MA LTD
versus
ZIMBABWE REVENUE AUTHORITY

SPECIAL COURT FOR INCOME TAX APPEALS
KUDYA J
HARARE, 26 February 2015 and 20 October 2016

**Income Tax Appeal**

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

KUDYA J: This judgment deals with both the preliminary points raised by the respondent against the income tax appeal brought to this Court by the appellant and the issues referred to trial on the merits.

**THE PRELIMINARY POINTS**

*The facts*

The appellant is a company registered in the Republic of Mauritius, which provides amongst other countries digital satellite television services in Zimbabwe. The respondent is a statutory body created in terms of the Zimbabwe Revenue Authority Act [*Chapter 23:11*].

The appellant concluded a franchise agreement with a Zimbabwean resident businessman and satellite engineering specialist[1] on 16 July 2004 with retrospective effect from 1 January 2003. He had the exclusive direct to home business franchise for local subscribers that received satellite television signals directly through their very own television receive only satellite dishes. He in turn assigned the franchise, with the consent of the appellant, to his company. That company was investigated by the Department of Taxes for sales tax culminating in *ITC 1692* (2000) 62 SATC 508 (Z) where the Department lost in its bid to collect sales tax from the corporate franchisee. In 2003 the respondent commenced tax investigations of the appellant.

[1] Clause 1.4.16 of franchise agreement, p 79 of bundle

On 11 February 2011 the respondent submitted a position paper covering *inter alia* the income tax implications of the appellant's purported operations in Zimbabwe for the tax years ending 31 December 2009 and 2010 respectively. Concomitant with the position paper was the appointment of the businessman as the designated public officer of the appellant purportedly in terms of s 61 (4) of the Income Tax Act [*Chapter 23:06]*. The designated public officer successfully resisted the appointment under this section only to be reappointed in terms of s 61 (9) of the same Act.

On 11 March 2011 the appellant through its tax advisers made representations to the respondent on the position paper. The respondent in turn responded to this letter on 30 May 2011. It maintained the basis for finding the appellant liable for income tax and anticipated payment in terms of some attached schedules. The concluding remarks in that letter in regards to income tax were couched in these terms:

> "You therefore have not provided convincing representations to reverse the position that appellant has a permanent establishment in Zimbabwe and that deemed income received by appellant from a source within Zimbabwe should be taxable in Zimbabwe. We are therefore expecting appellant to pay income tax due as per schedules attached."

The attached schedules appear on pp 42 to 47 of the bundle of documents. The schedule on p 42 is entitled appellant monthly and annual revenue. It covers on a monthly basis the tax years 2009, 2010 and up to March 2011. It is further divided into 13 columns of the year and month, number of subscribers, monthly rate for premium bouquet, appellant's monthly sales, VAT due, commission rate, commission received by franchisee, other costs per subscriber, other expenses, total costs attributable to Zimbabwe, taxable income attributable to Zimbabwe, tax rate and aids levy and tax payable. I reproduce the yearly totals for 2009 and 2010 shown on p 42 below

| | | 2009 US$ | 2010 US$ |
|---|---|---|---|
| a. | subscribers | 310 617 | 436 011 |
| b. | Premium bouquet p.m. | 67 | 70 |
| c. | Appellant year sales | US$ 20 811 339 | 30 520 770 |
| d. | VAT due | US$2 714 522.48 | 3 980 970 |
| e. | commission rate | 5% | 5.5% |
| f. | commission to franchisee | 1 612 357 | 2 398 060.50 |
| g. | other costs per subscriber | 10 | 12 |
| h. | other expenses to PE at | 3 106 170 | 5 232 132 |
| i. | total local costs | 4 718 527 | 7 630 192.50 |
| j. | taxable local income | 16 092 812 | 22 890 577.50 |
| k. | tax rate plus aids rate 3% | 30% | 25% |

l. Tax payable 4 972 678.91 5 894 323.71

The detailed computations of interest for both 2009 and 2010 are shown on p 43 and 44 and are in the sum of US$324 307.83 and US$326 690.87, respectively. These computations took into account the retrospective income tax quarterly payments dates. In addition a summary of the principal tax, interest, penalty and aggregate amount are indicated with the 2010 figures shown in parenthesis in the sum of US$4 972 678.71 [US$5 894 323.71], US$24 307.83 [US$326 690.87] US$2 486 339.45[nil] and US$7 783 326.19 [US$6 221 014.58], respectively. These figures are further summarised on p 47 of the bundle. The figures for 2011 to March are captured on p 45. However p 46 shows the actual revenue earned from local subscriptions that was supplied by the appellant after receiving the schedules for the period 2006 to February 2011. The relevant total sales were US$ 17 382 824 and not US$20 811 339 for 2009 and US$ 28 484 705 instead of US$30 520 770 in 2010. The principal taxes, penalties and interest in the schedules amounted to US$ 13 794 340.77 in respect of income tax for the tax years ending 31 December 2009 and 2010.

On 29 June 2011 the appellant's tax advisers objected to the letter and schedules. On 18 July 2011 the respondent disputed that the letter constituted an assessment. The tax advisers insisted on 17 August 2011 that the schedules were assessments to which they were entitled to object. On 18 August 2011, the respondent capitulated and decided to treat the letter as an objection. The failure to render a decision within 3 months of receipt of the objection prompted the appellant to treat the objection as disallowed in terms of s 62 (4) of the Income Tax Act and file a notice of appeal to this Court on 22 November 2011.

On 21 December 2011 the respondent wrote to the appellant's legal practitioners of record. The letter indicated that the "appellant's case" had been filed without the requisite notice of appeal. The appellant had however filed with the registrar a notice of appeal for the VAT matter concurrently with the notice of appeal for the income tax matter. Instead of filing the two in different Court records, the registrar had stapled the two notices together. The error was not corrected by the parties by the time the matter was heard. In fact the date on which the notice of appeal was served on the respondent is not indicated in para 7 of the appellant's case. The VAT bundle clearly shows that it was however filed concurrently with the notice of appeal in the VAT matter and the parties' perpetuated the error by making it the first page in the VAT bundle of documents. The appellant responded to the letter on 11 January 2012 and dealt with issues concerning VAT but omitted to deal with the "missing notice of appeal".

On 8 February 2012 the respondent filed the Commissioner's case[2]. The case covered both the VAT and Income Tax matters. The respondent raised the preliminary point concerning the validity of the appeal. The income tax hearing was set down for hearing on 9 February 2012 before my brother Hlasthwayo J, as he then was. He directed the parties to prepare a document covering all the pertinent issues for both the VAT and Income Tax cases highlighting areas of agreement between them, and postponed the matter *sine die.* The appellant prepared a statement of agreed facts dated 5 November 2012[3] and amended it on 5 September 2014[4] while the appellant did so on 9 September 2014[5] .

On 10 September 2014, I held a preliminary pre-appeal management meeting with the parties. I directed the parties to compile two separate records for the VAT and Income Tax matters and agree on the issues for appeal. I postponed the pre-trial hearing to 17 October 2014 and then to 7 November 2014 on which date the parties were directed to file a joint pre-trial hearing minute covering the agreed issues by 8 December 2014. The appeal was heard on 26 February 2015.

At the preliminary pre-trial management meeting of 10 September 2014, while intimating that he was not taking issue with the point, counsel for the appellant indicated that the Commissioner's case had been filed hopelessly out of time. The observation was disputed by the respondent in the letter of 14 October 2014 in which it took the point that the appeal was invalid for lack of a notice of appeal.

*Whether the appellant filed a notice of appeal*

The first preliminary point for determination is whether there was a notice of appeal or not; if not whether the appeal is invalid. Section 65 (2) of the Act introduces a notice of appeal into the equation. It reads:

> "(2) Every notice of appeal shall be in writing, shall state whether the appellant wishes to appeal to the High Court or to the Special Court and shall be lodged with the Commissioner within twenty-one days after the date of the notice mentioned in subsection (4) of section *sixty-two* or, as the case may be, after the expiry of the period mentioned in the proviso to that subsection. Unless such notice of appeal has been lodged within the period prescribed by this subsection, it shall be of no effect whatsoever and the objection shall not be considered further:

[2] P 130-145 of the bundle
[3] P 14-24 of bundle
[4] P242-253 of bundle
[5] P 112-129 of bundle

> Provided that the High Court or the Special Court to which the appellant wishes to appeal may, on good cause being shown or by agreement of the parties, extend the said period."

