NETONE CELLULAR (PVT) LTD
versus
ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE,
ZIYAMBI AJ
HARARE, 18 September 2019 & 26 November 2019

Court Application for Declaratur

D. Tivadar, for the applicant
A. Moyo, for the respondent

ZIYAMBI AJ

[1] This application was filed in the High Court but set down for hearing in the special court, by consent of the parties, on the basis that the subject matter relates closely to cases ITC14 & 15/17. At the Pre-trial hearing for these matters, it was determined that all three matters be heard together but on the date set for the hearing, the 17 September, 2019, there being certain irregularities besetting the papers, I directed that the instant matter be postponed to the following day by which time all defects would have been cured.

[2] The applicant is a licensed telecommunications company in terms of the Postal and Telecommunications Act [*Chapter 12:05*]. It seeks an order declaring that:

> "1. Interconnection fees, roaming fees, access fees and ZETDC commission are not subject to special excise duty in terms of section 172F of the Customs and Excise Act [Chapter 23:02]; and that
> 2. The respondent's assessment dated 10 May 2017 is a nullity in so far as it assesses the Applicant for special excise duty for the periods 2009 to 2016 in relation to any of the fees referred to above" as well as costs."

[3] The dispute arose when the respondent, after completing its audit of the applicant's tax affairs for the period 2009-2016, issued assessments for those periods. In its computation of the special excise duty to be charged in terms of s 172F of the Customs and Excise Act the respondent included the items mentioned in paragraph 1 of the order sought. In a letter dated 19 June 2017, the applicant objected to this inclusion on the grounds that the inclusion of interconnection and roaming fees results in double taxation while access fees and ZETDC commission are not licensed services in terms of the Postal and Telecommunications

Act [*Chapter 12:05*]. By letter dated 30 September 2017, the respondent disallowed the objections.

[4] Section 172F of the Customs and Excise Act [*Chapter 23:02*] ("the Act") provides:

> "**172F Special excise duty on airtime**
> Subject to this Part, there shall be charged, levied and collected, for the benefit of the Consolidated Revenue Fund, a special excise duty on the *sale value* of the *airtime"*.

Airtime is defined in s172E as follows:

> "**172E Interpretation in Part XIIB**
> In this Part—
> "airtime" means the minutes of voice calls, short message service (sms), multimedia service (mms), internet band width or such *other service as* a licensed operator may offer through a cellular telecommunication system *or any other electronic communications service*;" (My italics for emphasis).

The parties agree that the sole issue for determination is whether the applicant's receipt of the fees in question falls within the definition of 'airtime' such that special excise duty is payable on their sale value.

[5] The applicant, as an operator in the mobile telecommunications services industry, is interconnected with other licensed operators (like Econet, Telone, Telecel and so on) with whom the applicant has concluded interconnection agreements. The agreement with Econet, annexed to the founding affidavit, contained the following clause:

> "INTERCONNECTION FEE
> The parties agree to apply the 'calling party pays' principle. For traffic that terminates on GSM network, the charges are shown on Appendix C. There is no charge for traffic that are not answered or routed to a busy number."

A similar clause is contained in the agreement with Telecel. Thus, using Econet as an example, Econet charges NetOne for calls made by NetOne subscribers to Econet customers, and records this as revenue. This fee is a cost to NetOne who records it as an interconnection cost under 'Çost of Sales'. In the same way, although this is not disclosed in the applicant's founding affidavit, NetOne charges Econet for calls made to NetOne subscribers by Econet customers. The same principle applies in respect of roaming fees.

The applicant avers that as both interconnection and roaming fees 'are charged for the benefit of the partner network', it follows that the applicant cannot charge special excise duty on these amounts, as they are not part of the 'sale value of the applicant's airtime'. The applicant, as already stated, makes no mention of the interconnection fee received by the

applicant from Econet as well as other operators both within the country and abroad. Those fees are what the respondent claims is liable to special excise duty in terms of s 172F.

[6] The respondent has opposed the application and prayed for its dismissal with costs. In its opposing affidavit sworn by the Chief Investigations Officer charged with the management of this matter, the respondent explained that interconnection fees are those raised between phone network providers within the borders of the country while roaming fees are raised to or by offshore telecommunications service providers. Where a customer calls using one network and terminates the call on another network, then interconnection or roaming charges arise. While it is true that the payments made by the applicant to other network operators is a cost to the applicant and does not attract special excise duty, it is equally true that the interconnection and roaming fees received from the other telecommunications providers whose clients terminate their calls on the applicant's network is income which falls within the definition of 'sale value of airtime'.

