

VFSL (PVT) LTD
and
SWA (PVT) LTD
and
SC (PVT) LTD
and
WSA (PVT) LTD
versus
ZIMBABWE REVENUE AUTHORITY

FISCAL APPEAL COURT
KUDYA J
HARARE 17 November 2015 and 18 January 2019

VAT Appeal

AP de Bourbon, for the appellants
S Bhebhe, for the respondents

KUDYA J: These four appeals were consolidated at the pre-trial meeting of 15 June 2015 because it was convenient to do so. The appellants were represented by the same legal practitioners and all the appeals raised the same issues. On the date of the pre-trial hearing the parties filed a joint pre-trial minute and four issues were referred for determination on appeal. The appeals were initially set down 10 November 2015. On 4 November 2015 the erstwhile legal practitioners for the respondent assumed agency. At their behest and with the consent of the appellants' erstwhile legal practitioners the appeal was moved to 17 November 2015. On 13 November 2015, the respondent filed heads of argument in which it raised a preliminary point. The heads were only served on the appellants' legal practitioners and thereafter availed to counsel for the appellants on the day before the date of hearing.

The appellants' witness was in attendance on the date of hearing. By consent of the parties, the Court agreed to hear argument on both the preliminary point and the merits and reserve judgment in the matter. The understanding being that if the preliminary point was upheld then judgment on the merits would be dispensed with. Notwithstanding that I have upheld the preliminary point; I decided to consider judgment on the merits for three reasons. The first is to cover myself in the event that my finding on the preliminary point is wrong. The second is that I heard evidence on appeal. The last is because of the long delay in delivering

judgment, which was occasioned by a prior protracted matter which exercised my mind for a considerable length of time.

In an unusual turn of events, five sets of heads of argument were filed in this matter. The initial heads were filed by the appellants on 11 July 2012. These were followed by the heads filed by the respondent on 13 November 2015. At the conclusion of the appeal hearing, Mr *de Bourbon*, for the appellants handed in a written set of heads in which he incorporated the initial heads. Mr *Bhebhe*, for the respondent successfully applied for the filing of supplementary heads to address the issue raised by Mr *de Bourbon* in both his written and oral addresses on the impact of s 10 (2) (q) of the Value Added Tax Act [*Chapter 23:12*] on section 15 of the Value Added Tax (General) Regulations SI 273 of 2003 as amended. He filed the supplementary heads for the respondent on 20 November 2015 and in consequence thereof, Mr *de Bourbon* filed his supplementary heads on 26 November 2015.

The general facts

The respondent conducted an audit of all the players in the Tourism Industry in Zimbabwe for tax compliance sometime in November and December 2010.

It was common ground that each appellant is a company registered in Zimbabwe conducting business in the tourist sector from Victoria Falls. Each appellant offers a variety of facilities and activities to tourists who come to Zimbabwe. In addition each appellant is a registered tourist facility operator designated as such in terms of the First Schedule to the Tourism (Designated Tourist Facilities) (Declaration and Requirements for Registration) Regulations SI 106 of 1996 as read with s 10 (2) (q) (i) of the Value Added Tax Act.

The services provided to locals are subject to value added tax while most of the services that are provided to foreign tourists are statutorily zero rated from paying value added tax. The activities and facilities provided by each appellant were listed in each appellant's bundle of documents filed of record on 6 November 2015. In addition each appellant indicated the services that are supplied by kindred operators in the area to which it books and refers interested tourists.

The appellants in tandem with other tourist operators conduct an integrated booking system in which they book at the instance of the tourist an all-inclusive holiday package which includes those activities, which the booking tourist operator does not provide but are offered by a kindred operator. Each appellant charges the tourist for both the activities it offers and those provided by kindred operators in one account. The appellants labelled the facilitation to

kindred operators “activity desk sales”¹. Each appellant provides the tourist with a voucher, which the tourist surrenders to the kindred operator before accessing the activity. The kindred operator invoices the appellant for that activity at the net effective rate, which is below the gross rate or as it is called in the industry “the rack or published rate” charged to the tourist by the appellant. The gross rate constitutes the normal rate charged for the activity by the kindred operator to any walk-in customer, including the tourist who books for such an activity directly with the kindred operator. The appellant retains the balance. Each appellant underscored in para 2 of its letter of objection that the rack rate was shared between each appellant and the local kindred operator in accordance with the prevailing worldwide tourism industry pricing model agreement². The pricing model was dictated by economic realities affecting the countries in which all tourist players operate in from the source to the end markets. The local kindred operator did not receive the full price that it charged for the service but a net effective rate.

Each appellant contended that the retained balance constituted a “booking fee”³, which covered the costs incurred in booking the activity for the tourist with the kindred operator inclusive of communication and connection costs. The respondent contended that the retention constituted a commission received by each appellant for the referral or client sourcing service provided to the kindred operator.

The respondent treated the retained balance as commission paid by the kindred operator to each appellant for the referral service notwithstanding that it originally emanated from the tourist and subjected it to value added tax.

The facts specific to each appellant

VFSFL (PVT) LTD

On 6 November 2015 the first appellant VFSL (Pvt) Ltd filed a 7 page upbeat brochure of some of the tourist services and activities that it provides. It offers amongst others “unquestionable commitment to excellence, unforgettable experience, a sublime river cruise, adrenalin rush bunji jumps, a truly classic African Bush experience and must do eating centres that bombard the senses”, and boasts of being voted Zimbabwe’s best safari premises for 17 years in a row by the Association of Zimbabwe Travel Agents.

¹ Respondent’s letter to first appellant of 7 January 2011 at p 1 of rule 5 documents.

² Pp 9-13 for first appellant and 33-37 for second appellant and pp of rule 5 documents and pp 3-7 of the third appellant’s separate r 5 documents

³ The opening remarks of Mr *de Bourbon*

The first appellant indicated on page 5 of the bundle the “price list valid to the end of December 2011” for a category of 14 activities⁴. The appellant warned that the prices did not include value added tax and cautioned that they would change with any change in law. The list also excluded park fees per person in the indicated amounts. At the hearing, the sole witness called by the appellants produced an updated activities price list for 2015 under the first appellant’s letter head. The prices, including the park’s fees, had risen since 2011 and a total of 15⁵ categories of activities were covered. A total of 13 kindred operators were highlighted in red ink. A copy of an invoice from a kindred operator for the period 8 to 24 June 2011 showed the date, the kindred operator’s reference, the first appellant’s reference, the tourist to whom the kindred operator provided the activity, the nature of the activity, the number of tourists, the charge per tourist and the total charged by the kindred operator. The United States Dollar and the South African Rand Foreign Currency Accounts of the kindred operator into which payments were to be remitted at cost to the first appellant were indicated. Page 7 reproduces two confirmation travel vouchers issued by the first appellant to the tourists who were staying on its premises. The first voucher 09686 dated 17 June 2011 was for 2 adults and the second 09642 dated 18 June 2011 was for 3 adults, who were all booked by the first appellant for and provided with elephant back safaris by a kindred operator at a cost of US\$120 per person on the day after the payments. The amount of US\$240 and US\$360, respectively were paid by the tourists to the first appellant.

The table below represents the accounting of the payments in respect of the above vouchers between the appellant and the kindred operator.

Date	Third Party (TP) ref	First App ref	Tourist	Activity	Pax	TP Rate USD per person	Gross USD	Net USD to TP	Retained USD
June 2011									

⁴ Helicopter flights, lion encounter, Elephant trails, horse trails, game drives and walking safaris, game drives in private parks, Tour of the Falls , village and Township tour, Chobe day trips into Botswana (excluded Visa fees), dinner at Boma, fishing safaris, Zambezi memories, DVDs and other services such as internet, merchandise

⁵ Scenic flight of angels, Hi-Wire, Elephant Back Safaris, Lion Encounter, Game Drives (public and private parks), horse trails, Spa (provided by first appellant), Tour of the Falls, Chobe Day trip, White water rafting, Upper Zambezi Canoeing Safaris, Sundowner Cruises, Guided Walking Trails and Croc Cage Diving.

18	54648	9686	G	Elephant Back Safari	2	90	240	180	60
19	55059	9642	W	Elephant Back Safari	3	90	360	270	90
08	54122	9604	WG	Lion & Elephant Combo	2	172		344	
24	55137	9718	WN	White Water Rafting	2	90		180	

Between 23 November and 14 December 2010, the respondent investigated the first appellant in respect of both income tax and value added tax compliance. The parties held several meetings and conducted telephonic conversations and various documents were supplied to the respondent. On 7 January 2011, the respondent's head of investigations⁶ accepted the accuracy of the first appellant's activity desk sales computations. He treated it as a provision of a vatable service by the local tourist operator, the appellant, to another local tourist operator, the kindred operator. In the letter was a table in the aggregate sum of US\$92 254.47 for the principal of US\$44 224.82, penalty in the same amount and interest of US\$3 804.84. The monthly VAT computations for the 2009 calendar year and the 2010 months to the end of October were attached⁷. I reproduce below how the computations were captured for the months of January, June October and December, where applicable, and the aggregate figures.

Vat computation

Year	Month	Sales	Output Tax	Purchases	Input Tax	Tax payable
2009	January	31 933.00	4 165.17	24 280.00	3 166.96	998. 22
	June	66 257.30	8 642.26	50 448.00	6 580.17	2 062.08

⁶On p 2 of rule 5 documents, the letter expressed appreciation for cooperation exhibited during the audit
⁷ P 3-6 of rule 5 documents

	October	49 053.51	6 398.28	36 939.87	4 818.24	1 5 80.04
	December	70 515. 11	9 197.62	52 915.00	6 901.96	2 295.57
	s/total 2009					20 072.64
2010	January	76 569.84	9 987.37	58 033.16	7 569.54	2 417.83
	June	76 569.84	9 987.37	58 033.16	7 569.54	2 417.83
	October	85 887.00	11 202.70	67 551.00	8 8 10.96	2 391.73
	2010 s/t					24 152.18
Total						44 224.82

The computation of interest on the outstanding VAT principal for the period 6 February 2009 to 15 January 2011 in the aggregate sum of US\$3 804.84 was set out on page 7 of the rule 5 documents. A penalty of 100% was imposed on the outstanding principal.