In terms of s 65 (2) an appeal against the Commissioner's decisions or deemed decisions shall commence by way of a notice of appeal lodged with the Commissioner within 21 days of such decision or deemed decision. Failure to comply with this subsection renders the notice of appeal void unless extended on good cause shown or by agreement between the parties. In the absence of an application for extension of time, the Court seized with such an appeal would be obliged to strike it off the roll.

In a letter of 21 December 2011 and the Commissioner's case, the respondent took the point that the appellant's income tax appeal was defective for want of a notice of appeal. The Appellant preferred to respond to the value added tax issues and not the income tax issues raised in that letter. To compound matters, in para 7 of the appellant's case, the date on which the notice of appeal was allegedly served was left blank. As a matter of fact, however, the appellant filed a notice of appeal for the income tax appeal with the Registrar and served it on the respondent on same day, the 22 November 2011 at 14:58 hours[6]. Unfortunately, the notice was misfiled in the VAT bundle of documents instead of the Income Tax bundle. It was addressed to the Commissioner-General of the respondent on the letterhead of the appellant under the hand of a director cum Secretary and is headed: "NOTICE OF APPEAL: APPELLANT: DEMAND FOR THE PAYMENT OF INCOME TAX" and reads in full:

> "We refer to the letter of 29 June 2011 written on our behalf by the tax advisers and to your acceptance of 18 August 2011 that such letter constitutes an objection in terms of s 62 of the Income Tax Act *[ Chapter 23:06]* of Zimbabwe. Since three months have since passed since the date of your acceptance, by virtue of the proviso to s 62 (4) the objection raised on our behalf is deemed to have been disallowed.
>
> Please take notice that it is our intention to appeal against that deemed decision. We hereby note an appeal against that decision to the Special Court for Income Tax Appeals in terms of s 65 (2) of the Act. The case for the appellant required by para 5 of the Twelfth Schedule to that Act will be filed in due course.
>
> We hereby appoint Messrs Costa & Madzonga, legal practitioners of Harare, as our legal representatives for the purpose of that appeal and for the purposes of the related appeal to the Fiscal Appeal Court in relation to claims of value added tax"

The contention by Mr *Magwaliba* that no notice of appeal whatsoever was filed by the appellant either with this Court or the Commissioner therefore falls away.

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[6] P 1 of the VAT bundle

The three requirements set out in s 65 (2) are that the notice of appeal must be in writing, must make an election of the Court of appeal and must be lodged with the Commissioner within 21 days of the decision or deemed decision appealed against. The purported notice of appeal lodged with the Commissioner meets the first two requirements. The appellant elected to appeal to the Special Court. The procedure to be followed is set out in s 64 (8) which reads:

> "**64 Special Court for Income Tax Appeals and proceedings on appeal**
>
> (8) The procedure for the institution and hearing of appeals to the Special Court shall be in accordance with this Part and the rules set out in the Twelfth Schedule."

The Twelve Schedule provides *inter alia* that:

> "The rules in this Part shall apply in the determination of appeals under section sixty-five or any proceedings incidental thereto or connected therewith—
>
> 1. The Special Court shall have all the powers of the High Court as in civil actions, and the general procedure and practice, save as specially provided for by these rules, shall be that prevailing in the High Court, in so far as the same is applicable, and if any matter should arise which is not contemplated by either such procedure and practice or these rules, the Special Court shall give instructions regarding the course to be pursued, which instructions shall be binding on the parties."

My understanding of r 1 is that the Special Court exercises the powers that the High Court has in civil trials. In addition it applies the general procedure and practice of the High Court, where applicable. However, where the Twelfth Schedule rules prescribe the procedure and practice to be followed, then they take precedence. The Special Court is also empowered to issue directives that are binding on the parties before it in the areas vacated by both the High Court general procedure and practice and the Twelfth Schedule rules.

Notices of appeal are specifically referred to in r 5 and r 11 of the Twelfth Schedule. Rule 5 requires that the "Appellant's case" must be filed within 60 days of the service of the notice of an appeal. Rule 11 directs the respondent to submit to the Special Court an agreed case or the parties' respective cases together with certified copies of the assessment made on the appellant and the notice of objection and notice of appeal and any material correspondence on the assessment, the respondent's determination and reasons for such a determination. It seems to me that the notice of an appeal referred to in r 5 is the notice of appeal invoked by s 65 (2) of the Act and is the same document referred to in r 11. Other than the three requirements set out in s 65 (2) of the Income Tax Act, the Twelfth Schedule rules do not specify the structure and further contents of such a notice. Mr *Magwaliba,* however, submitted that r 1 of the Twelfth Schedule directs the Special Court to have recourse to the High Court rules. In rebuttal, Mr *de Bourbon* submitted that no formal notice of appeal was required as long as the notice substantially notified the Commissioner of the impending appeal.

The structure and contents of a formal notice of appeal in the High Court is prescribed in s 7 (1) of the High Court (Miscellaneous Appeals and Review) Rules RGN 475 of 1975, as amended. A notice instituting an appeal is required to conjunctively state "the tribunal or officer whose decision is appealed against, the date on which the decision was given, the grounds of appeal, the exact nature of the relief sought and the address of the appellant or his legal representative". I agree with Mr *de Bourbon* that the notice of appeal filed in terms of s 65 (2) is not required to meet these stipulations. In my view, any notice in full compliance with the provisions of s 64 (8) of the Income Tax Act suffices. It must meet the full requirements of the provisions of Part VII of the Act and the rules set out in the Twelfth Schedule. The use of the word "shall" preceding each of the requirements prescribed in s 65 (2) delineates the exact and specific mandatory contents of such a notice. All that is required for full compliance with the Twelfth Schedule rules is for the taxpayer to give the notice of an appeal to the Commissioner. A notice of appeal in full compliance with the requirements of the Act and the rules is all that is required to institute the appeal in the Special Court. The inclusion of grounds of appeal in the Appellant's case amongst material and relevant facts and contentions of law further negates the requirement for filing a standard High Court notice.

There is however an apparent shortcoming with the notice of appeal in question which renders it incurably bad. It was not lodged with the Commissioner within 21 days of the deemed decision appealed against. Section 62 (4) provides the date on which the deemed decision would have been made. It is deemed to have been made within three months of receipt by the Commissioner of the purported letter of objection. The appellant was under a misapprehension of law in regards to the date of the deemed decision. That date is not calculated from the date on which the respondent accepted the purported objection as an objection. Rather, it is calculated from the date on which the respondent received the purported objection. In the present matter, the date on which the purported objection was received was not disclosed. The respondent's date stamp on the income tax objection is illegible while the VAT objection clearly[7] shows it was received by the respondent on the date of objection. Since the income tax matter was pursued concurrently with the VAT matter I am satisfied that the income tax objection was also received by the respondent on 29 June 2011. The statutory three months for the respondent to determine the purported objection would have ended on 29 September 2011 and not as suggested by the appellant on 18 November 2011. The purported objection was therefore deemed disallowed on 29 September 2011. The 21 days for lodging the notice of appeal thus expired on 20 October 2011.

The appellant did not apply for extension of time nor reach agreement on such extension with the respondent. A strict application of s 65 (2) renders the notice of appeal issued after 20 October 2011 void. See *Jansen* v *Acavalos* 1993 (1) ZLR 216 (S), *Matanhire* v *BP Shell Marketing* 2004 (2) ZLR 147 (S) and *Hubert Davies Employees Trust (Pvt) Ltd & Ors* v *Croco Holdings (Pvt)* Ltd 2009 (2) ZLR 53 (S). The purported notice was issued on 22 November 2011 and served on the respondent at 14:58 hours on the same date. It was void for failure to comply with the time strictures provided in s 65 (2) of the Income Tax Act.

*Whether the Commissioner's case was filed out of time*

This issue was raised in passing by the appellant's counsel at the pre-trial hearing of 10 September 2014. It evoked the response of 10 October 2014, in which amongst other things the respondent disputed that its case had been filed out of time, contending that the calculation of time for the Twelfth Schedule to the Income Tax Act rules was regulated by the High Court Rules 1971. At the appeal hearing Mr *de Bourbon* contended that the reckoning of time for this "specific statutory procedure" was governed by the Interpretation Act [*Chapter 1:01*] rendering the Commissioner's case filed on 8 February 2012 late by some 26 days. His offer to concede condonation was not taken by Mr *Magwaliba* who forcibly maintained the respondent's position. The real question for determination is therefore whether the calculation of time is based on ordinary days or on court days[8]. Ordinary days connote the inclusion of both business and non-business days while court days connote the use of business days[9] only in the calculation of time.

