusal and was not made at the instance of the appellant as contemplated by s 44(8) of the Value Added Tax Act.

The letter of 30 May 2011 did not fall into any one of the three prescribed decisions that the appellant could object to. Neither was it a decision on the implementation or interpretation of regulations made under s 78 of the Act in respect of fiscalised electronic registers nor did it deal with assessments of VAT arising from such registers.

(iv) was it a direction or supplementary direction made and served in terms of s 52(3) or (4?)

The letter was not a directive nor a supplementary directive contemplated by s 52 of the Value Added Tax Act. The commissioner did not consolidate disparate units into a single registered operator nor levy VAT on such a consolidated entity.

(*v*). *was it an assessment made on the appellant in terms of s 31, 66 or 67 of VATA?*

An assessment in terms section 31, 66 or 67

The power of the Commissioner to make assessments is found in s 31 of the Value Added Tax Act. Section 31 (1) applies to the whole of s 31 and Part III, Part VII and sections 63, 65, 66 and 67 of the Act. Para (a) deems any non-registered operator who supplied goods or services and charged value added tax on the supply a registered operator. In addition para (b) deems the amount of tax charged in para (a) above or erroneously charged on exempt or zero rated goods or services by a registered operator to be the value added tax payable to the Commissioner. Subsection (2) identifies the persons liable for payment of the tax assessed by the Commissioner. These are the representative taxpayers enumerated in s 6 (1), the seller or owner in s 29 and the deemed and actual registered operator in s 31 (3) (d) and (e).

The word "assessment" first appears in this section in subs (3) and is thereafter repeatedly used in subs (4) to (6). The five paragraphs in subs (3) all refer to failures to render returns or dissatisfaction with returns rendered under s 28, 28, 30 and 13 of the Act, failure to pay VAT by any person who has become liable for such payment, a non-registered operator who charges VAT and a registered operator who nevertheless charges VAT on exempt or zero rated goods. In all these circumstances:

> "The Commissioner may make an assessment of the amount of tax payable by the person liable for the payment of such amount of tax, and the amount of tax so assessed shall be paid by the person concerned to the Commissioner."

It is appropriate that I set out subs (4) to (6) in order to bring out the full context in which the word is used.

> "(4) In making such assessment the Commissioner may estimate the amount upon which the tax is payable;
>
> (5) The Commissioner shall give the person concerned a written notice of such assessment, stating the amount upon which tax is payable, the amount of tax payable, the amount of any additional tax payable in terms of section *sixty-six* and the tax period, if any, in relation to which the assessment is made, and—
>
> (*a*) where the assessment is made on a seller referred to in subparagraph (i) of paragraph (*b*) of subsection (2), send a copy of that notice of assessment to the owner referred to in that subsection; or
>
> (*b*) where the assessment is made on an owner referred to in subparagraph (ii) of paragraph (*b*) of subsection (2), send a copy of that notice of assessment to the seller referred to in that subsection.

(6) The Commissioner shall, in the notice of assessment referred to in subsection (5), give notice to the person upon whom it has been made that any objection to such assessment shall be lodged or be sent so as to reach the Commissioner within thirty days after the date of such notice."

In subss (4), (5) and (6) the phrase "such assessment" is also used. In addition the opening words of subs (5) refer to "a written notice of assessment" which is further identified in para (a) and (b) of the same subsection as "that notice of assessment" and in subs (6) as "the notice of assessment referred to in subsection (5)". The Commissioner is empowered in the circumstances enumerated in subs (3) to make an assessment of the amount of tax payable. He may do so by using the information in the returns to make an actual assessment of the amount of tax payable or he may estimate such amount. It seems to me that the words "the assessment" and "such assessment" in s 31 are synonymous with "make an assessment of the amount of tax payable". In s 66 (2) the word used is "assessed". The Commissioner is mandated to assess the additional tax payable for evasion or the excess claimed as a refund not exceeding the amount evaded or the excess claimed. S 67 permits the Commissioner to "raise an assessment upon the recipient for the amount of tax payable together with penalty or interest" arising from the recipient's fraudulent action or misrepresentation resulting in incorrect zero rating or exemption. He may estimate "such assessment". And the amounts payable under "such assessment" shall be paid by the recipient within the period set by Commissioner.

It was common cause that the word "assessment" is not defined in the Value Added Tax Act. Mr *de Bourbon* used the word "determination" interchangeably with "assessment" in his written heads.[6] The *Shorter Oxford English Dictionary* defines "assessment" *inter alia* as "the action of assessing", "the amount assessed"; "the determination of the amount of taxation to be paid". It defines "assess" as "to fix the amount of taxation"; "determine the amount of and impose upon", "to impose a fine or tax". Guidance as to its meaning is provided in s 31 (3), which identifies it with the making of an amount of tax payable. In my view it simply means the calculation or computation of the VAT using the formula set out in the Act. That formula involves scrutinising the returns and records rendered by the registered operator in the broad sense and applying the requisite percentage to the purchase price and selling price to delineate the output and input tax and then deducting the output from the input tax to arrive at the VAT payable. The formula takes into account both exempt and zero

[6] Para 11 p 6 para 20 p 10 and para 24 p 13 and para 29 p 15

rated supplies. See *Commissioner for the South African Revenue Services* v *Pretoria East Motors (Pty) Ltd* [2014] 3 All SA 266 (SCA) at 269-270 para [5].