On 12 January 2011, the first appellant, through its tax consultants, raised an objection to the letter of 7 January 2011⁸. The objection was addressed to the Acting Commissioner-General and headed: Re: Investigation Tourist Industry Victoria Falls: Objection to Assessment on VFSL”. In the second paragraph, the tax advisers intimated that the letter “serves as a formal objection by [the first appellant] to the assessments mentioned above”. The objection in respect of income tax matters which formed part of the 12 page overall objection are not presently before me. It is not necessary for me to refer to the objections relating to withholding tax, notwithstanding that they raise very interesting points which mirror the contentions that were raised in respect of value added tax on the nature of the income tax relationship between a foreign agent who sources clients for a local operator and the local operator. In the present matter, the issue relates to the value added tax treatment to be rendered between a local tourist operator, such as the appellants and another local tourist operator to whom the appellant connects with foreign tourists. The nub of the issue being whether or not the appellant is providing a service to a fellow local tourist operator or to the tourist or to both. The importance of the withholding tax objection lies in the terminology⁹ that applies to the payments made by

⁸ P8-19 of rule 5 documents

⁹ P 9 of rule 5 in letter of objection under Tourism Sector Pricing Models explanation in the first para the amounts paid to the foreign agents are termed discounts. All the providers who come into contact with the tourist in the 4 distribution channel share in the gross amount paid by the tourist with the appellant and third

the tourist to such operators as the appellants and those made by the appellant to the kindred operator. The former is called a “rack or published rate” while the latter is a “net effective rate”. The rack rate is determined by the provider of the required activity based on market fundamentals such as the state of the economy in source and end markets, regional and country competition.

In the objection, the tax advisors partly misconstrued the basis for placing the payment of VAT on the appellant. It was for supplying a service to the local kindred operator and not so much on the withholding tax or commission paid to a foreign agent. The attempts by the first appellant to persuade the Commissioner-General to suspend the payment of the assessed VAT principal, penalty and interest were unsuccessful¹⁰.

On 21 March 2011, the Commissioner-General determined the objection under the reference “Objection to assessment on first appellant: withholding tax on foreign commission and VAT”¹¹. The income tax objections were disallowed but the penalty was reduced to 20% and the first appellant was requested to claim the relief derived from applicable double taxation agreements. In regards to VAT, the Commissioner-General was emphatic that:

“The Value Added Tax liability is arising from the commission earned by the first appellant from its dealings with other local registered operators such as WH, S etc. Section 6 (1) (a) of the Value Added Tax Act [*Chapter 23:12*] provides for the taxation of such transactions. This ground of objection is therefore disallowed as the supply of services locally (i.e. services offered by a local operator to another local operator) is liable to VAT at 15%. If you are dissatisfied with my decision, you may appeal to theFiscal Appeal Court in terms of section 33 of the VAT Act [*Chapter 23:12*].”

The first appellant filed its notice of appeal on 12 April 2011 and statement of facts and law on 23 May 2011. The respondent filed its reply thereto on 11 July 2011. The appellant and the respondent agreed that the tourist paid the full price for the activity provided by the local kindred operator. They further agreed that the full price was shared between the appellant and the local kindred operator in accordance with the prevailing worldwide tourism industry pricing model agreement that each appellant underscored in para 2 of the letter of objection¹². The pricing model is dictated by economic realities affecting the countries in which all tourist

party earning 70% of the tourist dollar after discounting 30% of its normal charges influenced by volumes, season, day of the week, slump business.

¹⁰ Letter from Dube Manikai and Hwacha of 18 January 2011 pp 20-22 of rule 5 documents and response dated 16 February 2011 on p24of rule 5 documents

¹¹ P25-27 of rule 5 documents

¹² Pp 9-13 for first appellant and 33-37 for second appellant and pp of rule 5 documents and pp 3-7 of the third appellant’s separate r 5 documents

players operate in from the source to the end markets. It is in the nature of an unwritten but binding convention that participating tourism actors subscribe to. The local kindred operator does not receive the full price that it charges for the service but a net effective rate.

The sole witness called was the Group Chief Executive Officer of first appellant. He gave a general overview of the travel industry based on his experience and involvement as founding shareholder retrospective to 1992 when the first appellant commenced trading. He confirmed the activities provided by the first appellant and the concierge services availed to the tourist by the first appellant that were sourced from its preferred kindred operators. The preference was dictated, *inter alia*, by the state of equipment, the service standards, the quality of product, safety considerations and the provision of public liability insurance cover of at least US1 million. He further indicated the payment arrangements between the appellant and the kindred operators. He considered the retention to be income accruing from the concierge services provided to the tourist. To his knowledge the other appellants operated a similar system.

He conceded under cross examination that the retained income was volume driven but denied the existence of a prior arrangement for sourcing clients between the appellants and the preferred kindred operators. He confirmed that the retention was withheld once the tourist undertook the activity provided by the kindred operator. He vehemently denied that the retention constituted a commission and preferred to call it the “tourist guest revenue”. He indicated that the tourist was unaware of the arrangement between the appellant and the kindred operator. The appellant retained the revenue from those tourist who booked through it and undertook the activity. He emphasized that those tourist who inquired about the services from the preferred kindred operators but did not participate in the activities were not charged for the services rendered to them by the tours desk. He provided the descriptions of some of the all-inclusive trips such as the Zimbabwe Safari Star Johannesburg, Victoria Falls-Hwange-Mana Pools inclusive of Sunset Cruise and guided tour through the rain forest.

SWA (PVT) LTD, the second appellant

On 6 November 2015 the second appellant filed a 6 paged bundle consisting of a 5 page brochure and an invoice dated 22 November 2012 from a local kindred operator. It has been “pioneering spirits since 1982” and was a winner of the Association of Zimbabwe Travel Agents Best Tour Operator Trophy for 12 consecutive years. Its activities traverse the Golden Triangle in Zimbabwe, Zambia and Botswana where it “removes geographic limitations and

makes cross border transport easy and economical.” The brochure iterates 14 activities undertaken by the second appellant from its own premises using its own assets¹³. The bungee jumping offered from the Victoria Falls Bridge has been “consistently voted as one of the top five adrenalin experiences on the planet.”¹⁴ The invoice from a local kindred operator identified the account into which the denoted net price payment was due for the services rendered.

The VAT schedules, with a Zimbabwe Revenue Authority date stamp of 24 December 2010 covered each month in 2009 and up to the end of October in 2010¹⁵. The outstanding principal VAT for 2009 was in the sum of US\$16 976.75 to which a penalty of an equivalent amount and interest of US\$ 1 994.18 was imposed. The total amount due in 2009 was US\$ 35 947.67. The outstanding amounts for 2010 consisted of the principal amount of US\$ 21 661.23, a penalty of an equivalent amount and interest of US\$ 962.91 which all added up to US\$ 44 285.37. The total amount owing for the two years was in the sum of US\$ 80 233.04.

The second appellant raised “objection to assessment” in the heading of the letter dated 12 January 2011 but the first two paragraphs thereof recorded that the objection was to “tax schedules”¹⁶. Other than the names of the appellant and the local kindred operators, LA, ZHC and EC¹⁷, and the amounts involved, it was a replica of the first appellant’s objection. The determination was made on 21 January 2011. The notice of appeal was filed on 12 April 2011 and followed by the second appellant’s statement of facts and law on 23 May 2011 to which the Commissioner-General responded on 11 July 2011.

The averments made by the tax advisor in the objection in regards to the relationship between the kindred operator and each of the appellants was contradicted by the e-mail of 11 February 2011 on page 48 and 49 of the rule 5 documents. LOA, one of the kindred operators who supplied a service to the tourist booked by the second appellant treated the second appellant and all parties in the position of the second appellant as agents¹⁸. The e-mail confirmed the efficacy of a voucher and in para 9 thereof treated the difference retained as commission. Again, the second appellant treated the monthly income received from a kindred

¹³ P2-4 of the brochure depicts the activities in both pictorial and written form. It depicts the flight of angels, Zambezi Sunset Cruise, Elephant Back Safari, Elephant Back Safari, Chobe Day Trip, Lion Walk, Transfers, Bridge Tour, Bungee Jumping, Bridge Swing, Bridge Slide, White Water Rafting, The Boiling Pot Hike, Batoka Gorge Hike and Ndebele Village Tour and the Rhino Encounter.

¹⁴ P 3 of brochure

¹⁵ Pp29-31 of rule 5 documents.

¹⁶ Pp32-43 of rule 5 documents

¹⁷ Para 12 of Commissioner’s reply of 11 July 2011

¹⁸ Para 2, 7 and 9 of e-mail on p 49 of rule 5 documents

operator ZHC in the period January to December 2009 and January to October 2010 as indirect agency sales¹⁹.

SC (PVT) LTD t/a VFRCL, the third appellant

On 13 November 2015 the third appellant filed a two paged bundle of documents consisting of invoices dated 2 August and 6 August 2011 addressed to the fourth respondent in respect of lion walks. The invoices show that a tourist one G paid US\$375 for a lion walk to the fourth appellant on 2 August 2011. However, the fourth appellant was invoiced US\$300 by the local kindred operator on 26 August 2011. The amount retained was therefore US\$75.

The respondent filed separate rule 5 documents for the third appellant on 7 October 2015. On 3 December 2010 the respondent's head of investigations requested the third respondent to, *inter alia*, settle outstanding VAT on local commissions for the period from February 2009 to October 2010 by 10 December 2010. On 16 December 2010 the tax advisors of the third appellant filed an "objection to assessment" to the letter of 3 December 2010²⁰. The attempt to have payment suspended pending determination of the objection was not successful.²¹ The determination of 21 March 2011 omitted to deal with the objection to VAT and concentrated on the income tax issues raised²². However, in terms of the proviso to s 32 (4) of VAT Act, the VAT objection was deemed disallowed.