Rule 9 of the Twelve Schedule to the Income Tax Act obliges the Commissioner:

> "Within 60 days of the receipt of the applicant's case lodge with the taxpayer a statement setting out which of the allegations he admits as correct and which he denies, and shall set out

[7] P 113 of VAT bundle in the notice of amendment of 18 February 2015
[8] *Kombayi v Berkout* 1988 (1) ZLR 53 (S) at 56B
[9] In *Ellis & Anor v Maceys Stores Ltd* 1983 (2) ZLR 18 (S) at 18G-H

all such other facts which he considers relevant and material to the determination of the appeal. The Commissioner shall also state his contentions of law. Such statement shall be called the "Commissioner's case"

The Twelve Schedule rules do not provide any internal mechanism for computing time. Rules of Court normally define how self-embedded time frames are reckoned[10]. For example, r 4A of the High Court Rules states that:

> "Unless the contrary intention appears, where anything is required by these rules or in any order of the court to be done within a particular number of days or hours, a Saturday, Sunday or public holiday shall not be reckoned as part of such period."

The reckoning of time within the Constitution is set out in s 336 which reads:

"**336 References to time**

(1) In this Constitution, whenever a period of days is expressed—

(*a*) to begin on or to be reckoned from a particular day, that day is not to be included in the period;

(*b*) to end on or to be reckoned to a particular day, that day is to be included in the period.

(2) Subject to this Constitution, whenever the time for doing anything in terms of this Constitution ends or falls on a Saturday, Sunday or public holiday, the time extends to and the thing may be done on the next day that is not a Saturday, Sunday or public holiday.

(3) A reference in this Constitution to a month is to be construed as a reference to a calendar month, and a period of months is to be reckoned from the date when the period begins to the corresponding day of the month when the period ends.

(4) A reference in this Constitution without qualification to a year is to be construed as a reference to a period of twelve months."

In the Interpretation Act [*Chapter 1:01]* time is calculated thus:

**PART VIII**

**33 Time**

(1) Words in an enactment relating to time, and references therein to a point of time, shall be construed as relating to standard time as used in Zimbabwe, that is to say, two hours in advance of Greenwich Mean Time.

(2) Where in an enactment a period of time is expressed to begin on, or to be reckoned from, a particular day, that day shall not be included in the period.

(3) Where in an enactment a period of time is expressed to end on, or to be reckoned to, a particular day, that day shall be included in the period.

(4) Where the time limited by an enactment for the doing of anything expires or falls upon a Saturday, a Sunday or a public holiday, the time so limited shall extend to, and the thing may be done on, the first following day that is not a Saturday, a Sunday or a public holiday.

(5) Subsections (2), (3) and (4) shall apply whether or not the number of days concerned is expressed to be clear days.

(6) In an enactment—

[10] Order 1 r 5 (2) of the Magistrates Court (Civil) Rules 1980, r 4 of the Labour rules SI 59/2006, r 3 of the Rules of the Supreme Court, r 4A of High Court Rules 1971, and r 3 of Constitutional Court Rules 2016

(*a*) a reference to midnight in relation to any particular day shall be construed as a reference to the point of time at which that day ends;
(*b*) a reference to a weekday shall be construed as a reference to any day which is not a Saturday or Sunday;
(*c*) a reference to a month shall be construed as a reference to a calendar month;
(*d*) a reference without qualification to a year shall be construed as a reference to a period of twelve months.

The time frames in both the Constitution and the Interpretation Act include both business and non-business days while those in the High Court Rules cover business days only, unless a contrary intention is apparent from a specific rule. The utilization of the general practice and procedure prevailing in the High Court is authorised by r 1 of the Twelfth Schedule, which provides that:

> "The Special Court shall have all the powers of the High Court as in civil actions, <u>and the general procedure and practice, save as specially provided for by these rules, shall be that prevailing in the High Court, in so far as the same is applicable, and if any matter should arise which is not contemplated by either such procedure and practice or these rules</u>, the Special Court shall give instructions regarding the course to be pursued, which instructions shall be binding on the parties." (Underlining for emphasis)

The juxtaposition of the words "save as specially provided for in these rules" within the phrase "the general procedure and practice prevailing in the High Court, in so far as the same is applicable" and the further linkage between "such procedure and practice or these rules" demonstrates beyond doubt that "the general procedure and practice prevailing in the High Court" simply refers to all the rules of Court used in the High Court in civil matters.

The Twelfth Schedule Rules do not specify whether the reckoning of time is based on ordinary days or court days. In the absence of such a provision, the Special Court is directed by r 1 to seek guidance from the general procedure and practice prevailing in the High Court. Such guidance is found in r 4A of the High Court Rules 1971, which excludes non-business days in the computation of time. The correctness of this finding is confirmed by the case of *Ellis & Anor* v *Maceys Stores Ltd* 1983 (2) ZLR 18 (S). In that case, Rule 30 (a) of the Supreme Court rules of the time allowed direct access of appeal without leave where the notice of appeal had been filed and served within 21 days of the judgment appealed against. Rule 3 of those rules provided that any act required to be done by or on any date which fell on a non-business day would be validly done on the next succeeding business day. It was held that r 3 provided the basis for the reckoning of time in those rules which embraced both business and non-business days. At 19B-C GUBBAY AJA stated that:

> "Mr *de Bourbon* argued that as Rule 30 does not expressly specify the nature of the twenty-one days there is an omission in the Rules and so in terms of Rule 58(1) the practice and procedure of the High Court must be followed. Consequently by virtue of Rule 4A of the High Court Rules, in calculating the twenty-one days within which an appeal is to be noted to the Supreme Court, non-business days are to be excluded. The argument is untenable. Rule 58(1) applies where there is a total omission in the Supreme Court Rules. There is certainly no omission in relation to the calculation of days. There is a provision and it differs from that in the High Court Rules."

By parity of reasoning, it seems to me that as the computation of time is not defined in the Twelfth Schedule, the Special Court must follow Rule 4A of the High Court Rules in doing so. I accordingly agree with Mr *Magwaliba* that the Commissioner's case was filed within the 60 day period provided in r 9 of the Twelfth Schedule. The 60 days did not expire on 23 January 2012 but would have done so on 20 February 2012. The computation of time between the Act and rules are different. In the rules r 4A of the High Court Rules applies while in the Act, the provisions of the Interpretation Act apply. By way of example, in the present case the purported objection was filed and served on 29 June 2011, which was within the period of 30 ordinary days set out in s 61 (2) of the Act from 30 May 2011, the date on which the purported assessment was made. I do not find it necessary to express an opinion on whether or not the Interpretation Act would have applied had the Twelfth Schedule not provided recourse to the High Court Rules.

*Whether the letter of 30 May 2011 and the attached schedules constitute assessments*

The last preliminary point raised by the respondent was that the objection was premature based as it was on a mere letter of demand rather than on any assessments. It was common cause between the parties that the schedules did not constitute assessments[11]. Counsel were in agreement on the correctness of the decision in *Barclays Bank of Zimbabwe Ltd* v *Zimra* 2004 (2) ZLR 151 (H) at 154A-155C in regards to the mandatory statutory requirements of an assessment and of a notice of such assessment. MAKONI J held that the far reaching consequences of both the assessment and notice of assessment required exact and strict compliance with the provisions of both s 2 and s 51 of the Act. These two documents invoked certain legal rights, duties and responsibilities on both the taxpayer and taxman such as closure of the negotiation process, certainty of the amount demanded and its enforcement together with the accompanying right of objection and appeal.

In terms of s 61 (1) as read with s 51 (2) the right to object is precipitated *inter alia* by a notice of assessment predicated on an assessment. Mr *Magwaliba* submitted that the

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[11] Appellant's case para 22 p 5 and Respondent's case para 40 p143

purported objection of the appellant predicated as conceded on a letter and its attached schedules was invalid for want of compliance with both the requirements of an assessment and a notice of assessment. That submission stood uncontroverted and is fatal to the appeal.

Mr *de Bourbon* sought refuge in the provisions of s 51 (2) of the Income Tax Act as read with 68 (1) and 69 (2) and (3) of the Constitution. The reliance on the positive duty created by s 51 (2) of the Act stems from the sentiments of MAKONI J in the *Barclays* case where she stated at p 154G that:

> "In addition, in terms of s 51 of the Act, a notice of assessment should be issued whenever an assessment is carried out…..The legislator could only have envisaged granting the Commissioner power to execute pending determination in circumstances where the taxpayer has clearly been advised of the basis of assessment."