[7] With regard to Access fees, the contention by the applicant was that those fees are a contractually agreed periodic sum payable by the customer for the customer to keep a contract sim card. These fees are entirely unrelated to the use of airtime and are payable even if no voice calls, sms, mms, data internet band width or other service takes place. Such fees could not properly be regarded as the 'sale value of airtime' as there is no correlation between the fee and airtime used by the applicant's customers.

However, the respondent counters that a contract line is a 'line without limit of airtime for services'. The purpose of paying the access fee is to afford the customer continued access to the applicant's network. Access fees he submitted, amount to airtime as defined in s172E in that payment of the access fee enables the customer to use the airtime in the contract line. Access fees therefore amount to 'other services' provided by the applicant using its network systems.

[8] As to the ZETDC Commission, the applicant averred that in common with a broad variety of other commercial enterprises, it provides to customers a facility enabling them to purchase ZETDC coupons for the purpose of charging their prepaid electricity meters. For the provision of this service the applicant receives a commission from ZETDC. That commission, it was averred, falls outside the definition of 'sale value of airtime' and cannot therefore be liable to special excise duty.

The respondent contends to the contrary that the service of purchasing ZETDC tokens offered by the applicant, falls within the definition of airtime as stated in s172E of the Act as

it amounts to 'such other service' provided by the applicant, a licensed operator, through its cellular network. This is because the customers use the cellular network to utilise this service. The customers use short messages to purchase ZETDC coupons which are distributed by the applicant using its network. The sale of the coupons amounts to 'sale value of airtime' for the purpose of special excise duty payments.

[9] On behalf of the applicant it was submitted that none of the fees under mention are liable to special excise duty in terms of s 172F and that the phrase 'sale value' must be interpreted in accordance with the meaning adopted in previous legislation, for example, the now repealed Sales Tax Act [*Chapter* 184] which defined 'sale value' as:

'the total sum payable by the purchaser under the agreement of sale of such goods..';

further, that the definition of airtime relates strictly to communication services offered by a licensed operator. The wording of the Act, it was submitted, is precise and ought not to be extended to include services not provided for under the definition of 'airtime'.

The Commissioner on the other hand submits as follows. The terms 'sale value' and 'airtime' must be correctly interpreted. Sale value is not defined in the Act but generally means 'the amount of money which would be received if something is sold'. The meaning given to a phrase occurring in one statute is not necessarily to be given to it when used in another statute. He referred the court, in this regard, to *B. M. AND OTHERS* v *COMMISSIONER OF TAXES* 1970 RLR13 at p18. The applicant's attempt, he submitted, to define the term 'sale value' by virtue of the meaning given to it under the now repealed Sales Tax Act is without merit. He urged the court to give effect to the ordinary meaning of the term sale value.

As to the term 'airtime', the revenue received from other telecommunications providers, national and international, when calls are terminated on the applicant's network constitute income falling within the ambit of 'sale value of airtime' by virtue of them being 'such other service..'

[10] I turn to consider whether the fees in dispute fall within the s 172E.

The phrase 'sale value' is not defined in the Act. Its ordinary meaning is stated to be: 'the amount of money that something would make if it were to be sold[1]

This is the meaning the respondent attributed to it and in my view this meaning accords with the transactions with which we are here concerned.

[1] Collins English Dictionary

As to the definition of 'airtime', a division is clearly made between what is generally and popularly regarded as 'airtime' and the other services offered by the licensed telecommunications operators using their cellular telecommunications system or other electronic communications service. The word 'airtime' is clearly defined. If I may dissect the section somewhat, it appears that the words
'or such other service' are wide enough to include the fees and commission under discussion.
'as a licensed operator may offer through a cellular telecommunication system'. The applicant is a licensed operator and the 'other service' is offered through its cellular telecommunications system.

It appears me that by using the phrase 'sale value of the airtime' the legislative intention was to target, for special excise duty, the value which would be placed on the 'other service' in each case if that were sold. It is the sale value of this 'other service' on which the respondent levied special excise duty.

I am, therefore, in agreement with Mr *Moyo*, for the respondent, that all the fees in dispute were correctly considered by the respondent to be liable to special excise duty in terms of the Act.

[11] On the question of costs, which usually follow the event, I am minded to follow the general principle of not awarding costs in tax cases unless an application or the defence of it is frivolous.

[12] The application is accordingly dismissed.

Gill, Godlonton and Gerrans, applicant's legal practitioners
Kantor and Immerman, respondent's legal practitioners