On 12 April 2011, the third appellant appealed against the deemed disallowance and filed its statement of the allegations of fact and law on 23 May 2011. The respondent filed his response thereto on 11 July 2011. In para 12 of the response it identified the local kindred operator as WH.

WSA (PVT) LTD, the fourth appellant

On 9 November 2015, the fourth appellant filed its bundle of documents consisting of an invoice from a local kindred operator and another from a foreign third party. The invoice to the local kindred operator was issued on 30 January 2012 for services rendered to two tourists booked by the fourth appellant on 26 and 27 January 2012. The invoice from the fourth appellant to the foreign agent in Cape Town, South Africa showed all the activities that had been provided to those two tourists in Zimbabwe between 26 January and 4 February 2012 and the United States dollar payment due from the foreign agent for the local bank account of the

¹⁹ P51, 52 and 53 of rule 5 documents.

²⁰ P 2-13 of third appellant's rule 5 documents

²¹ P 14-17 of third appellant's rule 5 documents

²² P18-20 of third appellant's r 5 documents

fourth appellant. While the invoices were not relevant for the period under appeal, they showed that the cost of accommodation at the local kindred operator party's facility payable to the fourth appellant was in the sum of US\$ 1 088. However, the fourth appellant was invoiced US\$980 by the local kindred operator. The fourth appellant would retain US\$ 108 in respect of that accommodation facility.

The date on which the respondent served the fourth appellant with the VAT schedules for the period from January 2009 to October 2010 was not indicated. There is no accompanying letter attached to these schedules. I summarise in the table below the information in the schedules that were dispatched to the fourth appellant by the respondent.

VAT on local sales

Year	Value of supply	VAT	penalty	Sub-total	Interest	Total
2009	644 723.71	84 094.40	84 094.40	168 188.79	13 148.34	181 337.13
2010	820 322.48	106 998.58	106 998.58	213 997.17	1 466.40	215 463.56
Total	1 465 046.19	191 092.98	191 092.58	382 185.96	14 614.74	396 800.69

The 2009 schedule and the 2010 schedule show the monthly value of the supply, the value added tax due and the 100% penalty imposed. The total in this regard for 2009 was in the sum of US\$ 168 188.79 while for 2010 it was in the sum of US\$ 213 997. The principal outstanding value added tax for each year was US\$84 094.40 and US\$106 988.58. The respective yearly total for the value of supply was US\$ 644 723.71 in 2009 and US\$ 820 322.48 in 2010. The computation of the total value of supply in each year is captured on pages 56 and 57 of the rule 5 documents. The interest levied on the 2009 principal was US\$13 148.34 while that for 2010 was in the sum of US\$1 466.40.²³ The last three invoices raised by the fourth appellant against three operators and a credit raised on a local kindred operator in favour of the fourth appellant were not explained.²⁴

The objection raised with the Commissioner-General by the fourth appellant did not form part of the documentary exhibits filed of record. Reference to its existence was made by the Commissioner-General in his determination of 13 September 2011. It was apparently dated 9

²³ Pp 54-55 of r 5 documents

²⁴ Pp 61-64 of rule 5 documents on 22 September 2010, 31 May 2009, 1 September 2009 and 1 October 2010, respectively

June 2011. The determination²⁵ was a carbon copy of all the other determinations in respect of the other appellants and especially of the first and second appellants. The fourth appellant filed its notice of appeal and statement of the facts and law on 10 October 2011. The respondent filed his reply on 15 November 2011.

The preliminary point

The issues

The two issues raised *in limine* were:

1. Whether the objections raised by each appellant were valid? And
2. If not, whether the respondent is estopped from denying their validity

The relevant statutory provisions

The main point taken by Mr *Bhebhe* was that the appeal was nullified by an invalid and void notice of objection. He submitted that notwithstanding the perpetuation of all the procedural steps required in dealing with a valid objection from the rendering of a purported assessment to the appeal hearing, in the absence of a notice of assessment issued in terms of the Value Added Tax Act [*Chapter 23:12*], all the subsequent steps taken by both parties were void and of no force or effect. Mr *de Bourbon* took the contrary point that a valid objection was rooted in an assessment rather than in a notice of assessment. He, therefore, submitted that the objections lodged by the appellants were valid, founded as they were, on the assessments issued by the respondent.

Section 32 (1) of the Value Added Tax Act prescribes the administrative actions of the Commissioner that a taxpayer may object to. These are limited to specified decisions, directives and assessments. It was common ground that the appellants' objections were lodged in terms of s 32 (1) (b) against the purported assessments issued against them by the Commissioner's authorised officials. S 32 (1) (b) reads:

“32 Objections to certain decisions or assessments

- (1) Any person who is dissatisfied with—
 - (b) any assessment made upon him under sections *thirty-one, sixty-six or sixty-seven*; may lodge an objection thereto with the Commissioner”

In terms of subs (3) of the same section, the primacy of a notice of “any assessment against which such objection is lodged” is underscored.

- (3) No objection shall be considered by the Commissioner which is not delivered at his office or posted to him in sufficient time to reach him within thirty days after the date on which notice of any decision or assessment against which such objection is lodged

²⁵ Pp58-60 of rule 5 documents

was given by the Commissioner, unless the Commissioner is satisfied that reasonable grounds exist for delay in lodging the objection:

Provided that any decision of the Commissioner in the exercise of his discretion under this subsection shall be subject to objection and appeal.

The powers of the Commissioner in respect of the objection are stipulated in subs (4) of s 32 of the Act. In terms of subs (5) of s 32 as read with s 33 (1) of the VAT Act the determination made under s 32 (4) of the same Act lies to the Fiscal Appeal Court.

Mr *de Bourbon* railed against Mr *Bhebhe* for way laying him with “an unethical ambush” in the preliminary point at the door of the Fiscal Appeal Court. The present erstwhile legal practitioners for the respondent assumed agency on 3 November 2015. The initial appeal hearing dates were set down at the pre-trial hearing of 15 June 2015 for 10 and 11 November 2015. At the request of the respondent’s erstwhile legal practitioners the appeal was postponed to Tuesday 17 November 2015. In the meantime on Friday 13 November 2015, the respondent’s legal practitioners filed with the Registrar of the Fiscal Appeal Court heads of argument that *inter alia* took for the first time the preliminary point in question. They were only served on Mr *de Bourbon*’s instructing legal practitioners at 11 am on Monday 16 November 2015. At the time, Mr *de Bourbon* was based in Cape Town. He only had notice of the heads on his arrival in Harare at 3pm on that day. He took umbrage at the conduct of Mr *Bhebhe* with his senior partner. Notwithstanding the short notice, he elected to argue the matter after evidence rather than seek a postponement and relied heavily on heads he had filed on 26 February 2015 in the matter of *MC Ltd v Zimbabwe Revenue Authority* ²⁶HH 634/2016, in which judgment was then pending. A similar preliminary point had been raised by the Commissioner in that case, from the onset, on receipt of the letter of objection and not as in the present matter, at the 11th hour. I determined the preliminary issue in *MC Ltd, supra* from pp 9 to 19 of the cyclostyled judgment after I had already reserved judgment in the present matter and found against the contentions advanced by Mr *de Bourbon*. I upheld the preliminary point in that case and struck the matter off the roll.

The word assessment is not defined in the VAT Act. It is, however, defined in the Income Tax Act [*Chapter 23:06*]. The power of the Commissioner to make an assessment is enshrined in s 31 of the VAT Act. The word “assessment” first appears in this section in subs

²⁶ Case No. FA 24A/2011 which was heard on 16 February 2015 but in which judgment was delivered on 20 October 2016.

(3) and is thereafter repeatedly used in subs (4) to (6). The closing words of subs (3) insinuate what an assessment is in these terms:

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

Subs (4) to (6) of s 31 provide the full textual context essential in determining the meaning of the word.

- “(4) In making such assessment the Commissioner may estimate the amount upon which the tax is payable;
- (5) The Commissioner shall give the person concerned a written notice of such assessment, stating the amount upon which tax is payable, the amount of tax payable, the amount of any additional tax payable in terms of section *sixty-six* and the tax period, if any, in relation to which the assessment is made, and—
- (a) where the assessment is made on a seller referred to in subparagraph (i) of paragraph (b) of subsection (2), send a copy of that notice of assessment to the owner referred to in that subsection; or
- (b) where the assessment is made on an owner referred to in subparagraph (ii) of paragraph (b) of subsection (2), send a copy of that notice of assessment to the seller referred to in that subsection.
- (6) The Commissioner shall, in the notice of assessment referred to in subsection (5), give notice to the person upon whom it has been made that any objection to such assessment shall be lodged or be sent so as to reach the Commissioner within thirty days after the date of such notice.” [Underlining mine for emphasis]

The Commissioner makes an assessment of the amount of tax payable. The conclusion I reach from the underlined words is that the assessment” and “such assessment” in s 31 are synonymous with “make an assessment of the amount of tax payable.” The link between an assessment and an amount is iterated in s 66 (2) and s 67 of the Act.

I reproduce what I said in the *MC Ltd* case at page 10 of the cyclostyled judgment:

“It was common cause that the word “assessment” is not defined in the Value Added Tax Act. Mr *de Bourbon* used the word “determination” interchangeably with “assessment” in his written heads.²⁷ The *Shorter Oxford English Dictionary* defines “assessment” *inter alia* as “the action of assessing”, “the amount assessed”; “the determination of the amount of taxation to be paid”. It defines “assess” as “to fix the amount of taxation”; “determine the amount of and impose upon”, “to impose a fine or tax”. Guidance as to its meaning is provided in s 31 (3), which identifies it with the making of an amount of tax payable. In my view it simply means the calculation or computation of the VAT using the formula set out in the Act. That formula involves scrutinising the returns and records rendered by the registered operator in the broad sense and applying the requisite percentage to the purchase price and selling price to delineate the output and input tax and then deducting the input from the output tax to arrive at the VAT payable. The formula takes into account both exempt and zero rated supplies. See *Commissioner for the South African Revenue Services v Pretoria East Motors (Pty) Ltd* [2014] 3 All SA 266 (SCA) at 269-270 para [5].”