And at 155A-B:

> "In the process of serving the taxpayer with an assessment and hearing objections, the Commissioner should comply with the provisions of the Act as his administrative acts have far reaching consequences of a garnishee on the taxpayer."

It seems to me that these sentiments must be adjudged in the context of the facts that were before her, which are distinguishable from those in the present matter. In that case, unlike in the present, the respondent sought to execute on the misapprehension that the letter of demand and schedules constituted an assessment. My understanding of the sentiments relied upon by Mr *de Bourbon* was that MAKONI J was simply chastising the respondent for seeking execution without issuing formal assessments compliant with both the s 2 definition and s 51(2) and (3) notice. I therefore agree with Mr *Magwaliba* that those sentiments are inapplicable to the facts of the present case. In regards to the constitutional provisions, I also agree with Mr *Magwaliba* that the appeals in income tax matters is proscribed by the provisions of s 65 (4) of the Act which limit argument to the grounds raised in the notice of objection. The purported notice of objection did not raise any constitutional issues. See also *Austerlands (Pvt) Ltd* v *Trade an Investment Bank Ltd & Ors* 2006 (1) ZLR 372 (S) at 378D-E and *Sumbureru* v *Chirunda* 1992 (1) ZLR 240 (H) at 242G. In any event the constitutional arguments are grounded on speculative fear of the possible recourse to the provisions of s 58 (1) of the Act rather than on any hard facts.

Section 68 and s 69 (2) and (3) provide:

> "**68 Right to administrative justice**

> (1) Every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair.
> (2) Any person whose right, freedom, interest or legitimate expectation has been adversely affected by administrative conduct has the right to be given promptly and in writing the reasons for the conduct.
> (3) An Act of Parliament must give effect to these rights, and must—
> (*a*) provide for the review of administrative conduct by a court or, where appropriate, by an independent and impartial tribunal;
> (*b*) impose a duty on the State to give effect to the rights in subsections (1) and (2); and
> (*c*) promote an efficient administration.
> **69 Right to a fair hearing**
> (2) In the determination of civil rights and obligations, every person has a right to a fair, speedy and public hearing within a reasonable time before an independent and impartial court, tribunal or other forum established by law.
> (3) Every person has the right of access to the courts, or to some other tribunal or forum established by law for the resolution of any dispute."

The appellant has failed to demonstrate how its right to objection has been abrogated by the letter and schedule written to and in response of its tax consultants own letter of 11 March 2011. The appellant was not denied access to the High Court, a superior court of inherent jurisdiction that is empowered by an Act of Parliament envisaged by s 68 (3) of the Constitution such as s 27 the High Court Act [*Chapter7:06]* and s 4 of the Administrative Justice Act [*Chapter10:28*] to deal with any administrative complaints it may have against the Commissioner. The Income Tax Act does not provide review jurisdiction to the Special Court. Access to this court is available to the appellant once an assessment compliant with s 2 definition of the Act has been made and a notice of assessment compliant with s 51 (2) has been issued. It was common cause that no such assessment was ever issued. The purported objection based on some other documents that did not constitute such an assessment was therefore invalid and of no force or effect.

Lastly, Mr *de Bourbon* sought to save the appeal on the limited ground consequent upon the determination made by the Commissioner under s 12 (4) (b) of the Income Tax Act that the appellant was liable to be taxed on any income earned in Zimbabwe on the basis that it had a permanent establishment in this country, which determination was subject to objection and appeal in terms of s 62 (1) (b) as read with para (c) of the Eleventh Schedule of the Income Tax Act. The determination of permanent establishment was made an additional ground of objection in the letter of 29 June 2011. It would have been properly before this Court had the appeal been filed on time. As I have already found in dealing with the validity of the appeal, the notice of appeal was filed in excess of the statutory 21 days provided in s 65 (2) of the Income Tax Act. The refusal to determine the issue of permanent establishment does not abridge the appellant's constitutional rights to a fair hearing as it would have to await the issue of formal assessments by the respondent.

The respondent prayed for the dismissal of the appeal with costs. I think the appropriate order would be to strike off the appeal from the roll. As the basis for striking off was not raised by the respondent but appeared *ex facie* the papers, there is no basis to award costs to the respondent. Accordingly, the appeal is struck off the roll with no order as to costs.

That should really be the end of the matter. I have taken the precaution of providing my considered opinion on the merits just in case my decision to strike off the matter from the roll is wrong. In any event, as I heard full evidence and argument, I believe that neither party would be prejudiced by this course of action.

**THE MERITS**

The parties basically referred two issues to trial on the merits. The first was whether the appellant could properly be deemed in terms of s 12 (4) (b) of the Income Tax Act to have earned income from a source within Zimbabwe for which it was liable for taxation. The second was whether it could further be liable for taxation in terms of the Convention between the Government of the Republic of Zimbabwe and the Government of Mauritius for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to taxes on Income, Capital and Capital Gains executed in London on 6 March 1992 and published in the Gazette on 2 April 1993 as Statutory Instrument 135/1993.

The facts

The facts appear from the pleadings, the bundle of documents and the testimony of the Kenya based general manager for taxes for the appellant. The appellant company is the main digital satellite TV provider in sub Saharan Africa. It was originally incorporated in the British Virgin Islands[12] before relocating registration to Mauritius on 26 September 2002[13]. It is a registered investment holding and trading Class 1 Global Business Company whose main activity is the provision of pay-television and internet related services. The Global Class 1 Business Licence[14] was issued subject to *inter alia* eight conditions enumerated on the obverse side of the licence. Condition 5 states:

[12] Clause 1.4.8 of franchise agreement p78 and 148 of bundle effective 1 January 2003 and executed 22 July 2004 yet maintains company already registered in Mauritius as still registered in BVIs.
[13] Mauritian Certificate of registration by continuation p 58 and 195 and Category 1 Global Business Licence of 12 February 2009 p 59 and 196
[14] P60 and 197

"a. When delegating or outsourcing any function, the Company should ensure that the delegate is competent, capable and fit.

b. The Company shall not be discharged from its responsibility upon any delegation or outsourcing arrangement.

c. Notwithstanding any delegation or outsourcing agreement, all books and records of the service transaction delegated or outsourced should be made available for inspection by the Commission at the latter's request even though the books and records are kept at the delegate's office"

*The corporate structure*[15]

The appellant is wholly owned by a company registered in the Netherlands which in turn is wholly owned by a South African company of the same name, the parent company, which is in turn wholly owned by the ultimate holding company N Ltd listed on the JSE Securities Exchange. The parent company also owns 80% of another South African registered company which owns a company that owns the South African company mentioned in the franchise agreement.[16] With the exception of the ultimate holding company N Ltd, all these other companies constitute the MH Holdings Ltd South Africa Group.[17]

*The franchise agreement*[18]

The appellant is registered as a taxpayer with the Mauritius Revenue Authority where it submits annual tax returns and pays taxes on African revenue including from Zimbabwe. The appellant contended in pleadings and averred in oral evidence that it does not have any fixed place of business nor offices nor employees nor broadcasting equipment nor assets in Zimbabwe. It, however, entered into an exclusive franchise agreement of unlimited duration with a local resident businessman and satellite engineering specialist who in turn assigned his rights, duties and responsibilities to his locally registered company, the franchisee. In terms of clause 6 of the franchise agreement the franchisee solicits and manages the local subscribers on behalf of the appellant. In addition it sells and installs and services digital satellite decoders that are compatible with the services offered by the appellant, which are a must have for any subscriber in order to enhance service delivery and preserve the brand and image of the appellant. A South African associate company of the appellant manages the billing and backroom systems[19] and offers the digital satellite television service in Zimbabwe

[15] P 62 and 199 of the bundle
[16] Clause 1.4.9 p 78 and 148
[17] Clause 1.4.6 franchise agreement p 78 and 148 MH exercises more than 50% equity voting rights and has the right to appoint majority directors
[18] Pp 77-100 and 147-171
[19] Para 3 of founding affidavit of businessman p 177 and 178

on behalf of the appellant from South Africa. Prospective subscribers submit their applications to the franchisee who transmits them to the appellant. It is the appellant who contracts with each subscriber on the basis of the information submitted through the franchisee. The franchisee assists collect subscriptions and facilitates transmission of the gross amounts to the appellant without deducting the set commission due for services rendered. The computation and payment method are set out in clause 12.2 and 12.3 respectively. It was paid commission of 14% of the gross subscription revenue based on the equated, active, registered subscribers at the close of business on the 25$^{th}$ of each month. Some of the subscriptions are billed by and paid to appellant through some local banks. Once payment is confirmed by appellant, the South African associated company sends an encrypted signal to the subscriber which is unscrambled by the Irdeto BV technology embedded in the digital satellite decoder and smartcard for normal picture and sound.