In the letter of 30 May 2011 the Commissioner submitted schedules justifying the principal value added tax, penalties and interest that the appellant was expected to pay. It was common cause that once the Commissioner makes an assessment he has a mandatory obligation in terms of s 31 (5) to give a written notice of such assessment. The notice is given to certain specified persons. These are "the person concerned", the seller or owner in s 29 with a copy to the owner or seller respectively. The notice bears a specific architectural design. It must state the amount upon which tax is payable, the amount of tax payable, the amount of any additional tax payable in terms of s 66, and the tax period covered by the assessment. In addition subs (6) requires that in the notice referred in subs (5) the commissioner notifies the concerned person that any objection to such assessment shall be lodged or be sent so as to reach the Commissioner within thirty days after the date of such notice.

I reproduce below a summary of the information set out in the schedules on p 116A to 122 of the bundle of documents.

P 116A: Appellant VAT on subscriptions: Summary 2006-February 2011

year	**Principal US$**	**Interest US$**	**Penalty US$**	**Total US$**
2006	1 995 038.61	**414 031.87**	997 519	3 406 589.78
2007	2 210 545.57	**336 621.42**	1 105 272.78	3 652 439.77
2008	2 449 263.65	**356 510.16**	1 224 631.83	4 030 405.64
2009	2 714 522.48	**441 934.48**	1 357 261.24	4 513 718.20
2010	3 980 970.00	**333 371.57**	1 990 485.00	6 304 826.57
2011	663 490.43	**17 268.93**	331 745.22	1 012 504.58
Total	**14 013 830.74**	**1 899 738.43**	**7 006 915.37**	**22 920 484.54**

P 116B and 116C show monthly VAT for 2006, 2007, 2008, 2009, 2010 and March 2011. Each table shows the number of equated subscribers, monthly rate for premium bouquet, appellant monthly sales and the VAT due.

year	subscribers	Premium bouquet Monthly rate US$	Sales US$	Vat due US$
2006	228 288	67.00	15 295 296	1 995 038.61
2007	252 948	67.00	16 947 516	2 210 545.57
2008	280 264	67.00	18 777 688.00	2 449 263.65
2009	310 617	67.00	20 811 339.00	2 714 522.48
2010	436 011	70.00	30 520 770.00	3 980 970.00
2011	109 002	70.00	7 630 140.00	995 235.65

Pages 117- 122 show tables of monthly computations of penalties at 50% based on the sales figures and VAT due and interest at 5.51% for period from 1 January 2006 to 31 December 2009 and mainly 10% from January 2010 to 30 May 2011 based on the VAT due and the days payment was delayed from the due date to 30 May 2011.

Principal	Interest US$	Penalty 50% US$	Total US$
2006: 1 995 038.61	414 031.87	997 519.30	3 406 589.78
2007: 2 210 545.57	336 621.42	1 105 272.78	3 652 439.77
2008: 2 449 263.65	356 510.66	1 224 631.33	4 030 405.64
2009: 2 714 522.48	441 934.48	1 357 261.24	4 513 718.20
2010:3 980 970.00	333 371.57	1 990 485.00	6 304 826.57
2011: 663 490.43	17 268.93	331 745.22	1 012 504.58

The information in the schedules showed the monthly number of equated subscribers, the monthly rate for the premium bouquet, the monthly sales and the monthly VAT due for the period from January 2006 to March 2011. The VAT for all the years, except 2010 which was at an average of 12.63 %, was 13.04% of the sales. VAT was and is still charged in terms of

Part IV of the Second Schedule to the Value Added Tax (General Regulations SI 273/2003) headed "Goods not exempt from VAT" at the rate of 15% in Zimbabwe. It reads:

> "The goods which fall under any item or heading as contemplated in the Customs Act and are not mentioned in the First Schedule in Parts I,II,III shall be charged VAT at the rate of 15 *per centum.*"

It is apparent that the figures of the sales do not represent the amount upon which tax is payable. However, the amount of tax payable, the amount of additional tax payable and the periods of assessment are indicated in the schedules. In addition the letter and schedule are not addressed to the concerned person but to the tax advisers. The requirement in subs (6) was not complied with. The appellant was not advised of his right of objection. In his written heads Mr *de Bourbon* correctly submitted that there was a mandatory obligation on the Commissioner to give notice of the assessment[7]. Indeed in his written heads[8] Mr *de Bourbon* conceded that no formal notice of assessment was ever issued. The pleadings show that such notice of assessment was not given. Accordingly, I agree with Mr *Magwaliba* that the covering letter and the schedules did not constitute a notice of assessment.