²⁷ Para 11 p 6 para 20 p 10 and para 24 p 13 and para 29 p 15

In the present matter, both Mr *de Bourbon* and Mr *Bhebhe* agreed that s 31 refers to an assessment and a notice of assessment and that they differ in both content and meaning. This is clear from the use of “such assessment” in subs (5) of s 31. Mr *de Bourbon* reluctantly conceded the point underscored by Mr *Bhebhe* that the letters accompanying the schedules were not notices of assessment. He, however, contended that those letters constituted the assessments because they worked out not only the amount of tax but also the related penalties and interest that was due and payable. It is correct that the head of investigation attached “detailed computations” to the letter addressed to the public officer for the first appellant. Those computations show that VAT payable constituted 15% of the value of supply, equivalent to the amount upon which tax is payable, calculated by subtracting output tax from sales and input tax from purchases. The head of investigations, however did not indicate the resultant amounts of such deductions in the computations. However, the letter of objection while headed “objection to assessment” identifies in the first two paragraphs that the objection is to the “tax schedules” received by the second appellant.

The letter accompanying the VAT computations for the second appellant was not attached. The tables on p 29 to 31 merely indicated the VAT payable, penalty, and interest computations but did not indicate how the VAT was calculated. In other words, the amount upon which tax was payable was not shown. In regards to the third appellant, the letter of 3 December 2010 identified the VAT computations as “attached schedules” to which the firm of tax advisers to each appellant in its wisdom chose to call “assessments”. The letter to which objection was taken and the letter of objection of the fourth appellant were not attached. The schedules indicated the value of supply which, however, do not appear to be equivalent to the amount upon which tax was payable.

It seems to me that once the Commissioner makes an assessment he has a mandatory obligation in terms of s 31 (5) to give a written notice of such assessment. The notice of such assessment bears a specific architectural design and designated content. It must state the amount upon which tax is payable, the amount of tax payable, the amount of any additional tax payable and the tax period covered by the assessment. In addition subs (6) requires the subs (5) notice to alert the concerned taxpayer of his right to object to such assessment within 30 days of such notice.

It was common cause that the letters written by the Commissioner’s officials to the appellants do not meet the mandatory requirements of s 31 (5) and (6). Indeed in the heads of

argument filed in the *MC Ltd* case, Mr *de Bourbon* correctly submitted that there was a mandatory obligation on the Commissioner to give notice of the assessment²⁸. I agree with Mr *Bhebhe* that the covering letters and the schedules did not constitute a notice of assessment. Thus while an assessment predates the notice of assessment, the right to object is triggered by receipt of the notice of assessment. The general prevailing practice of the respondent, which runs in tandem with the law has been to serve the assessments in the format of a notice of assessment. The statutory provision requires that the assessments be served in the format of a notice of assessment, which in turn places the taxpayer *in mora* and informs him of the *dies induciae* for lodging objection. It seems to me that the schedules merely advised the appellants of the preliminary amount of VAT that each was likely to pay once the notices of assessments were raised.

One of the arguments advanced by Mr *de Bourbon* in the *MC Ltd*²⁹ case was that in the circumstances of that case, the schedules attached by the respondent's officials were in substance though not in form assessments and as objection was required to assessments and not to the notice of assessment, the objection directed to the assessment in the absence of such a notice was therefore valid. He called in aid the cases of *Sterling Products International v Zulu* 1988 (2) ZLR 293 (S) at 301B-302A and *Mwenye v Lonrho Zimbabwe* 1999 (2) ZLR 429 (SC) at 433A-C, in which GUBBAY CJ suggested that the categorisation of an enactment between a peremptory strict approach of exact obedience and a directory substantial obedience, which concerned the quality of the command had given way to the intention of the legislature as derived from the words of the enactment, its general plan and objects. In *Mwenye*'s case at 433C GUBBAY CJ reduced the distinction between the two to "the question....whether that object [was] defeated or frustrated by the non-compliance complained." In *Zimbabwe Unity Movement v Mudede NO & Anor* 1989 (3) ZLR 62 (SC) at 79C-81A and *Kutama v Town Clerk Municipality of Kwekwe* 1993 (2) ZLR 137 (SC) at 144D the principle enunciated in the *Sterling Products International* case, *supra* was upheld. The *Zimbabwe Unity Movement* case was written by MCNALLY JA while the *Kutama* case was written by KORSAH JA. In both cases, GUBBAY CJ concurred. In these two cases the Supreme Court enforced the categorisation with MCNALLY JA emphasizing that the relevant sections under consideration prescribed in absolute, explicit, peremptory and literal language the exact and strict compliance and not substantial

²⁸ Last sentence para 14 p8

²⁹ P16-17 of the cyclostyled judgment.

compliance in making the contemplated decision while KORSAH JA denoted the omission to comply with the mandatory provisions of the section under consideration a “fatal flaw.”

It seems to me that the words used in s 31 are clear and unambiguous. The literal language of s 31 (3) as read with subs (5) and (6) of the VAT Act is couched in explicit and peremptory language permitting no deviation therefrom. The provisions were promulgated for the benefit and protection of the taxpayer. The failure by the Commissioner to strictly adhere to these requirements would prejudice value added taxpayers who would be left in the dark as to when to object to an assessment. It is to this prejudice, though made in the context of the Income Tax Act, that MAKONI J addressed in *Barclays Bank of Zimbabwe Ltd v Zimra* 2004 (2) ZLR 151(H) at 154F-155B. Like in the *MC Ltd* case, I find that the objections were prematurely lodged.

Whether the respondent is estopped from relying on the invalidity of the objections

In *Barclays Bank of Zimbabwe v Air Zimbabwe Corporation* 1992 (2) ZLR 377 (HC) at 388G-389A ADAM J reiterated the requirements of estoppel thus:

“The plaintiff raises estoppel. In *Senior Services (Pvt) Ltd v Nyoni*, [1986 (2) ZLR 293 (S)] at 305 DUMBUTSHENA CJ accepted the broad principles of estoppel as follows:

- “(a) a representation by words or conduct which might reasonably be expected to mislead;
- (b) the misleading of the representee;
- (c) inducing him to alter his position on the faith of such representation;
- (d) the representor must have intended that the representation should be acted upon by the representee, though this is normally presumed.”

Mr *de Bourbon* further relied on estoppel and submitted that having tagged the documents as assessments, the respondent was bound by that appellation. In fairness to him, he recognised that the appellation originated with the appellants’ tax advisors and was perpetuated by the respondent. The approach to be adopted in revenue matters to questions of estoppel by representation were settled by MALABA JA in *Commissioner of Taxes v Astra Holdings (Pvt) Ltd* 2003 (1) ZLR 417 (S) at 427-429D. One of the principles I derive from that case is that the Commissioner is not bound by any conduct or undertaking given by him or his officials in error of law but is bound to act in terms of the law of the land. I said as much in *ST (Pvt) Ltd v Commissioner- General, Zimra* 2016 (2) ZLR 133 (FAC) at 144E and in *CF (Pvt) Ltd v Zimbabwe Revenue Authority* HH 99/2018 at page 43 of the cyclostyled judgement. The essence of the sentiments of MALABA JA in *Commissioner of Taxes v Astra Holdings (Pvt) Ltd* 2003 (1) ZLR 417 (S) at 427F-429D was that estoppel cannot be raised to prevent or excuse

the performance of a statutory duty or discretion, otherwise to do so would be to act against the public interest. See also *Eastern Metropolitan Substructure v Peter Klein Investments (Pty) Ltd* [2001] 1 All SA 187 (W) at para [20].

In *Aris Enterprises (Finance) (Pty) Ltd v Protea Assurance Co Ltd Assurance* 1981 (3) SA 274(A) at 291D-F, CORBETT JA, as he then was, held that a party:

“was precluded, that is, estopped, from denying the truth of the representation previously made by him to another person if the latter believing in the truth of representation acted thereon to his prejudice (see Joubert *The Law of South Africa* vol 9 para 367 and the authorities there cited). The representation may be made in words, i.e. expressly, or it may be made by conduct, including silence or inaction, i.e. tacitly (*ibid para 371*); and in general it must relate to an existing fact (*ibid para 372*).”

The principle was adopted with approval in *Mashave v Standard Bank of South Africa* 1988 (1) ZLR 436 (S) at 438D-E.

In the present case, an application of the four requirements of estoppel shows that the letters to which the appellants raised objection did not misrepresent their nature. They were schedules which carried no reasonable expectation that they might mislead each taxpayer. The facts showed that it was actually the appellants who through their tax experts misled themselves and the respondent. There was no inducement against each of the appellant nor were they forced to act upon their better judgment by the Commissioner. Rather, the Commissioner was prevailed upon by the exigencies of the situation to respond.

Lastly, Mr *de Bourbon* sought to discredit the decision in *Barclays Bank of Zimbabwe Ltd v Zimra* 2004 (2) ZLR 151(H). In that case MAKONI J, as she then, was asked to determine the narrow question of whether the schedule placed before her constituted either an assessment or a notice of assessment. In my view, she correctly held that the schedule was neither an assessment as defined by s 2 nor a notice of assessment as contemplated by s 51(2) and (3) of the Income Tax Act [*Chapter 23:12*]. She was however, not called upon to distinguish between the two. Like in the Income Tax Act, the VAT Act also explicitly predicates the payment of outstanding VAT unearthed during an investigation on a notice of assessment. The notice of assessment must bear the contents prescribed in s 31 (5) and (6) of the VAT Act and s 51 (2) and (3) of the Income Tax Act. One of the consequences of a notice of assessment is the lodgement of an objection in terms of s 32 (1) of the VAT Act and 62 (1) of the Income Tax Act, respectively. It appears to me that the wording in these two Taxes Acts prescribes and reposes in absolute, explicit, peremptory and literal language in a notice of assessment the right to objection.