The terms and conditions of the franchise agreement, especially clauses 4, 7, 8, 10, 11, 12, 13 and 14 appear onerous and harsh. The franchisee is permitted to trade under the brand name but would require written authority to use any other name. It would require similar authority to appoint its own directors and shareholders. The franchisee was restricted to trade in Zimbabwe and only in the goods and merchandise of the appellant. Its articles of association required alignment with the terms of the agreement. Auditors were nominated and the financial year of the franchisee was chosen by the appellant. The appellant had overarching control over the day to day operations of the franchisee and in other areas such as staff engagement and training, purchase of IBS software compatible computer hardware and communication equipment. It prescribed landscape management, office décor, the type of stationery used, office hours and the stock quantities for decoders and smartcards and payment terms to suppliers of goods and services. It sanctioned and controlled promotions and the marketing and advertising account of the franchisee.

In terms of clause 9, the franchisee purchased "keysafed decoders" and smartcards that had undergone production line testing and quality acceptance from the appellant's Decoder Centre in South Africa as a principal and not as an agent for resale to subscribers and prospective subscribers but at a prescribed price. In terms of clause 9.6 keysafing was defined as "a process which gives each decoder a unique identity so that it may be individually addressed by over-the-air television signals but not pre-enabled." In terms of clause 14 the accounts were prepared in a format acceptable to the appellant and were to be submitted by the 14$^{th}$ of each month. The appellant provided the franchisee with management information sufficient for billing local subscribers and credit control. All subscriber data base information remained the property of the appellant. The trademarks, copyrights and computer software were protected by clause 17. In clause 17.5 the parties agreed that "the franchisee (undertook) to use its best endeavours to protect the trademarks, the copyright in the computer software **embodied in the decoders** or otherwise licensed to the franchisee pursuant to this agreement and the copyright in any programme-carrying signal forming part of the brand bouquet"(underlining mine for emphasis).

*The evidence*

The appellant called the evidence of its general manager for taxes who is based in Kenya. The respondent did not call any evidence. The general manager testified to the appellant's domicile in Mauritius, Dubai, Kenya and Ghana. The appellant had 2.4 million subscribers in more than 48 countries in sub Saharan Africa of whom just over 200 000 were in Zimbabwe. The Appellant managed the full Direct Broadcasting Satellite (DBS) service from Mauritius.

He gave detailed evidence on the technical modalities involved in transmitting picture and sound into the home of the digital satellite television subscriber. The business model runs on three legs of broadcast content, infrastructure and the subscriber. To access the service provided by the appellant, the subscriber purchases a satellite dish, a digital satellite decoder, and a smartcard from a supplier approved by the appellant who deals in products compatible with the service provided by the appellant. The subscriber also requires a television set. The satellite dish technically known as the Television Receive Only (TVRO) is normally mounted on the roof. It consists of a low noise block down converter (LNB) and is linked to a digital satellite decoder (DSD) by cable. A smartcard is inserted into the decoder. The DSD embodies Irdeto BV encryption technology (electronic information), which digitally unlocks compressed encrypted TV carrying digital signals and enables the subscriber to view pictures and hear sound.

As a Direct Broadcasting Satellite (DBS) service provider, the appellant procures rights to broadcasting content from various producers such as SuperSport. The broadcasting content is beamed from the producer to a satellite in geostationary orbit which downlinks it to any one of the appellant's terrestrial uplink dishes in Spain, South Africa or the United Kingdom. The appellant packages the content it receives from various producers into television channels or bouquets. It compresses and encrypts them into digital form before uplinking them to the transponders of 2 other geostationary satellites 37 000 km above the equator with an orbital period of 24 hours. The satellites downlink the bouquets to the subscriber's satellite dish which in turn links it to the decoder, smartcard and television set. The dish collects the signal and transmits it through the LNB converter to the decoder which demodulates and converts the signal to the desired picture quality and high stereo. Annexure 2[20] is the pictorial representation of the beaming from programming source via satellite to the broadcasting centre where channels are aggregated into bouquets and from where bouquets are uplinked to the satellite that downloads the bouquets to the subscriber through his satellite dish to the decoder and TV set for viewing. The subscriber with the compatible viewing equipment then pays for access to bouquets. The general manager emphasised that the signal covers the whole region but access to a bouquet is controlled by the decryption key (the password) transmitted through the smartcard. The key unscrambles the signal specific to the bouquet subscribed by the customer. All the satellites and uplink equipment used to deliver service to more than 48 countries in sub Saharan Africa are conducted from outside any of these territories, including Zimbabwe.

It was common cause that local subscribers pay subscriptions directly to the appellant through normal banking channels unless they happen to be in Mauritius where they can pay directly at the appellant's offices. Payment is by either local or foreign credit card, international money transfer, bank drafts or cheque or cash. On acceptance of an application for subscriptions the appellant allocates the subscriber account number, which is updated on each subscription. The backroom team in South Africa transmit the password through the computer to the decoder and the password opens viewing of the specific bouquet to which the subscription relates.

It was clear from his evidence that neither the appellant nor the franchisee were related parties. It was also clear that the franchisee did not conclude any contracts on behalf of the appellant. Ordinarily a contract is concluded when communication of acceptance is received. In terms of clause 12 of the terms and conditions of subscription and the evidence of the witness the contract would have been concluded in Zimbabwe where the communication of acceptance was received but for the overriding provisions of clause 16 of those conditions. The contract was deemed by clause 16 to have been concluded in Mauritius. It was also apparent that the appellant was established outside Zimbabwe from where it was managed and controlled. The franchisee was an independent company that provided

[20] P 281 of bundle

subscriber management services to the appellant in data capturing, marketing and subscriber support services including the management of the call centre, technical troubleshooting and customer queries. The management and shareholders of franchisee have operational and management freedom to run their company subject to limits within the agreement for the use of the brand name. He sought to underplay the overarching role the appellant has in the day to day operations of the franchisee. While it was heavily involved in soliciting and managing subscription it had no role to play in procurement of content and allocation of satellite space and broadcasting. The subscription application form, annexure 1[21] surrendered to the franchisee for submission to the appellant bears the name, Mauritian registration number and logo of the appellant. The prospective subscriber certifies the accuracy of his bio data and acknowledges reading and understanding the terms and conditions of subscriptions available to him or her on request. He gave contrary testimony on whether or not the appellant operated from South Africa.

He revealed under cross examination that the hardware purchased by the subscriber was calibrated to the downlink satellite covering the Southern Region and were manufactured to the appellant's specifications. He maintained that the encrypted signal was decrypted by the decoding chip in the smartcard and converted from digital to normal. He further revealed that whether one had the reception equipment or not the encrypted footprint of the downlink bouquet carrying signal would cover the territory of Zimbabwe. He was adamant that the customer module in the decoder was linked to the appellant for effective one way communication from South Africa to the subscriber.

I understood from his evidence that the satellite beams the signal down to all countries in the Southern Region, including Zimbabwe, whether or not there is a decoder. However, to receive the signal a subscriber requires a dish, decoder and smartcard. The smartcard and decoder[22] constitute an electronic key in which electronic information is stored to receive and open the over-the-air signal. I understood the witness to assert, in conformity with the clause 17.5 of the franchise agreement, that though the smartcard forms part of the subscriber's equipment, it bears the embedded software of the appellant. The embedded software is referred to in clause 9.6 of the franchise agreement as "keysafed". Each decoder is purchased with a unique identity for over-the-air TV signals communication. It seems to me that the appellant installs customer system software for its own use rather than for the customer's use.