Mr *de Bourbon* further correctly submitted that there was a conceptual difference between a notice of assessment and an assessment. It is obvious that an assessment is made before a notice of "that or such assessment" is raised. Mr *de Bourbon* argued correctly that the right of objection conferred by s 32 (1) (b) was not to the notice of assessment but to the assessment itself. He, however, wrongly submitted that the right to object was not dependent on the notice of assessment. In my view, the right of objection derived from s 32 (1) (b) is dependent on the notice of assessment to the extent that it can only be exercised on receipt of the notice of assessment. Without the notice of assessment, the taxpayer remains uncertain as to whether the Commissioner has reached a definitive assessment to which he can object. The purpose of the notice of assessment therefore serves to advise the taxpayer that the negotiations on disputed contentions on the amount of VAT owing are over and the Commissioner has now come to a final and definitive assessment. To the same effect is Murray CJ in *Clan Transport Company (Pvt) Ltd* v *Road Service Board and Anor* 1956 R &N 322 at 326C and F where he said:

> "The delivery of its judgment on the issue before it is as much part of its proceedings as its deliberations and the arrival of, after discussion, at its conclusion. Until <u>its conclusion has been clothed with finality by its communication, either in open sitting or by its administrative officer to the parties, I find it difficult to see on what ground a party could legitimately attack</u>

[7] Last sentence in para 14 page 8.
[8] Para 28

> any subsequent unanimous decision by it to reconsider the matter and reverse the conclusion at which it had at one stage arrived……I have come to the conclusion that the Boards' proceedings terminated only on communication of the decision in April 1956." (Underlining my own for emphasis)

In the present case, the communication which would have clothed the decision, that is the assessment, with finality would have been the notice of assessment. Such notice of assessment would bring to finality and thus terminate the making of the assessment contemplated by s 31(3) of the Value Added Tax Act. The appellant would only be able to exercise his right of objection on receipt of the notice of objection. Mr *de Bourbon* contended that the letter and schedule constituted the assessment made in terms of s 31. The point taken by the respondent was that the letter and schedule did not constitute an assessment[9]. I do not think that point was seriously disputed by the appellant's tax advisers, the appellant and Mr *de Bourbon*. This is clear from the very first point raised by the tax advisers in the purported objection of 29 June 2011. They declared that "no assessments had been issued; instead our client has been furnished with a schedule"[10] and in detail pontificated that:

> "The fact that the Act uses the word "shall" as opposed to "may" [means] therefore there is no choice, the Commissioner must and by delegation of powers his subordinates must issue an assessment as ordered to do so by the very Act they claim to administer. However in this case assessments were not raised. Instead schedules were raised thereby accomplishing two things. Firstly on an assessment [our client] has the right to object within thirty days from the date of issue. Our client was not advised that if they were unhappy or dissatisfied with the "schedule" they had the right to object. Secondly, the assessment should state the period the taxpayer has in which to settle the liability. Further, the assessments and covering letter were addressed to [the tax advisers] and not the client"[11].

In the grounds of appeal, the first ground is couched in similar language[12]thus:

> "The respondent failed to issue assessments in terms of the Value Added Tax Act [*Chapter 23:12*] and only produced schedules for the period from January 2006 to March 2011 as the basis of the demand for the payment of value added tax, interest and penalties."

In fact, in the second ground of appeal, the appellant poignantly declared that:

> "The respondent failed to serve the aforementioned schedules and the covering letter of 30 May 2011 on the appellant, or serve the same in terms of s 75 of the Value Added Tax Act, and thus such schedules and such covering letter have no legal force in terms of the Act."

The parties were in agreement that a valid objection stands on the shoulders of a valid assessment. I hold on the authority of *Gwalazimba's* case *supra*, that the purported objection,

[9] Letter of 18 July 2011p 63 of bundle
[10] P 60 of the bundle
[11] Pm 61 of bundle
[12] Pp1-2 of bundle

based as it was on documents that did not constitute an assessment was invalid. In consequence, the subsequent notice to appeal based on an invalid objection is a nullity. It cannot be saved by the letter of 18 August 2011 in which the respondent agreed to treat the purported objection as an objection. As noted by reference to *MacFoy* v *United Africa Co Ltd* [1961] 3 All ER 1169 at 1172 in such cases as *Jansen* v *Acavalos* 1993 (1) ZLR 216 (S) at 220B, *Matanhire* v *BP Shell Marketing* 2004 (2) ZLR 147 (S) at 149E and *Hubert Davies Employees Trust (Pvt) Ltd & Ors* v *Croco Holdings (Pvt)* Ltd 2009 (2) ZLR 53 (S) at 55E-56A such an error of law is incurably bad and cannot be salvaged.