The submission by Mr *Bhebhe* that there is no valid appeal was well taken. He predicated the submission on the wise sentiments of KORSAH JA in *Muchakata v Netherburn Mine* 1996 (1) ZLR 153 (S) at 157A-C that:

“Provided it is not one which is required by a definitive law to be specially pleaded, a point of law, which goes to the root of the matter, may be raised at any time, even for the first time on appeal, if its consideration involves no unfairness to the party against whom it is directed: *Morobane v Bateman* 1918 AD 460; *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A) at 23D-G. If the order was void *ab initio* it was void at all times and for all purposes. It does not matter when and by whom the issue of its validity is raised; nothing can depend on it. As Lord Denning MR so exquisitely put it in *MacFoy v United Africa Co Ltd* [1961] 3 All ER 1169 at 1172I:

"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad ... And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

Mr *de Bourbon* did not suggest that the point required to be specially pleaded. He took issue with the timing of the point and complained of “unethical ambush” but contemptuously dismissed the need for standing down the matter to afford him adequate time to prepare his response. In view of the late taking of the preliminary point and in order to obviate any prejudice to the appellants’ witnesses in attendance, I acceded to hear both the preliminary point and evidence on the merits and reserve judgment in the matter.

The essence of the preliminary issue goes to the root of the jurisdiction of the Commissioner to consider an objection. If the objections in the present appeals fall outside the ambit of s 32 (1), the respondent is disabled by law from considering them. See *Mariane Sabeta v Commissioner-General Zimbabwe Revenue Authority* HH 79/2012 at p 5 of the cyclostyled judgment. The Supreme Court has emphatically held in labour related cases such as *Mugwebie v Seed Co Ltd v Anor* 2001 (1) ZLR 93 (S) at 96H-97C; *Gwalazimba and PG Merchandising Ltd and Anor* 1993 (2) ZLR 215 (S) at 216B-C and *Mutukwa v National Dairy Co-operative Ltd* 1996 (1) ZLR 348 (S) that any decision made outside the four corners of an empowering statute by an administrative authority, Court or Tribunal is a nullity with no force or effect³⁰. In the context of review KORSAH JA noted firstly at 352D-F that:

³⁰ *JDM Agro-Consult & Marketing (Pvt) Ltd v The Editor of the Herald Newspaper & The Herald Newspaper* HH 61/2007 at 5 GOWORA J upheld a preliminary point attacking the citation of non-existing defendants raised for the first times at the trial and observed that “the process of filing pleadings under those names would not have imbued the summons with any form of legality.” Again in *F Hoffman La Roche and Others v Secretary of State for Trade and Industry* [1975] AC 295 at 319H-320 LORD DENNING said: “I have always understood the word “void” to mean that the transaction in question is absolutely void-a nullity incapable of any legal consequences- not only bad but incurably bad-so much that all the world can ignore it and that nothing can be founded on it. See *MacFoy v United Africa Co. Ltd* [1962] AC 152, 160”

“By s 26 of the High Court Act [*Chapter 7:06*], the court is vested with jurisdiction and authority to review all proceedings and decisions of all inferior courts of justice, tribunals and administrative authorities within Zimbabwe. Any proceedings or decisions of the above enumerated bodies may properly be impeached in the High Court for want of jurisdiction by the tribunal or authority concerned - see s 27(1)(a) of the High Court Act. See also *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS 111; *Attorney-General, Transvaal v Additional Magistrate for Johannesburg* 1924 AD 421 at 438; *Loxton v Kenhardt Liquor Licensing Board* 1942 AD 275 at 281; and *Ex p Commissioner for Child F Welfare: In re Adoption Volezer* 1960 (2) SA 312 (O) at 312H. “

And secondly at 353C that:

“In any case, a question of jurisdiction is one that a court imbued with review powers may raise *mero motu*; for parties cannot confer jurisdiction on an adjudicating authority where such jurisdiction has not been conferred on that adjudicating authority by statute.”

To the same effect are *Boswinkel v Boswinkel* 1995 (2) ZLR 58 at 60B-D; *Goldschmidt v Folb* 1974 (1) SA 576 (T) at 577A and *Smith v Smith* 1962 R & N 469 (FS) 470G.

Like in *MC Ltd*, I hold that the objections were invalid and of no force or effect. They cannot be saved by estoppel. Accordingly, the appeals are struck off the roll.

Costs

The respondent raised the issue of validity at the eleventh hour. For that reason, it disentitled itself to a favourable order of costs. In the premises each party will bear its own costs.

Disposition

According each appeal is struck off the roll and each party shall bear its own costs. That should really be the end of the matter. However, I proceed to deal with the merits of the matter for the three reasons that I indicated at the commencement of this judgment.

The Merits

The appellants called the evidence of a single witness, the Group Chief Executive Officer of the first appellant. In addition they relied on the pleadings and bundles of documents filed by each appellant, whose contents I have already outlined under the facts specific to each appellant. The respondent did not call any oral evidence but relied on the pleadings and rule 5 documents. Most of the evidence was common ground. The only factual issue for determination was whether or not each of the appellants provided a service to a foreign tourist or to another local activity provider, whom I will interchangeably call the third party or the local kindred operator. The appellants contended that they provided the service for which they retained the balance of the amount paid by the tourist to the paying tourist. The respondent, however, contended that the retained amount constituted commission paid to each appellant by the local

activity provider for the referral service of the paying tourist to the local activity provider in question. The facts from which the disparate contentions arise are these.

A tourist comes to the tours desk or as it was called by each appellant during the investigations, the activity desk, of each appellant. An employee specifically employed for the purpose by each appellant renders a service to the tourist of booking an activity provided by another local operator. The tourist either undertakes to pay or actually pays for the activity provided by the other local provider at that local provider's going rate. The evidence of the sole witness established and confirmed the averments in the pleadings that the amount paid was the full charge of the local kindred operator. He stressed the point, which Mr *de Bourbon* was too eager to contend, that the activity desk employee provided the service for a fee solely to the tourist and not to the other local activity provider. He however, reluctantly conceded the obvious fact that the desk activity employee helped the third party boost its clientele base and bottom line. The appellants alleged that the fee catered for the cost of running the activity desk. The tourist was invoiced by the appellant for the activity at the going rate charged by the third party. He received a voucher from the appellant, which he used to access the activity. The appellant did not issue any invoice to the activity provider. However, at the end of each month, the third party invoiced the appellant at the net effective rate and contrary to Mr *de Bourbon's* contention in the additional heads; the local kindred operator did not invoice the tourist through the appellant. The appellant retained the difference.

The sole witness gave most of his evidence very well. He was generally a credible witness. There were, however, some disquieting features in his testimony. He refused to accept against all reason that the retained amount constitutes a fee, preferring to call it Tours Desk Revenue. The probabilities, as I will shortly demonstrate, were heavily tilted against his identification of the retained income. Those probabilities tend to show that the appellants "received" the retention as payment for the services they rendered to the local kindred operator rather than to the tourist.

The issues

The four issues for determination are:

1. Whether the procedure by which the appellants take bookings for foreign tourists to utilise facilities not offered by the appellants themselves, but by third parties, thereby enabling those foreign tourists to utilise such third- party facilities, means that as a

matter of law each appellant is a service provider to those third party entities which have such facilities.

2. Whether the actions of each appellant constitute the rendering of a service, and if so, whether those services were rendered to the foreign tourist or to the provider of the activities in Zimbabwe.
3. Whether the difference between the amount paid by the tourist to each appellant and that paid by each of the appellant to the provider of the activities, which difference is retained by the appellants is variable.
4. Whether in the circumstances of this case the penalty imposed was justified, and whether or not the penalty should be waived in full.

The determination of the issues

The burden of proof

It was common cause that the burden of proof in each of the four issues raised on the merits lay on the appellants to show on a balance of probabilities that the Commissioner wrongly decided them against each appellant. This is clearly set out in s 37 of the VAT Act, which, in relevant, states:

“37 Burden of proof

The burden of proof that any supply..... is not liable to any tax chargeable under this Act or is subject to tax at the rate of zero *per centum*shall be upon the person claiming such exemption, non-liability, rate of zero *per centum*, and upon the hearing of any appeal from any decision of the Commissioner, the decision shall not be reversed or altered unless it is shown by the appellant that the decision is wrong.”

Whether the procedure by which the appellants take bookings for foreign tourists to utilise facilities not offered by the appellants themselves, but by third parties, thereby enabling those foreign tourists to utilise such third- party facilities, means that as a matter of law each appellant is a service provider to those third party entities which have such facilities

The sole witness categorically stated that the tourist who merely made an enquiry or had a booking made for him cancelled was not charged any fee for that kind of service rendered to him by the activity desk employee. He was only charged a fee on taking up the activity provided by the third party. It was to these retentions that the respondent assessed for value added tax. I am satisfied, for two reasons that the retention constituted payment to each of the appellants by the third party. The first is that the retained amount constituted a diminution of the income of the third party and was in substance a prepayment by the third party to each appellant. The second was that it was only paid from the amount paid by a tourist who undertook the activity provided by the third party and not by a tourist who made enquiries or

even a tourist who cancelled the activity which had been booked for him. In my view, if payment was for the running costs of the activity desk, then such a tourist ought to have been charged a fee for the aborted service rendered to him or her by the activity desk employee. After all, the activity desk would have incurred running costs in attending to the inquiry and in booking and cancelling any such activity with the third party. The sole witness' testimony for the retained amount does not accord with either the probabilities or business sense. In my view, it runs contrary to the elaborate economic justifications underpinning the creation of rake rates in the travel industry, which were set out in each appellant's purported letter of objection. In any event, each appellant unwittingly disclosed in para 2 of their purported letters of objection that the payments were based on the prevailing worldwide tourism industry pricing model agreement, which they were party to. The suggestion in para 12.1 and 13 of the heads of argument of 11 July 2012 that the appellant B was paid commission by C the tourist for the services rendered to C are incorrect. This is because the tourist does not pay any amount in excess of what the local activity provider charges.