[21] P 280 of the bundle
[22] Clause 1.4.2 p 147 and 1.4.7 at p 148 of bundle

I understood the witness to concede that that the appellant sells to the subscriber through the franchisee a Trojan horse, an asset of the appellant disguised as property of the subscriber. Clause 45 of the Terms and Conditions for Appellant Digital Satellite Subscription Broadcasting Services by Individuals for their Private Use[23] as read with clauses 19, 28.8 and 57 confirm that the software in the decoder and smartcard remain the intellectual property of the appellant. The software allows access to disable the smartcard temporarily or permanently under clause 19 and to only receive and use equipment at a specific address. Clause 28.8 reveals the existence of a conditional access system, an operating software or encryption software in the smartcard and decoder to receive the appellant's prepaid service. In fact clause 45 denies the subscriber any system rights while clause 57 gives the appellant overriding powers to address system errors and other problems on software by means of over the air software downloads and to disable and alter functionality.

It is on the basis of these findings that I proceed to determine the two issues referred to trial on the merits.

**Whether the appellant is liable for taxation under s 12 (4) (b) of the Income Tax Act**

The appellant contended that it was not liable to pay income tax in respect of subscriptions by local viewers because the income was derived from a source outside Zimbabwe. The respondent will seek to assess the appellant to income tax on the basis of s 12 (4) (b) of the Income Tax Act. The provision reads:

> "4) An amount shall be deemed to have accrued to any person from a source within Zimbabwe if it has been received by or has accrued to or in favour of such person by virtue of the use in Zimbabwe of or the grant of permission to use in Zimbabwe, or the imparting of or the undertaking to impart any knowledge directly or indirectly connected with the use in Zimbabwe of—
>
> (*a*) any patent, design, trade mark, copyright, model, plan, secret process or formula or any other property which, in the opinion of the Commissioner, is of a similar nature; or
>
> (*b*) any motion picture film or television film or any sound recording or advertising matter used or intended to be used in connection with such film;
>
> wheresoever such ……….film, sound recording or advertising matter has been produced or made or such permission has been granted or such knowledge has been imparted or such undertaking has been given or payment for such use, grant of permission, imparting of knowledge or undertaking has been made or is to be made, and whether such payment has been made or is to be made by a person resident in or out of Zimbabwe."

[23] P219-225 of bundle

The essential elements which invoke the deeming of the source to be from within Zimbabwe are:

(i) whether an amount was received or accrued to or was made in favour of the appellant;

(ii) by reason of the usage in Zimbabwe of; or authorisation to use in Zimbabwe or the dissemination of or the promise to disseminate any knowledge connected with the usage in Zimbabwe of any motion picture film or television film or sound and advertisements used with such film

(iii) Notwithstanding the place where any one of these four activities took place or the payment that was made for each activity or whether the payer was resident in or outside Zimbabwe.

Mr *de Bourbon* submitted that the words "any person" in the opening phrase do not have extra-territorial application but are restricted to a person to whom the tax laws of Zimbabwe apply. The presumption that a statute does not have extraterritorial effect was laid out by Malan J in *Bishop & Ors v Conrath and Another* 1947 (2) SA 800(T) at 803 in these words:

> "It should be observed that in the interpretation of a statute a presumption arises that a statute will not have extraterritorial application or strike acts committed beyond the limits of jurisdiction of the legislature unless such an intention appears clearly from the enactment."

See also *R* v *Masupe & Anor* 1967 (3) SA 530 (R) at 531B and *Minister of Law and Order, KwaNdebele & Ors* v *Mathembe & Anor* 1990 (1) SA (A) at 119 F.

The purpose of s 12 is to deem the source of income that would ordinarily be considered to be from a source outside Zimbabwe to be from Zimbabwe; otherwise no useful purpose would be served in deeming locally derived income. The opening words in s 8 (1) of the Income Tax Act capture into gross income both actual and deemed income arising from work performed in Zimbabwe. In the context of the right to use motion picture film, television film, sound recording and advertising matter connected with such film or recording s 8 (1) (d) (iv) and (v) further incorporate into gross income premiums paid for the right to use or the impartation or the undertaking to impart knowledge connected with the use of such film, sound recordings or advertising matter. The meaning of these sub sections in our present context would be that if the local subscriber paid a premium to the appellant for the right to use any of these four objects or paid a premium for the dissemination or undertaking to disseminate knowledge on how to use any of these four objects that premium would form part of the gross income of the appellant and that premium would, in terms of s 15 (2) (d), be eligible for deduction from the income of the subscriber.

It is settled law that the source of any payment is the originating cause, which is *prima facie* synonymous with the place where the work giving rise to the payment was performed.[24] WATERMEYER CJ succinctly explained in *Commissioner for Inland Revenue* v *Lever Bros & Anor* 1946 AD 441 at 450 that:

> "the source of receipts, received as income, is not the quarter whence they come, but the originating cause of their being received as income, and that this originating cause is the work which the taxpayer does to earn them, the *quid pro quo* which he gives in return for which he receives them. If the place of performance is in a foreign jurisdiction, then the non-resident falls to pay income tax on the work done in that jurisdiction."

The question of source has been authoritatively determined in this country. In *M. Limited* v *Commissioner of Taxes,* 1958 (3) SA 18 (SR) at 20-21 MURRAY CJ stated:

> "The source of income according to the authorities is not a legal concept, nor does the Statute contain any definition of the term. Source means something which the practical man would regard as a real source of income. The ascertainment of the actual source is a practical hard matter of fact."

See also *T Co Ltd* v *Commissioner of Taxes* 1966 (2) SA 16 (R) at 28G- 29D and *K* v *Commissioner of Taxes, supra* at 197F-H.

The submission made by Mr *de Bourbon* that it is not possible to interpret s 12 (4) of the Income Tax Act as having general extraterritorial applicability must therefore fail. The use of the words "source within Zimbabwe" being synonymous with the originating cause for the payment implicitly incorporate extraterritorial applicability to a non-resident who falls to pay income tax on work done in the foreign jurisdiction. Again, in the context of the present matter this would mean that even though the appellant is resident outside Zimbabwe, it would be taxed in Zimbabwe for any work that it does in Zimbabwe. In these circumstances the words "any person" would also apply to the appellant even if it is not generally speaking resident in Zimbabwe.

*Was any amount received by or accrue to or in favour of the appellant*

It was common cause that the subscriptions paid to the appellant by the subscribers resident in Zimbabwe constituted the amounts contemplated by the opening words of this sub-section.

[24] Per Smith J in *K v Commissioner of Taxes* 1990 (1) ZLR 191 (H) at 197F

*The originating cause of the amount received, accrued to or in favour of the appellant*

The second essential requirement for deeming is predicated on the originating cause for the receipt or accrual of the income. I understand the phrase "by virtue of the use in Zimbabwe of or the grant of permission to use in Zimbabwe, or the imparting of or the undertaking to impart any knowledge directly or indirectly connected with the use in Zimbabwe of" to constitute the originating cause of the subscriptions being received as income. I agree with Mr *de Bourbon* that the word "use" as used in the subsection is a noun rather than verb. As a noun it is defined in *The Shorter Oxford English Dictionary* as "the act of using or the fact of being used, usage or utilization" and imparting as "disseminating". Applying these definitions to the subsection would render the second essential requirement for deeming to mean that the receipt or accrual would arise from usage in Zimbabwe or the authorisation to utilise in Zimbabwe, or the dissemination or the promise to disseminate knowledge connected with the use in Zimbabwe of the motion picture film, television film, or recording sound and advertising matter used or to be used in such films. Clearly, the legislature in its wisdom deemed the usage of the films in Zimbabwe rather than the place from where the films were broadcast to be the originating cause for taxing the appellant.