It does not appear to me that the Commissioner could waive compliance with the requirements of s 32. See *Foroma* v *Minister of Public Construction and National Housing and Anor* 1997 (1) ZLR 447 (H) at 464B-H where Smith J cited with approval Innes ACJ in *Ritch & Bhyhat* v *Union Government (Minister of Justice) 1912* AD 719 at 735 that:

> "Cases in which the result of the renunciation or waiver would be to effect something either expressly forbidden by statute or absolutely illegal by common law of course present no difficulty. But the same principle must necessarily apply where the result of a renunciation by an individual would be to abrogate the terms of a statute which in their nature are mandatory and not merely directory (see Craies p 83). Because otherwise the result would be not merely to destroy private rights, but to defeat the provisions of an enactment intended on general and public grounds to be peremptory and binding on all concerned. See also *van Heerden v Pretorius* 1914 AD 69 at 84"

And Steyn CJ in *SAR & H* v *Transvaal Consolidated Land & Exploration Co Ltd* 1961 (2) SA 467 at 481C that:

> "In the present case, there is the further consideration that the executive authority cannot renounce a peremptory statutory obligation imposed upon it by the legislature for the conservation of public moneys."

It was common cause that the letter of 30 May 2011 was in response to the letter of 11 March 2011 from the appellant's tax advisors. It restated the basis for VAT liability that was initially stated in the position paper. It also provided the preliminary computations of the VAT liability, which were still open to correction and which had been promised in the position paper. Indeed in the purported objection the tax advisors indicated that the computations were inaccurate. They however did not identify the errors. That the schedules were never intended to be assessments was confirmed by the service of the letter and the schedules on the tax consultants contrary to the prevailing general practice of the respondent and the law. The law required that the assessments be served in the format of a notice of assessment, which placed the taxpayer *in mora* and informed him of the *dies induciae* for lodging objection. In my view, the schedules merely informed the appellant the preliminary

amount of VAT that it was likely to pay once the notices of assessment were raised. They were neither an assessment nor a notice of assessment. I am fortified in this view by the chain of correspondence between the parties. The position paper of 11 February 2011 established the basis the appellant's liability for payment of VAT. The respondent requested the appellant to submit representations on the contents of that position paper. It also advised the appellant that it would quantify liability and demand payment of the resultant VAT at some future point. The appellant responded on 11 March 2011 but that response was not made part of the record of proceedings. However the contents of that letter can easily be discerned from the reply of 30 May 2011. In the reply the respondent reconfirmed the basis upon which it initially found the appellant liable for payment of VAT and fulfilled its avowed intention to quantify the amounts that the appellant was expected to pay. These amounts were stated in the schedules.

In my view the words "expected to pay" mean "due". They do not denote demand. They merely informed the appellant of the suggested amount of value added tax owed to the respondent. Ordinarily a demand is accompanied by the threat of a specified sanction and where no such sanction is threated, the word "demand" is used. Neither the word "demand" nor the threat of sanction form part of this letter. It is thus clear to me that the letter and the schedules did not constitute a demand for payment. They would have been a demand were they in exact compliance with the requirements set out in subs (5) and (6) of s 31 of the Act. It seems to me that an assessment to which a taxpayer can object under s 32 (1) (b) must be one made in terms of subs (3) as read with subsection (5) and (6) of s 31 of the Value Added Tax Act. In my view, therefore, by operation of law the Commissioner is precluded from demanding payment on the basis of documents by whatever name called whether schedules or even assessments, which merely comply with the provisions of subs (3) and do not further comply with subsection (5) and (6) of section 31 of the Value Added Tax Act. It is only to an assessment that fully complies with all three subs sections of s 31 that a taxpayer is obliged to pay the amount of VAT thus assessed.

Mr *de Bourbon* further advanced a three pronged argument in his bid to save the notice of appeal. He contended that the letter of 30 May 2011 and the attached schedules constituted an assessment in substance though not in form and that even though it fell short of the requirements of a formal assessment it met the general plan and objects of s 32 (1) (b). By formal assessment I understood him to mean an assessment which is in exact compliance with all the requirements of the three subsections of s 31 referred to above. Such an

assessment is availed to the taxpayer by way of notice which provides on the face of it the amount on which the tax is payable, the amount of tax payable, the amount of any additional tax, the *dies induciae* for objection and the demand for payment. The major strand of his argument was based on *Sterling Products International* v *Zulu* 1988 (2) ZLR 293 (S) at 301B-302A and *Mwenye* v *Lonrho Zimbabwe* 1999 (2) ZLR 429 (SC) at 433A-C that found traction in our law in the cases of *Zimbabwe Unity Movement* v *Mudede NO & Anor* 1989 (3) ZLR 62 (SC) at 79C-81A; *Vrystaat Estates (Pvt) Ltd* v *President , Administrative Court & Ors* 1991 (1) ZLR 323 (SC) at 327F; *Kutama* v *Town Clerk Municipality of Kwekwe* 1993 (2) ZLR 137 (SC) at 144D *et seq* and *Movement for Democratic Change & Anor* v *Mudede NO & Ors* 2000 (2) ZLR 152 (S) at 158G-159A.