In the heads of 11 July 2012, the appellants relied on three European Court of Justice, EUECJ, cases of *Autolease Holland BV v Bundesant fur Finanzen: Autolease Holland (Taxation)* (2003) EUECJ C-185/01 and the consolidated customer loyalty rewards cases of *Commissioners for Her Majesty's Revenue and Customs v Loyalty Management UK (Taxation)* (2010) EUECJ C-55/09; *Baxi Group Ltd (Taxation)* (2010) EUECJ C-53-09 for the proposition that the retained amount constituted payment for a supply of services to the tourist rather than to the kindred operator, and therefore did not constitute a taxable service. While these case dealt with VAT arising from the supply of goods and services, as all VAT cases must, they were based on the specific definitions of goods and services embodied in art. 5 (1), 6 (1) and 11A (1) (a) of the 6th Directive of the European Commission and were all distinguishable to the present case on the facts. Unlike the present case and the *Secret Hotels Ltd (formerly Med Hotels Ltd) v The Commissioner for Her Majesty's Revenue and Customs [2014] UKSC 16* they were not based on what was referred to in the latter case in para [13] as the "reverse charge procedure" payment, represented by the difference between the gross rate paid and the invoiced net rate.

In any event, it is significant that while Mr *de Bourbon* adopted the original heads, he did not base any of his submissions on any of these cases. Rather, he was content to warn against reliance on foreign case authorities, which are often based on legislative provisions that

are different from our own. It is noteworthy that while para [20] and [21] of the original heads sought to equate the sponsor, identified in para 19.1, 19.27 and 19.29 as the retailers in the *LMUK* case and @1 in the *Baxi* case with the appellants in the instant case and the customers with the tourist, the redeemers were not equated with anyone. Equating the redeemers with the local activity providers would alter the whole complexion of these cases in that they determined the relationship between the promoters of the customer loyalty schemes and the redeemers from the perspective of the redeemer. They determined the kind of service rendered to the promoter by the redeemer and unlike in the present case, the service provided by the promoter to the redeemer. A closer look at the facts disclose that neither the promoter nor sponsor who may be equated to appellants in the present case received a higher amount from the customer, the tourist, and remitted a lesser net amount to the redeemer-the local activity provider. The facts of these cases show that the customer unlike the tourist in the present appeals receives the prizes for free and the redeemer, unlike the local activity provider receives a higher amount from the promoter and not a lower amount. These cases are therefore irrelevant to the present appeals.

There were four role players in the *Autolease* case. These were Autolease, based in the Netherlands, which leased vehicles to lessees in amongst other countries German. Autolease executed further agreements with DKV, a credit company the terms of which allowed the lessees to fill up the leased vehicles on the credit account of Autolease held with DKV. Autolease paid the full amount for the fuel and recovered it in full by monthly instalments from each lessee. The issue for determination was whether Autolease could recover the input VAT paid in the Netherlands from German on the ground that the filling up on credit was a supply of goods to Autolease. The ECJ held that under the definition of goods in art 5 (1) of the 6th Directive the service stations supplied the goods directly to the lessees and not to Autolease. Autolease did not receive fuel which it on sold to the lessees, rather it supplied financial services to the lessees and was therefore ineligible to claim input VAT from the German Tax Authorities for the supply of fuel.

The *LMUK* customer loyalty rewards case had four role players while the *Baxi* case had three. The *LMUK* players were LMUK, the scheme promoter and redeemer of points at a fixed value, the retailers cum sponsors from whom the customers purchased goods and received points and the redeemers who supplied the customers the prizes in exchange for points. The redeemers purchased the prizes at wholesale prices and were paid the retail price by LMUK.

The consideration of the redeemers consisted of the difference between the lower purchase price and the higher retail price. In the *Baxi* case, @1 in agreement with Baxi was both the sponsor and redeemer. Baxi paid @1 the retail price, the difference being @1's consideration. The redeemers invoiced the promoters cum sponsors and the issue was whether the payments by the promoter or the sponsor were for services rendered or goods supplied. The ECJ noted that both LMUK and Baxi provided a number of services linked to the operation of the scheme and held that the payment by the promoter or sponsor to the redeemer constituted on the one hand a third party consideration for the supply of goods by the redeemer to the customer on the other the supply of services to the sponsors or promoter by the redeemer.

It seems to me that the English Supreme Court case relied upon by Mr *Bhebhe* is on the facts almost analogous to the present appeals. The brief facts of the *Secret Hotels Ltd* case, *supra*, were that Secret Hotels executed various agreements with all the role players involved in the arrangement. These were the foreign hotels that provided accommodation to the tourists booked with them by the Secret Hotels on line. The tourist paid the gross rate charged by the hotel to Secret Hotels and thereafter accessed the hotel service. The hotel would invoice Secret Hotels at a lesser net amount and Secret Hotels retained the balance. Her Majesty's Commissioners sought VAT on the retained amount on the basis of the relevant English VAT legislation, which was aligned to the 6th Directive of the European Union. The major point of dispute between the taxpayer and the taxman was whether the taxpayer acted as a principal in its own right or as an agent of the foreign tourist hotels. The effect of the legislation was that if it acted as a principal it would be subject to domestic VAT legislation and if it was an agent it would be subjected to the VAT legislation of the country in which the hotel was located. On the basis of all the documentation executed between all the players and the economic and commercial realities it was held that the appellant was an agent of the hotels and was not liable to domestic VAT on the retained amount. The importance of this case to the present appeals is that the Court found that the retained amount constituted consideration for services rendered by Secret Hotels to the foreign hotels.

The local case

Both Mr *de Bourbon* and Mr *Bhebhe* made contrary submissions on whether *T (Pvt) Ltd v Zimbabwe Revenue Authority* 2015 (1) ZLR 530 (H) was analogous to the present appeals. Mr *de Bourbon* submitted that it was not while Mr *Bhebhe* said it was. The key players in that case were the travel agent, the airline, the local passenger and the International Air

Transport Association, IATA. The passenger would purchase an airline ticket through the travel agent. The travel agent supplied certain services to the passenger such as booking the seat, receiving payment, issuing ticket and entertaining complaints for a fee for which VAT was paid. The travel agent interacted with the airlines on line through the central reservation system. It sold the tickets to passengers on behalf of the airline at the fare determined by the airline and deposited the gross proceeds into a transitory bank account for the benefit of the airline. IATA computed the travel agent's commission from these gross proceeds at the rate between zero per cent and one per cent of the actual fare charged by the airline. The commission was deducted from the gross fare charged by the airline and the net amount was remitted to the airline.³¹

I agree with Mr *Bhebhe* that these facts are analogous to the present appeals. The passenger may be equated to the tourist, the travel agent to each appellant and the airline to the local activity provider. One of the insignificant differences was that the computation of the commission due from the gross airline was computed by IATA. The other was the absence of documentation referencing the retained amount as "commission." Of course, in the present appeals there are the unwitting concessions in para 12.1 to 13 of the original heads which refer to analogous payments to foreign tour operators as commissions and the concessions in the rule 5 documents e-mail in which the local activity provider LOA identify the second appellant as an agent to whom commission was paid. Again, other than the argument in respect of the impact of s 10 (2) (q) of the VAT Act, the other submissions made by Mr *de Bourbon* bear the same import as those made by Mr *Ochieng* at p539A in the *T (Pvt) Ltd* case judgment.

On the basis of the reasoning in that case, I am satisfied that the first issue must be answered in favour of the respondent. The retained amount constituted a commission paid by the local activity providers to the appellants for the referral and sourcing of clientele service that was underpinned by the worldwide tourist industry pricing model agreement to which the appellant, by their own admissions, were party. Clearly, the appellants acted as agents for the local activity providers and unless the amount is zero rated then they would be liable to value added tax.

Mr *de Bourbon* further argued by virtue of the provisions of s 10 (2) (q) (i) that the retained amounts were zero rated. This is the appropriate moment for me to set out the relevant legislation on which the respondent relied upon to levy VAT on each appellant.

³¹ At page 535A and 535G-536A

The legislation

I am grateful to Mr *de Bourbon* for so ably taking me through the chequered history of s 10 (2) (q) of the Value Added Tax Act, in both his oral and written “additional heads of argument for the appellants” handed over the bar on 17 November 2015. The initial VAT Act [*Chapter 23:12*] enacted as Act 12 of 2002 was published on 2 May 2003 by Statutory Instrument 284 of 2003 and took effect with retrospective effect to 1 January 2004. Para (q) of subsection (2) of section 10 of the VAT Act did not exist. At all material times of the investigation, the provision of the schedules, the raising of the purported objections, determination, notices of appeal, appellants’ cases and respondent’s replies subs (q) did not exist as section 10 (2) of the VAT Act ended in para (p). S 10 (2) (q) appeared in the draft Finance Bill 2003 but was not enacted when the Bill was passed into legislation. This anomaly was cured long after these appeals were launched by s 19 of the Finance (No. 3) Act 2014 (Act 11 of 2014) which inserted para (q) into s 10 (2) retrospectively to 1 January 2004, thus effectively coinciding with the commencement of VAT in Zimbabwe. Act 11 of 2014 was under Government Notice 4 of 2015 published and operationalized on 6 January 2015.