Mr *de Bourbon* further identified the subscriber rather than the appellant as the user of the motion picture or television film contemplated by the subsection under consideration. It seems to me that in doing so he misconstrued the meaning of the subsection. In my view the subsection brings to tax the use in Zimbabwe of the motion picture films or television films and the sound and advertisements connected to their use. The person who received or to whom the amount accrued or was in favour of is the target of liability and not the payer. In the present case the person who received the subscriptions was the appellant and not the subscriber. The question that the Court is required to answer would therefore be whether there was usage, or an authorisation to use or the dissemination or promise to disseminate the usage of the motion picture film or television film in Zimbabwe by anyone including the appellant and the subscriber which gave rise to the receipt or accrual of the amount by and to the appellant. The appellant was certainly authorised to use the motion picture films and television films in Zimbabwe by the producers of these items. It not only undertook to disseminate but actually disseminated knowledge of the usage of these products to both prospective and actual subscribers. The activities of the appellant are fully captured by the provisions s 12 (4) (b). Like the cinema theatre owner the appellant received payment from subscribers for using the motion picture films and television films in Zimbabwe. In submitting that the subscriber does not use but views the motion pictures and television film *Mr de Bourbon* overlooked the title rendered by the appellant to the terms and conditions of subscription. Even if I were to accept that the usage of the motion picture films and television films is limited to the subscriber, the appellant would still not escape from liability. It is correct that clause 28 of the terms and conditions of subscription prohibits the subscriber from *inter alia* reproducing the motion picture films or television films for commercial use. The subscriber is however not precluded from using the motion pictures for personal and aesthetic considerations without reproducing such pictures and films. The subscribers are not precluded from using and copying the fashion trends and personal idiosyncrasies and traits of their favourite actors and actresses. In fact, the full title of the terms and conditions of the subscription indicate that the appellant contemplated usage in Zimbabwe by the local subscriber. The conditions are called "Terms and Conditions for Appellant Digital Satellite Subscription Broadcasting Services by Individuals for their Private Use". In addition clause 27.2 and 28.6 of those conditions confirm that some form of private use of its broadcasting services by subscribers was within the contemplation of the appellant. The submission by Mr *de Bourbon* that the bouquets could not be put to lawful use by the subscribers is dismissed for lack of merit.

*The objects*

The material items for which the amount received by the taxpayer relates are identified in the subsection in question as the motion picture film or television film or any recording sound or advertising matter connected to such film. Mr *de Bourbon* sought to exclude bouquets of live news, sport, shows, reality TV and religious channels from motion picture films and television films. The terms are not defined in the Income Tax Act. In these circumstances I must consider the ordinary meaning of these terms. I had recourse to *The Free Dictionary by Farlex* and *Thesaurus* on the internet. The first dictionary defines both motion picture and film as "a sequence of consecutive photographic images projected on a screen in such rapid succession as to give the illusion of movement" while the latter defines them as "a form of entertainment that enacts a story by sound and sequence of images giving the illusion of continuous movement" whose synonyms are *inter alia* "movie, moving picture show, film, picture show". My understanding is that the terms motion picture film and television film are not terms of art that bear a technical meaning. I take it that they are merely descriptive words of action. It appears to me that both terms describe the same activity. It seems to me that the definition is wide enough to encompass everything live or pre-recorded that appears on screen. In this judgment I would therefore treat everything broadcast by the appellant and which appears on television as constituting motion picture films and television films.

*The place of production, authorisation, dissemination or commitment to disseminate and the payment and the residence status of the payer*

In my view the general closing words of s 12 (4) (b) disregard the location where all or some of the listed four activities took place and the payments that were made in respect of these activities. Lastly the residence status of the person who pays the amount received is irrelevant to the deeming provision, which is solely based on the usage or dissemination of knowledge of the usage of the material items in Zimbabwe. In simple terms the closing words of s 12 (4) (b) renders the place where these things occur, or payments for these activities and the resident status of the person who pays the amount received irrelevant. The subsection is concerned with the usage in Zimbabwe, the authorisation of that usage in Zimbabwe, the dissemination of knowledge or promise to disseminate such knowledge, which is directly or indirectly connected with usage in Zimbabwe of these objects.

*Resolution of the issue*

The franchise agreement confirms that the appellant renders the Appellant Service in Zimbabwe. The franchise agreement defines and identifies decoders and smartcards utilised in providing "the Appellant Service to subscribers in numerous countries in sub Saharan Africa"[25]. Zimbabwe is one of the countries covered by the appellant. These key devices together with the broadcasting centres and geostationary satellites constitute the one way information highway used by the appellant in providing such service. To enhance its brand and increase its subscriber base in Zimbabwe, the appellant takes an active and controlling role in the way the franchisee conducts and promotes the business. The evidence of the general manager for taxation in all its technical detail is to this effect. The franchisee solicits for subscribers on behalf of the appellant who in turn executes the contracts of supply with the subscriber. The business of the appellant is to source broadcasting content and rights from producers, package it into bouquets and uplink them to a geostationary satellite which in turn

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[25] Clause 3 in preamble of the Terms and Conditions for the Appellant's Digital Satellite Subscription Broadcasting Services by Individuals for their Private Use

downlinks the bouquets to the satellite dish linked to a decoder carrying a smartcard that unscrambles the bouquets for normal viewing. The whole tenure of the appellant's evidence was that it is responsible for broadcasting the pictures and accompanying sound recordings and advertising and music. The witness emphasised that the franchisee did not hold any broadcasting licence nor did it broadcast the bouquets packaged by the appellant.

I agree with Mr *Magwaliba* that the determination of whether the appellant carries on business in Zimbabwe is a practical hard matter of fact based on the specific evidence led in the present appeal. The finding in ITC 1692 (62 SATC 508) that the appellant did not carry on business in Zimbabwe is irrelevant in the present proceedings based as it must have been on the evidence, inclusive of the franchise agreement, tendered in that case. On the basis of the technical explanations of how a keysafed decoder was opened in the home of the subscriber by the appellant to enable normal viewing, Mr *Magwaliba* submitted that the appellant carried on business in Zimbabwe.

The only relevant question must be whether the originating cause for which the appellant receives payment from the local subscriber is in Zimbabwe or in Mauritius. In my view, that question is answered against the appellant. It boasts in the franchise agreement and in the terms and conditions of possessing the rights to the motion pictures films and television films, sound recordings and advertising materials from the producers of such materials and maintains that it is in the business of supplying the Appellant Service to countries in sub Saharan Africa. That service is downlinked by the satellite covering the Southern Region into Zimbabwe. The names of the reception equipment linking the downlink satellite to the subscriber's television set are telling as against the appellant. The names betray the essence of the equipment. The satellite dish is called a Television Receive Only. It receives the signal from the downlink satellite and through the LNB transmits it to the digital satellite decoder which houses a smartcard. The decoder and smartcard unscramble the signal to give normal picture. Without these three essential equipment, the subscriber is unable to receive his or her bouquets. But even with this equipment, the subscriber requires activation by the appellant to open the signal. Thus whether one has the receiver or not, the footprint of the downlink satellite stamps its mark over Zimbabwe awaiting activation of prospective subscribers. Two things became apparent from the explanations proffered on behalf of the appellant in regards to the operation of the system. The equipment that belongs to the subscriber has been calibrated to the technical requirements of the appellant and secondly the appellant has embedded its own assets into all or some of the equipment. The sole witness underscored the one way nature of the information highway between the appellant and the subscriber. The chip in the smartcard belongs to the appellant. Its nature is both corporeal and incorporeal. It is a physical asset in which is embedded the requisite unlocking software.

In my view, the originating cause of the payment made by subscribers in Zimbabwe is the unlocking of the encrypted signal by the appellant in the decoder situated in the home or office or hotel room of each local subscriber.

I am satisfied that the appellant would be liable for income tax in Zimbabwe on the basis of s 12 (4) (b). The originating cause deemed by the section is the mere usage in Zimbabwe of the material items that it broadcasts. The appellant trades in Zimbabwe using its very own assets embedded in the decoder and smartcard ostensibly purchased by the subscribers. Again, in my view, the utilization of its embedded assets for trading in Zimbabwe would also bring the appellant into the income tax net under the provisions of s 12 (1) ((b) of the Income Tax Act.

**Whether the appellant would be liable for taxation under the Zimbabwe and Mauritius Double Taxation Agreement**

The last issue referred to trial was whether the appellant would be liable for taxation on the basis of the double taxation agreement between Zimbabwe and Mauritius. It was common cause that the DTA concluded between Zimbabwe and Mauritius was promulgated in Zimbabwe in the Gazette of 2 April 1993 and published in SI 135 of 1993. The provisions of such an agreement are deemed by s 91 (2) of the Income Tax Act to have been enacted in terms of that Act. The agreement seeks to avoid double taxation and prevent fiscal evasion with respect to taxes on income, capital and capital gains. It applies to persons resident in one or both countries.

Article 7(1) of the double taxation agreement permits the taxation in Zimbabwe of income earned by any person or company otherwise resident in Mauritius only to the extent that such income is attributable to a permanent establishment maintained by such a person or company in Zimbabwe. It reads:

> "The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business in the other Contracting State as aforesaid, the profits of the enterprise may be taxed in the other State, but only so much of them as is attributable to that permanent establishment."