In *Sterling Products International, supra,* GUBBAY JA stated at 30B-C that:

> "The categorisation of an enactment as "peremptory" or "directory", with the consequent strict approach that if it be the former it must be obeyed or fulfilled exactly, while if it be the latter substantial obedience or fulfilment will suffice, no longer finds favour. As was pertinently observed by VAN DEN HEEVER J (as he then was) in *Lion Match Co Ltd* v *Wessels* 1946 OPD 376 at 380, the criterion is not the quality of the command but the intention of the legislator, which can only be derived from the words of the enactment, its general plan and objects."

And in MWENYE GUBBAY CJ at 433C explained the relevant principle in these words:

> "The proper criterion in determining whether there has been compliance is not the quality of the injunction, but the object the legislator sought to achieve by it. The question is simply whether that object is defeated or frustrated by the non-compliance complained."

In *Movement for Democratic Change & Anor* v *Mudede NO & Ors, supra,* at 158G MCNALLY JA explained that the defect could not be regarded as formal if it might cause prejudice.

While accepting the correctness of the application of the principle on the facts of *Sterling Products International* case, McNally JA in *ZUM* v *Mudede, supra* and KORSAH JA in *Kutama* v *Town Clerk Municipality of Kwekwe, supra* both of which GUBBAY CJ concurred in, did not follow the *Sterling Products International* formulation. In the former case MCNALLY JA held that the relevant sections under consideration prescribed in absolute, explicit, peremptory and literal language the exact and strict compliance and not substantial compliance required in making the contemplated decision. In the latter case KORSAH JA held that the omission to comply with the mandatory provisions of the section under consideration in that case was a fatal flaw. These fine distinctions demonstrate the inherent danger posed by ignoring the golden rule of interpretation, which requires that:

> "Words must be taken in their context. The grammatical and ordinary sense of the words is to be adhered to, as LORD WENSLEYDALE said in *Grey* v *Pearson* (1857) 10 ER 1216 at 1234 'unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no further."[13]

The words used in s 31 are clear and unambiguous. There is no basis for construing them in the suggested manner, which simply leads to an absurdity and creates uncertainty. The literal language of s 31 (3) as read with subss (5) and (6) of the VAT Act is couched in explicit and peremptory language, which permits of no deviation. These provisions were promulgated for the benefit and protection of taxpayers who are obliged to pay VAT on properly prepared assessments. The failure by the Commissioner to strictly adhere to these requirements would be prejudicial to all value added taxpayers who might fall in the same situation as the appellant. In my view, the intention of the legislature derived from the object of s 31 (3) as read with subss (5) and (6) is to seek payment of the assessment from the taxpayer. Failure on the part of the Commissioner to issue a formal assessment negates this purpose. The schedules do not place the taxpayer on notice to pay the amounts stated therein. The fact that the taxpayer did not tender the amounts in the schedules for payment is clear evidence that the schedules were not assessments. The alternative argument advanced by Mr *de Bourbon* must therefore fail.

Mr *de Bourbon* further argued that the contents of the letter and schedules were in substance assessments though not in form. He identified the substance with the amount of VAT due and the compulsory appointment of a public officer. In my view, he underplayed the other essential components of a valid assessment that were missing from the letter and schedules such as the actual amount on which the VAT payable was based, the demand for payment, and the *dies induciae* for objection. I agree with Mr *Magwaliba* that the objection was premature. The only way a respondent is able to know that an assessment has been made is on receipt of a notice of assessment. That is the document from which he comes to know that the internal administrative processes of the respondent are over. My experience in the Fiscal Appeal Court is that before a notice is issued protracted negotiations take place in which both parties indicate their respective positions both orally and in writing. There was therefore no objective basis for the appellant's tax advisors to assume that the letter of 30 May 20111 constituted either an assessment or a notice of assessment or both.

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[13] *Chegutu Municipality v Manyora* 1996 (1) ZLR 262 (S) at 264D-E and *Madoda v Tanganda Tea Company* 1999 (1) ZLR 374 (S) at 377A-D.

The last argument advanced by Mr *de Bourbon* was based on para 5 and 5.2 of the respondent's written heads on the merits where Mr *Magwalib*a submitted that it was an "incontestable fact":

> "That the respondent assessed value added tax payable by the appellant for the period January 2006 to February 2011 in the sum of US$22 920 484.64."

I, however, do not regard that submission as binding, premised as it was on condition that this Court dismissed the preliminary points raised. My view is that an expectation to pay is not a demand to pay. One must bear in mind that payment of VAT does not have to be made on demand. A taxpayer who accepts liability is expected to pay without demand. After all, payment of VAT is a continuous obligation expected of every eligible operator whether registered voluntarily in terms of s 23 or compulsorily in terms of s 47 (1) (f) as read with (4) (b).

Costs

In the pleadings the Commissioner prayed for dismissal of the appeal with no order as to costs. In argument Mr *Magwaliba* prayed for dismissal with costs. Had the respondent not agreed to treat the purported objection as an objection in its letter of 18 August 2011, I might have acceded to Mr *Magwaliba's* prayer. It seems just and fair for each party bears its own costs.