On 12 December 2003, the Value Added Tax (General) Regulations were gazetted, in terms of s 78 of the VAT Act, in Statutory Instrument 273 of 2003. Section 15 of the Regulations was premised on para (q) of s 10 (2) of the VAT Act, which was not in existence. Mr *de Bourbon* submitted that this section of the Regulations was void and of no force or effect for lack of a statutory basis and was thus incurably bad. The section read:

“15. Zero rating: Services paid for in foreign currency by persons not resident in Zimbabwe
Subject to paragraph (q) of subsection (2) of section 10 of the Act any services that are supplied by the-
(a) operator of a tourist facility designated as such in the First Schedule to the Tourism (Designated Tourist Facilities) (Declaration and Registration) Regulations, 1996, published in Statutory Instrument 106 of 1996; or
(b)
(c)
to a person who is not a resident of Zimbabwe and who is required under the Exchange Control Act [Chapter 22:05] to pay for such services in foreign currency.

The above section was repealed and substituted by s 12 of the Value Added Tax (General) (Amendment) Regulation, 2015 (No. 38) Statutory Instrument 10 of 2015 published in the Government Gazette of 16 January 2015. The new section 15 reads:

“15. Zero rating: Tourism Services
Subject to paragraph (q) of subsection (2) of section 10 of the Act any services that are supplied to a tourist (as that word is defined in the Tourism Act [*Chapter 14:20*] are charged with tax at

the rate of zero *per centum* other than accommodation services provided to the tourist by any of the following persons, which shall be charged with tax at the rate referred to in section 6 (1) of the Act:

- (a) operator of a tourist facility designated as such in the First Schedule to the Tourism (Designated Tourist Facilities) (Declaration and Registration) Regulations, 1996, published in Statutory Instrument 106 of 1996; or
 - (b)
 - (c)
- to a person who is not a resident of Zimbabwe and who is required under the Exchange Control Act [Chapter 22:05] to pay for such services in foreign currency.

Section 10 of the VAT Act

S 10 of the VAT Act deals with zero rating for VAT purposes. While subs (1) deals with certain supplies of goods that are zero rated, subs (2) is concerned with the supply of zero rated services. Para (q), which was published and operationalized on 6 January 2015 retroactive to 1 January 2004, reads:

- (1)
- (2) Where, but for this section, a supply of services would be charged with tax at the rate referred to in subsection (1) of section *six*, such supply of services shall, subject to compliance with subsection (3) of this section, be charged with tax at the rate of zero *per centum* where—
 - (q) the services in question are supplied by—
 - (i) the operator of a facility designated in terms of the Tourism Act [Chapter 14:20] as a tourist facility of a class specified in the First Schedule to the Tourism (Designated Tourist Facilities) (Declaration and Requirements for Registration) Regulations, 1996, published in Statutory Instrument 106 of 1996 (as amended or replaced from time to time);
 - (ii)
 - (iii)
- (3) Where a rate of zero *per centum* has been applied by any registered operator under a provision of this section, the registered operator shall obtain and retain such documentary proof substantiating the registered operator's entitlement to apply the said rate under that provision as is acceptable to the Commissioner."

Mr *de Bourbon* correctly submitted that the charging of VAT at the standard rate in s 6(1) is made subject to the provisions of the VAT Act. He contended that the main charging section was subservient to the zero rating provisions of s 10. He further submitted that the attitude of respondent that zero rating only applied to those services rendered to the tourist was incorrect as what was zero rated, in terms of the closing words of para (q) were the services rendered by the operator of a facility designated under the Tourism Act as a tourist facility of a class specified in the First Schedule to the Tourism (Designated Tourist Facilities)

(Declaration and Requirements for Registration) Regulations 1996 and not the identity of the recipient of the services. He therefore argued that the service rendered by a designated tourist operator whether to a tourist or to any other local individual or corporate provider was zero rated.

It is pertinent to recite para 18 to 21 of his heads of argument filed on 17 November 2015 to appreciate his submissions in full. He argued that:

18. It is submitted firstly, as will be dealt with more fully below, section 15 of the Regulations prior to 2015, had no statutory basis and therefore to that extent was invalid. But secondly and more importantly, when legislation was introduced retrospectively it did not have the qualification referred to in the then existing wording of section 15 of the Regulations. Any such qualification would be outside the parameters of the zero rating set out in s 10 (2) (q), other than of the classes of services (which now applies only to accommodation) excluded by virtue of the proviso to s 10 (2) (q).
19. But even if the proviso can be interpreted to permit regulations to be made which specify not only the class of service but also the nature of the recipient, such a determination is irrelevant to the present appeals for that restriction was only at best lawfully introduced into the regulations on 16 January 2015.
20. In any event, the concept in section 15 of the regulations (whether looked at in terms of the old section 15 or the new one) of a person being required to pay for services in foreign currency is now redundant with the dollarization of the economy in Zimbabwe, which currency regime applied throughout the period of the various amended assessments in these appeals.
21. It is submitted that this Honourable Court cannot read into section 10 (2) (q) any qualification necessary to enable Zimra to exact VAT dependent upon the identity or residence of the entity to whom any of the appellants provided a service.

The construction of legislation

A court of law extracts the intention of the Legislature from the language employed in the legislation under consideration. In *Ex parte Minister of Justice: In re R v Jackson & Levy* 1931 AD 466 at 480 STRAFFORD JA warned that the Court “has no power to redraft or alter language” or to ascertain such intention “by surmise however probable such surmise may be” where the words are clear and unambiguous. This approach was adopted by GUBBAY JA, as he then was, in *Mxumalo & Ors v Guni* 1987 (2) ZLR 1 (S) at 8C-D who stated that:

“To seek to exempt an agreement to pay a lump sum free from the purview of by law 68 (1), as did Mr *Chatikobo*, to my mind involves a construction which declines to give the word “all” its ordinary and natural meaning. The language used is plain and unambiguous and the intention of the Law Society is to be gathered therefrom. It is not for a court to surmise that the Law Society may have had an intention other than that which clearly emerges from the language used. This principle has been stated frequently and I need only refer to *Ex parte Minister of Justice: In re R v Jackson & Levy* 1931 AD 466 at 480.”

To the same effect was CORBETT AJ in *S v Burger* 1963 (4) SA 304 (C) at 308D and 309A and SHEARER J in *Ex parte Lynn & Ors* 1987 (1) SA 797 (N) at **802-803**. However, it sometimes happens that the ordinary meaning may disclose an absurdity, which is utterly glaring. In those circumstances it is well to remember the authoritative words of INNES CJ in *Venter v R* 1907 TS 910 at 914, 915 that:

“.....it appears to me that the principle we should adopt may be expressed somewhat in this way-that when to give the plain words of the statute their ordinary meaning would lead to absurdity so glaring that it would never have been contemplated by the Legislature, or where it would lead to a result contrary to the intention of the Legislature, as shown by the context or by such other considerations as the Court is justified in taking into account, the Court may depart from the ordinary effect of the words to the extent necessary to remove the absurdity and give effect to the true intention of the Legislature.”

The construction of fiscal legislation

In regards to the language used in taxation statutes, GUBBAY CJ in *Commissioner of Taxes v CW (Pvt) Ltd* 1989 (3) ZLR 361 (S) at 372D-E said:

“Generally speaking, where taxation is concerned, it has to be acknowledged that justice and equity have little significance. If the language of the statute is plain the court must give effect to it, even if the result to the taxpayer is harsh and unfair. The State has a large leeway in making classifications and drawing lines which in its judgment produce a reasonable system of taxation. There is no rule of equality prohibiting the flexibility and variety that are appropriate in reasonable schemes of taxation. The State may impose different specific taxes on the different types of taxpayers; for instance, higher rates of taxation are commonly imposed upon the more well-to-do than upon the less affluent members of the community. There is no requirement to resort to close distinctions or to maintain a precise, scientific uniformity. Perfection is neither possible nor necessary.” [Underlining my own for emphasis]

The above underlined words from GUBBAY CJ are reminiscent of what LORD CAIRNS stated in *Partington v The Attorney-General* 21 LT 370 at 375, cited in *Commissioner for Inland Revenue v George Forest Timber Co. Ltd* 1924 AD 516 at pp 531-2 that:

“If the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the law the case might otherwise appear to be. In other words, if there be an equitable construction, certainly such a construction is not admissible in a taxing statute where you can simply adhere to the words of the statute.”

The above sentiments are counteracted by the *contra fiscum* maxim, which demands that an ambiguous tax provision must be interpreted so as to impose the lesser burden on the taxpayer as set out in *Endeavour Foundation & Anor v Commissioner of Taxes* 1995 (1) ZLR 339 (S) at 362D, *Meman & Anor v Controller of Customs & Excise* 1987 (1) ZLR 170 (S) at 174F-175A and *Glen Anil Development Corporation Ltd v Secretary for Inland Revenue* 1975 (4) SA 715 (A) at 727F-G. In the *Glen Anil Development Corporation Ltd case*, at 727F-G BOTHA JA stated that:

“ Apart from the rule that in the case of an ambiguity a fiscal provision should be construed *contra fiscum* (*Estate Reynolds & Ors v CIR* 1937 AD 57 at 70) which is but a specific application of the general rule that all legislation imposing a burden on the subject should, in the case of an ambiguity, be construed in favour of the subject, there seems little reason why the interpretation of fiscal legislation should be subjected to special treatment which is not applicable in the interpretation of other legislation.....Indeed I do not think that the rule as stated in the *Cape Brandy Syndicate case*, *supra*, is any different from that applicable in the interpretation of all legislation. However that may be, it is clear from the remarks of Wessels CJ, in the *Delfos case*, *supra*, that even in the interpretation of fiscal legislation the true intention of the Legislature is of paramount importance, and, I should say, decisive.”

See also *NST Ferrochrome (Pty) Ltd v Commissioner for Inland Revenue* (526/97) [2000] ZASCA 17; 2000 (3) SA 1040 (SCA) at 1048 para [17], *Coltness Iron Co v Black* 1881 (6) App CAS 315 (HL) at 330 and *CSARS v MultiChoice Africa (218/10)* [2011] ZASCA 41 at para [18] and [19].