The term "permanent establishment" is defined in article 5 (1) as "a fixed place of business through which the business of the enterprise is wholly or partly carried on". The definition is extended in para (2) and (3) to include amongst others, a place of management, a branch, an office, a factory, a workshop and a construction site, project or activity. In addition six other activities are excluded in para (4) from the definition of a permanent establishment. These entail the use of facilities or the maintenance of stocks of goods or merchandise solely for storage, display or delivery of goods or merchandise of the enterprise sought to be taxed or the maintenance of stock solely for processing by another entity. Again, the maintenance of a fixed place of business either solely for purchasing goods or merchandise or for collecting information; or solely for advertising, supply of information or any other activities of a preparatory or auxiliary nature, for the prospective taxpayer. Further excluded is the combination of the preceding activities as long as the overall activity of the resultant fixed place of business is of a preparatory or auxiliary character.

In terms of para (5) an agent with power to conclude contracts, other than for the activities listed in para (4) above, in the name of or who holds and distributes goods or merchandise belonging to the foreign enterprise creates a permanent establishment for his foreign principal in the Contracting State that seeks to tax him. Para (6) precludes the deeming of a permanent establishment for those enterprises that conduct their business in the State that seeks to tax them through a broker, a general commission agent or any other agent of an independent status, where such agents in the ordinary course of their business act not just for this enterprise but also for others. An agent who acts exclusively or almost exclusively for the foreign enterprise sought to be taxed is not regarded as an agent of an independent status. The permanent establishment status of the enterprise that conducts its business through an agent who acts exclusively or almost exclusively for it would be determined in terms of para (5) above. Lastly para (7) requires something more than just control by or of the enterprise by the company in the other Contracting State to found a permanent establishment.

In analysing article 5(1) of the Convention between the Government of the Republic of South Africa and the Swiss Federal Council worded in similar language, as the present one, CORBETT JA, as he then was, stated in *Secretary for Inland Revenue* v *Downing* 1975 (4) SA 518 (A) at 524D-E that:

> "The definition falls naturally into three parts. The first consisting of paras 1 and 2, defines "permanent establishment" by reference to a place where business is carried on; the second, consisting of para 3 [our para 4] excludes certain activities or functions from the term, and the third consisting of paras 4 and 5 [our paras 5 and 6], regulates the position where business is carried on through an agent.

> It is clear from article 7 (1) that, in order for the business profits of a Swiss resident to be taxable in South Africa, it must appear---
>
> a. that he has carried on business in South Africa; and
> b. that the business has been carried on through a permanent establishment situated in South Africa."

The appellant would be taxable in Zimbabwe in terms of the double taxation agreement if it conducted business in Zimbabwe through a permanent establishment. In the present case, the appellant disputes carrying on business in Zimbabwe through a permanent establishment. Mr *Magwaliba* for the respondent advanced three grounds for contending that the appellant carried on business through the franchisee in Zimbabwe. The first was that the appellant had occupation of the premises of the franchisee through the overarching control granted to it in the franchise agreement. The franchisee was not the type of broker or general commission agent or any other agent of an independent status contemplated in para (6) of article 5 of the double taxation agreement. The franchisee was obliged by the terms and conditions of the franchise agreement to conduct its ordinary business exclusively or almost exclusively for the appellant. Mr *de Bourbon,* in line with the provisions of clause 6 and 9 of the franchise agreement conceded that the franchisee purchased its stock-in-trade consisting of the equipment required to access the satellite television services of the appellant from the appellant for sale to prospective subscribers. The franchisee also advertised these satellite services to both existing and potential subscribers and managed the subscriptions of the local subscribers. I find the further averment that neither the franchisee nor its employees were under the control of the appellant contrary to clause 4, 7.5 and 11 of the franchise agreement. I, however, accept that the franchisee had no control over the content and timing of the bouquets and music broadcasts nor did it conclude contracts with subscribers on behalf of the appellant nor make managerial decisions for the appellant nor use part of the subscriptions before they were remitted to the appellant.

In terms of article 5 (6) the appellant would not be deemed to have a permanent establishment in Zimbabwe if it carried on business in Zimbabwe through a broker, a general commission agent or any other agent of an independent status acting in the general course of its business. One of the core functions of the appellant as a broadcasting entity would have been to solicit and run its own subscription management and public relations services. The evidence demonstrated that these services were carried out on its behalf by the franchisee on commission. The franchisee acted exclusively or almost exclusively for the appellant in the subscription management and public relations spheres of operation. The franchisee was therefore disqualified from being an agent of an independent status. Were it not for the provisions of article 5 (5) these two activities carried on by the franchisee on behalf of the appellant would have created a permanent establishment for the appellant in Zimbabwe. However, the wording of para (6) of article 5 requires that it be read in conjunction with the provisions of para (5) of article 5. The franchisee therefore fell into the category of an ordinary agent referred to in para (5) of article 5 of the double taxation agreement. To create a permanent establishment for the appellant, the franchisee as an ordinary agent would be required to satisfy the provisions of para (5) of article 5. A permanent establishment would be created under article 5 (5) if the franchisee was able to conclude contracts on behalf of the appellant or if it held and distributed goods or merchandise belonging to the appellant. In fact this para overrides para (1) and (2) to the extent that permanent establishment is founded on agency of any person acting in a Contracting State on behalf of an enterprise in the other Contracting State. The evidence established that the contracts were concluded by the appellant and not by the franchisee. The stocks of goods held and distributed by the franchisee were purchased from the appellant and its nominated suppliers. On purchase they became the goods of the franchisee and not of the appellant. Para (5) like para (6) of article 5 does not establish the presence of an agency based permanent establishment for the appellant in Zimbabwe.

Lastly, para (7) of article 5 precludes a finding of permanent establishment based solely on control. In my view this paragraph simply means that neither the control of the franchisee by the appellant or of the appellant by the franchisee nor the carrying on of business by the franchisee in Zimbabwe would make either of the two a permanent establishment of the other. The sole witness called by the appellant justified the control on international best practice. A reading of U-*Drive Franchisee Systems Ltd* v *Drive Yourself Ltd & Anor* 1976 (1) SA 137 (D) at 142F, *Tamarillo (Pty) Ltd* v *BN Aitken (Pty) Ltd* 1982 (1) SA 398 (A) at 436 B and F and 438A and *Longhorn Group (Pty) Ltd* v *The Fedics Group (Pty) Ltd & Anor* 1995 (3) SA 836 (W) at 842F demonstrate the *sui generis* nature of a franchise agreement. Such an agreement cannot be equated to a partnership or to a master and servant relationship. Even harsh, unfairly skewered and onerous franchise agreements such as the ones in the *Tamarillo* and *Longhorn* cases, *supra,* are justified on grounds of the sanctity of contracts and protection of goodwill, trademarks, brand and image of the franchisor.

In *U-Drive Franchisee Systems, supra*, MILNE J, as he then was, defined a franchise agreement as “those chain style operations in which the owner of a national brand product or service sub-contracts to permit a local dealer or person to use his brand name and agrees to provide advertising and know-how services, equipment and other benefits to the franchisee for the purpose of running the business." While I agree with Mr *Magwaliba* that the appellant had overarching control over the business activities of the franchisee in Zimbabwe, I find that such control was also dictated by the terms of clause 5 of the Category I Global Business Licence issued in Mauritius and for that reason did not undermine the nature and scope and efficacy of the franchise agreement. Accordingly, the provisions of para (7) of Article 5 would not apply in the present matter.

I have already found that the appellant has permanent presence in Zimbabwe by virtue of the tangible and intangible assets it holds in every home and place in Zimbabwe where a satellite dish, decoder and smartcard calibrated to the requirements of the appellant is found. The tangible asset being the chip in the decoder and smartcard and the intangible asset being the software used to unlock normal viewing and provide sound. The practical effect of the activities of the appellant fall squarely into the ambit of article 5 (1). The appellant has not just a fixed place but fixed places of business through which the business of the enterprise at the very least is partly carried on.

And for that reason, I would find the appellant liable for taxation in Zimbabwe in terms of the double taxation agreement executed between the Government of Zimbabwe and the Government of Mauritius.

It is not necessary for me to deal with the issue of penalties and interest in view of the manner in which I have disposed of this matter.

**Disposition**

I, however, uphold the preliminary point that the appeal filed in this court was invalid for lack of compliance with the mandatory strictures of s 65 (2) of the Income Tax Act that require a valid notice of appeal be filed within 21 days of the decision or deemed decision to the objection. Accordingly, the matter is struck off the roll with no order as to costs.

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