Disposition

Accordingly, the appeal is struck of the roll with each party to bear its own costs.

That should really be the end of the matter. However, just in case I am wrong to uphold the preliminary issue and more importantly, as I heard evidence and full argument on the merits, I deem it prudent to determine the issue referred to trial on the merits.

THE MERITS

The issue for determination on the merits is whether the appellant supplies services to subscribers in Zimbabwe or whether it is the subscribers who import such services from the appellant.

The facts

The facts in this appeal are basically common cause. The appellant relied on the testimony of its Kenyan based general manager for taxes in Africa and the pleadings filed of record. The respondent did not call any evidence but was content to rely on the pleadings filed of record.

The appellant is incorporated in Mauritius and has offices in Dubai, Kenya and Ghana. It is an investment holding and trading company, which provides satellite based pay-television and internet related services in most regions of the world including sub Saharan Africa. It appears to have no local presence in Zimbabwe. It is not registered and has no employees in Zimbabwe. It entered into a franchise agreement with a local businessman and satellite engineering specialist on 16 July 2004 with retrospective effect from 1 January 2003. It was common cause that the businessman on some undisclosed date assigned the franchise, with the consent of the appellant, to a company, hereinafter called the franchisee, in which he was the chairman and majority shareholder.

Apparently, *ITC 1692* (2000) SATC 508 (Z) reported a failed attempt by the predecessor of the respondent to collect sales tax from the franchisee. The evidence led in that case revealed that the relationship between the appellant and the franchisee started on 1 July 1996. This court found that the appellant operated from South Africa rather than Zimbabwe. On the 31 December 2003, on the eve of the commencement of VAT in Zimbabwe, the appellant wrote to the respondent and offered as an act of goodwill to collect VAT from local subscribers and remit it to the respondent. The letter did not receive the courtesy of a response. The respondent however commenced investigations into the income tax and value added tax status of the appellant in Zimbabwe which culminated in these proceedings.

In terms of condition 5 of the appellant's Category 1 Global Business Licence issued by the Financial Services Commission of Mauritius, the appellant could outsource some of its functions to any competent, capable, and fit person. The appellant duly outsourced its subscriber management services comprising of data capturing, marketing and subscriber support services in Zimbabwe to the franchisee on 14 % commission. The commission was based on the gross subscription revenue received from Zimbabwe. The franchisee was not enjoined to conclude any contracts or receive any subscriptions on behalf of the appellant. In addition, the franchisee was granted exclusive dealership rights in the relevant reception

equipment required of a subscriber to access the digital satellite television services offered by the appellant in Zimbabwe. The equipment consisted of Television Receive Only antennae, low noise blocker converters, integrated receiver decoders, digital satellite decoders, smartcards, remote controls and other spare parts. The equipment was custom made to the appellant's specifications.

The business of the appellant fell into the three categories of programme procurement, broadcasting infrastructure and subscriber management. The infrastructure consisted of two geostationary satellites located 37 000km above the equator with an orbital period of 24 hours and broadcasting centres situated in Spain, the United Kingdom and South Africa. The appellant rented space on two geostationary satellites covering 48 countries in sub Saharan Africa, one dedicated to Southern Africa and the other to East and West Africa. The appellant purchased the rights to ready-made programmes from producers, packaged them into channels called bouquets and beamed them to fee paying subscribers. The general manager outlined the process involved from purchasing to viewing of content in the home of the subscriber. The producers' uplinked the content purchased by the appellant from their studios to a satellite in space which in turn downlinked the content to the direct broadcasting satellite centres in Spain, the United Kingdom and South Africa. The appellant aggregated the channels into bouquets and encrypted them before up linking them to the two geostationary satellites. The satellites downlinked these encrypted bouquets back to earth. While the encrypted signal covered the whole region in which the satellite operated, it could only be received by a satellite dish and relayed to the decoder in the home of the subscriber. The subscriber required a decryption key provided by the appellant on payment of the requisite subscription fees to access the bouquet that related to him. He would only view the bouquets that related to him on inserting the smartcard into the decoder. On payment of the requisite subscription, the appellant dispatched a decryption key via satellite directly to the smartcard. The decoder received the encrypted signal and the smartcard unscrambled it into a normal picture.

In cross examination the general manager revealed that a chip was embedded in the smartcard by the appellant during customisation. On expiration of his subscription, the appellant automatically deactivated the subscriber from the system unless he had renewed his subscription. A prospective subscriber completed an application form and handed it over to the franchisee who uploaded the information onto the appellant's IBS system located outside Zimbabwe. The appellant considered the application and decided whether or not to accept it.

On acceptance the subscriber paid the requisite subscription and such payment activated the subscriber account number that was allocated to him and an encrypted signal was then dispatched via satellite to enable viewing. The general manager confirmed that decoders were keysafed with Irdeto BV encryption technology software inserted by the appellant while the same technology was embedded in the smartcard during customisation**.** He clearly stated that the reception equipment only receives and the downlink satellites only beam down signal into their respective regions.

In the letter of 30 May 2011 addressed to the tax consultants of the appellant the respondent indicated that the appellant was liable to pay VAT on subscriptions paid for the digital satellite service on the ground that such service was rendered in Zimbabwe. The respondent contended that the appellant was obliged to charge and remit VAT by reason of decryption of the extra-terrestrial transmission signal in the home of the subscriber. In other words the respondent's contention was that the service was only rendered after decryption. It advised the appellant of its liability for VAT, penalties and interest in the sum of US$22 920 484.54 for the period from 1 January 2006 to February 2011.

In the purported objection of 29 June 2011 the appellant disputed liability for VAT. The appellant contended that as the subscriber was the importer of the encrypted signal decoded in his home, he was liable for VAT in terms of s 13 (2) of the Value Added Tax Act. The appellant further contended that it did not have any assets and did not conduct any trading activities in Zimbabwe.[14]

It was common cause that s 38 (4) of the Value Added Tax Act imposes the duty to pay the tax amount to the Commissioner in foreign currency on a registered operator who was paid in foreign currency for the supply of goods and services with effect from 1 January 2006. It was further common cause that the appellant provides a service in Zimbabwe.

The issue

The issue for determination is whether the appellant supplied the service into Zimbabwe or whether the subscribers imported such service into Zimbabwe.

The legislative provisions

In Zimbabwe, value added tax is charged against the person designated in terms of subs (1) and paid by the person designated in subs (2) of s 6 of the Value Added Tax Act [*Chapter 23:12*]. The relevant parts read:

[14] Para 2 on p 90 of the bundle

"6 Value added tax

(1) Subject to this Act, there shall be charged, levied and collected, for the benefit of the Consolidated Revenue Fund a tax at such rate as may be fixed by the Charging Act on the value of—

(*a*) the supply by any registered operator of goods or services supplied by him on or after the 1st January, 2004, in the course or furtherance of any trade carried on by him:

(*c*) the supply of any imported services by any person on or after the 1st January, 2004; and

(2) Except as otherwise provided in this Act, the tax payable in terms of

(*a*) paragraph (*a*) of subsection (1) shall be paid by the registered operator referred to in that paragraph; and

(*c*) paragraph (*c*) of subsection (1) shall be paid by the recipient of the imported services; and"

In terms of s 6 (1) (a) as read with (2) (a) of the Act the obligation to pay value added tax on the supply of services falls on the registered operator who supplied those services while in terms of s 6 (1) (c) as read with (2) (c)) such an obligation falls on the recipient of the services and not the provider. The collection and method of computation of the value of such imported services are set out in s 13 of the Act. The words "services" and "imported services" are defined in s 2 of the Act in the following manner:

"services" means anything done or to be done, including the granting, assignment, cession or surrender of any right or the making available of any facility or advantage, but excludes the supply of goods, money or any stamp, as contemplated in paragraph (*c*) of the definition of "goods";

"imported services" means a supply of services that is made by a supplier who is resident or carries on business outside Zimbabwe to a recipient who is a resident of Zimbabwe to the extent that such services are utilised or consumed in Zimbabwe otherwise than for the purpose of making taxable supplies;"

And a taxable supply referred to in the definition of "imported services" means:

"taxable supply" means any supply of goods or services which is chargeable with tax under paragraph (*a*) of subsection (1) of section *six*, including tax chargeable at the rate of zero *per centum* under section *ten*;

Resolution of the issue

I believe that before I determine the conflicting contentions advanced by the parties I must identify the true nature of the service that was either purportedly supplied by the appellant or purportedly imported by the subscribers. In oral argument Mr *de Bourbon* identified the service provided by the appellant as the digital satellite subscription and broadcasting service. The identification is derived from the "Terms and Conditions for Appellant Digital Satellite Subscription Broadcasting Services by Individuals for Private Use." It is apparent from the preamble of these terms and conditions that the appellant "provides this service to subscribers in numerous countries in sub Saharan Africa" and that the subscriber accesses the service by making payment to the appellant and receives such service, in terms of clause 27, in a single dwelling unit.

In order to qualify as an imported service, three essential elements must be satisfied. The first is that the supplier must be resident outside Zimbabwe or carry on business outside Zimbabwe and the second is that the recipient must reside in Zimbabwe and the third is that the services must be consumed and not further supplied by the recipient in the course or furtherance of his own business activities for commercial gain. It seems to me that if the supplier is either resident or carries on business in Zimbabwe, then the service would not constitute an imported service. It would also not constitute such a service if the recipient does not reside in Zimbabwe or further supplies the service for commercial gain. In my view, the evidence established that the appellant is resident outside Zimbabwe. It also established that the recipients of the service, the subscribers, reside in Zimbabwe and that they consume the service and do not use it for commercial gain. In fact, the terms and conditions of use prohibit them from doing so.

The only element that has exercised my mind is whether or not the appellant trades in Zimbabwe. In the Act trade means:

> "(*a*) in the case of any registered operator…… any trade or activity which is carried on continuously or regularly by any person in Zimbabwe or partly in Zimbabwe and in the course or furtherance of which goods or services are supplied to any other person for a consideration, whether or not for profit,…." (The other parts of the definition are not relevant to the determination)

It was established in evidence that the appellant was not a registered operator. In terms of s 23 (1) and (4) (b) as read with the definition of registered operator in s 2 of the Act, the appellant would be liable for registration as a registered operator if it were found to have been trading in Zimbabwe from the date on which such trading commenced. The

Commissioner would be entitled to register him as from that date or any other subsequent date that he deems fit. In the event that the appellant is found to have been trading in Zimbabwe even though he was not a registered operator, he will therefore be deemed to have been registered from the date on which such trading commenced.

The general manager for taxes called by the appellant disclosed under cross examination that the appellant inserted Irdeto BV encryption technology in both the decoder and smartcard during the process of customisation before these items were sold to dealers for sale to the subscribers. This process is confirmed in clause 9.6 by reference to a "keysafed decoder" and in the definitions of decoder and digital satellite decoder and smartcard in the franchise agreement[15]. These products were tested for compatibility with the "Appellant Service" at the appellant's Decoder Centre in South Africa. These decoders and smartcards constitute the required hardware for accessing the service.[16]The witness disclosed that a computer chip was inserted into the smartcard. In this chip was stored electronic information belonging to the appellant, which enabled the appellant to communicate over the air with the subscriber and to unscramble compressed digital data into normal viewable pictures. In terms of clause 17.1 and 17.5 of the franchise agreement, the appellant was the owner or at the very least had the right of use to the trademarks, trademark applications and the copyright in the "computer software embodied in the decoders." In addition, clause 45 of the terms and conditions for the digital satellite subscription and broadcasting services ring fenced the appellant's intellectual rights embodied in these assets. In terms of clause 45 of the terms and conditions the right to use this software belonged to the appellant and not the subscriber even though it was in the subscriber's property.

The chip in the smartcard belongs to the appellant notwithstanding that it is embedded in the property of the subscriber. The chip and software constitute intangible and tangible property. They are assets of the appellant**.** The contention by the appellant that it did not have assets in Zimbabwe was therefore demonstrably false. In my view, the software embodied in the decoder and the chip in the smartcard constitutes valuable assets that enable the appellant to conduct its business activities in Zimbabwe from the home or office wherever these items are to be found. These assets are used by the appellant to deliver the promised service to the subscriber. The service is completed once the subscriber is able to view what he actually paid for. These assets are continuously and regularly used in Zimbabwe by the appellant to earn

[15] Clauses 1.4.2, 1.4.7 and 1.4.11 on p 22 and 23 of the bundle
[16] Clause 20 of the terms and conditions p 285 of the bundle

income from the local subscribers. On the evidence presented before me I am satisfied that the appellant was trading in Zimbabwe during the period under consideration. It would properly be assessed for value added tax in Zimbabwe.

In view of my finding, the service provided by the appellant cannot therefore be regarded as an imported service. The parties were agreed that the appellant provided a service to local subscribers. In addition counsel were in agreement that the definition of service is wide and all encompassing. This was confirmed by Smith J in *ITC 1692* at p 514-515. I am satisfied on the evidence before me that the appellant did supply the service contemplated by s 6 (1) (a) of the Act. I agree with Mr *Magwaliba* that the service was supplied to the home of the subscriber as promised. I also find that the service was already in Zimbabwe when it was supplied. It was the testimony of the general manager that the downlink satellite covering the Southern Region continuously beams encrypted signals into the region including Zimbabwe. It does so whether or not a Zimbabwean resident has the reception equipment. The signal is accessed through a correctly calibrated satellite dish and decoded by the appellant's embodied software in the smartcard and decoder to enable normal viewing. I would also hold that the signal is supplied by the appellant into Zimbabwe. Until the encoded signal is unscrambled the subscriber does not receive in his home the service promised in the terms and conditions of the digital satellite subscription and broadcasting service for the private use of the individual. I am satisfied that after paying for the service, the subscriber becomes a passive consumer of the service supplied by the appellant. The correct position is that the appellant uses his own equipment situated both outside and inside Zimbabwe to supply the service to the local subscriber.

I am satisfied that the appellant would be liable for value added tax in Zimbabwe in terms of s 6 (1) (a) of the Value Added Tax Act.

I do not believe that it is necessary for me to determine the question of permanent establishment in view of the inapplicability of the double taxation agreement between Zimbabwe and Mauritius to value added tax. I also do not believe that it is necessary to determine the issue of penalties and interest in view of my finding that the appeal is a null and void and of no force or effect.

Disposition

Accordingly, the appeal is struck of the roll with each party to bear its own costs.

Costa and Madzonga, the appellant's legal practitioners
Sinyoro and Partners, the respondent's legal practitioners