In the quest to ascertain the true intention of the Legislature Courts often refer to dictionary definitions. In *Loryan (Pty) Ltd v Solarsh Tea & Coffee (Pty) Ltd* 1984 (3) SA 834 (W) at 846G-H MARGO J said:

"Dictionary definitions of a particular word are very often of fundamental importance in the judicial interpretation of that word in a statute or in a contract or in a will. Nevertheless, the task of interpretation is not always fulfilled by recourse to a dictionary definition, for what must be ascertained is the meaning of that word in its particular context, in the enactment or contract or other document."

And in the same vein was HEFER JA in *Fundstrust (Pty) Ltd (in Liquidation) v Van Deventer* 1997 (1) SA 710 (A) at 726H-727A who warned that:

“Recourse to authoritative dictionaries is of course a permissible and often helpful method available to the Courts to ascertain the ordinary meaning of words.But judicial interpretation, cannot be undertaken, as Schreiner JA observed in *Jaga v Donges NO & Anor; Bhana v Donges NO & Anor* 1950 (4) SA 653 (A) at 664H, by ‘excessive peering at the language to be interpreted without sufficient attention to the contextual scene’. The task of the interpreter is, after all, to ascertain the meaning of a word or expression in the particular context of the statute in which it appears....As a rule every word or expression must be given its

ordinary meaning and in this regard lexical research is useful and at times indispensable. Occasionally, however, it is not. The present appears to me to be such a case.”

The principle that emerges from case law is that the Court must endeavour to ascertain the language of the legislator, honestly, rationally and faithfully with a view to promote its object. In *Martin Sibanda & Anor v Benson Chinemhute & Anor* HH 131/2004 at p 4 MAKARAU J, as she then was, approved the approach advocated by GRIFFITHS LJ in *Peer v Hart* [1993] 1 All ER 42 that:

“The days have long passed when courts adopted a strict constructionist view of interpretation which required them to adopt a literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of the legislation and are prepared to look at much extraneous material that bears on the background against which the legislation was enacted.”

The subsidiarity of regulations to parent legislation

In our law, it is trite that statutory instruments are subordinate to their parent legislation. In *Hamilton-Brown v Chief Registrar of Deeds* 1968 (4) SA 735 (T) at 737C-D NICHOLAS J placed the status of the two beyond dispute when he said:

“It is not, however, legitimate to treat the Act and the regulations made thereunder as a single piece of legislation and to use the latter as an aid to the interpretation of the former. The section in the Act must be interpreted before regulation is looked at and if the regulation purports to vary the section as so interpreted, it is *ultra vires* and void. It cannot be used to cut down or enlarge the meaning of the section (see *Clinch v Lieb* 1939 TPD 118 at p. 125).

The decision was confirmed on appeal in *Chief Registrar of Deeds v Hamilton-Brown* 1969 (2) SA 543 (A) and the passage was applied with approval in *Rossouw & Another v Firstrand Bank Ltd* 2010 (6) SA 439 (SCA) at 448 para [24] and *Moodley & Ors v Minister of Education and Culture, House of Delegates & Anor* 1989 (3) SA 221 (A) at 233E-F. The same point was magnified in a pithy little statement by BROOME J in *Somers v Director of Indian Education & Anor* 1979 (4) SA 713 (D) at 716:

“But the answer to this is that just as the tail cannot wag the dog, the regulation cannot vary, or determine the interpretation of, the section. See *Hamilton-Brown v Chief Registrar of Deeds* 1968 (4) SA 735 (T) at 737D and on appeal at 1969 (2) SA 543 (A) at 547H.”³²

Mr *de Bourbon* further submitted that neither s 10 (2) (q) (i) nor its proviso nor even subs (3) did and could place any restriction on zero rating of the services supplied by a

³² In *E Hoffmann-La Roche & Co AG & Ors* at 327 Lawton LJ indicated that the legislative paternity of regulations conceived by Minister outside the enabling Act challengeable

designated tourist facility to tourists nor could any Ministerial regulations made in terms of subs (3) do so.

Whether the retroactive promulgation of s 10 (2) (q) of VAT Act was valid

The validity of the promulgation of s 10 (2) (q) on 6 January 2015 with retroactive application to 1 January 2004 was not impugned by the appellants at any time during the life of these proceedings. If anything the suggestion that they were validly made appears in paras 11, 35 and 38 of the additional heads of argument for the appellants handed from the bar on 17 November 2015. In para 11 Mr *de Bourbon* submitted that the anomaly in enacting the subsection in the original VAT Act No. 12 of 2002 “was eventually cured by section 19 of the Finance Act (No. 3) Act 2014 (Act 11 of 2014) which inserted paragraph (q) into section (10) (2) retrospectively to 1 January 2004 (being the date when VAT commenced in Zimbabwe).” A careful reading of para 35 and 38 of these heads of argument disclose an attack on the validity of s 15 of the Regulations and not the validity of s 10 (2) (q) of the VAT Act. In para 35 Mr de Bourbon contended that:

“That invalidity could not be removed by the retrospective introduction of s 10 (2) (q) of the Act as mentioned above. It lay within the power of Parliament to give retrospective recognition to s 15 of the Regulations but the Finance (No. 3) Act 2014, which introduced and made retrospective s 10 (2) (q) gave no such recognition to s 15 of the Regulations. Interestingly that Act did give recognition in s 32 to certain pension reviews.”

It is correct that Parliament in s 32 of that Finance Act, which came into operation on 6 January 2015, validated the levels of pensions paid retrospectively to 1 January 2010, 1 January 2011, 1 January 2012 and 1 January 2013, which had not been published by notice in a Statutory Instrument as required by the Act. S 15 in the 2003 Regulations was repealed and substituted by a new s 15 in SI 10 of 2015 with effect from 16 January 2015. The Finance Act did not give retrospective effect to the old section 15. It seems to me that the Minister could not make regulations with retrospective effect without an empowering legislative provision to that effect. He did not purport to do so in the new regulations.

The constitutionality of retrospective legislation by Parliament was recognised by our Constitutional Court in *Greatermans Stores (1979) (Pvt) Ltd t/a as Thomas Meikles Stores and Another v The Minister of Public Service, Labour and Social Welfare & Another* CCZ 2/2018 at p2 of the cyclostyled judgment thus:

“The Court holds, on the main ground on which the constitutionality of the transitional provision is challenged, that there is no constitutional provision which prohibits the use by the Legislature of the method of retrospectivity to implement civil legislation.”

And at page 18-19:

“The correct principle is that there is no constitutional provision which forbids the Legislature, in the exercise of its powers, to impose financial obligations retrospectively by means of civil legislation. The validity of the retrospective effect of legislation cannot be measured in terms of the nature of the obligation imposed. In the exercise of its power under s 117(2)(b) of the Constitution, the Legislature can legislate any subject matter and order retrospective application of civil legislation as long as doing so is for the purposes of peace, order and good governance of Zimbabwe. The Legislature is at liberty to decide whether the civil legislation enacted is to have retrospective application. The fact that the transitional provision ensured that the retrospective application of the law to the applicants had the effect of imposing a financial burden in place of a benefit enjoyed under the existing law is no valid ground for impugning its constitutionality. Every civil legislation which is retrospectively applied would by nature have the effect of changing the existing law. Tax laws invariably impose financial obligations retrospectively on citizens.” (Underlining my own for emphasis)

By operation of law, s 10 (2) (q) is deemed to have been in existence on 1 January 2004. The contention by Mr *de Bourbon* that the original s 15 had no statutory basis prior to the enactment of the retroactive section in 2015, was for this reason incorrect. The reference to s 10 (2) (q) before it was promulgated did not in my view invalidate s 15. This was because s 15 was enacted in terms of s 78 and not in terms of the non-existent subsection. The reference to the non-existent section merely meant that s 15 remained on the statute book but was inoperable and not invalid.

The impact of s 10 (2) (q) of the VAT Act on s 15 of the original Regulations: were they invalid or simply inapplicable

The original Regulations were enacted on 2 May 2003 and took effect simultaneously with the VAT Act on 1 January 2004. It seems to me that the retrospective existence of s 10 (2) (q) saved the original s 15 of the Regulations. By giving s 10 (2) (q) retrospective effect, Parliament breathed a lease of life into these regulations on 1 January 2004.

That the original section remained valid between 1 January 2004 and 16 January 2015, when it was repealed and substituted appears to be borne out by the sentiments of CHIDYAUSIKU CJ in *Registrar-General v Combined Harare Residents Association & Anor* (3) 2002 (1) ZLR 83 (SC) at 107A and 108B that:

“The fact that the Statutory Instrument is the law in force until such time as it shall have been struck down by a court of competent jurisdiction as being invalid cannot be disputed. Until such an adjudication there is a presumption in favour of the validity of the Statutory Instrument. It is quite clear from the learned judge’s judgment, HH-24-02, that he held over for determination on the return day the question of the validity or otherwise of the Statutory Instrument.

.....

In the case of *Batista v Commanding Officer, SANAB, SA Police, Port Elizabeth* 1995 (4) SA 717, it was held that an applicant cannot rely, in order to establish a *prima facie* right, on the

probability that existing legislation which he contravened may be altered at some future time or on the probability that such existing legislation may be held unconstitutional. By parity of reasoning, I am of the view that the respondents were not entitled to the interim relief they obtained on the basis that the SI that disentitles them to the relief may be held to be ultra vires.”

The same point was made by GEORGES CJ in *Zimbabwe Township Developers (Pvt) Ltd v Lou's Shoes (Pvt) Ltd* 1983 (2) ZLR 376 (SC) at 382G that:

“Again in Black on *The Construction and Interpretation of Laws (1911)* p 110 para 41H is cited as follows:

“Every Act of the legislature is presumed to be valid and constitutional until the contrary is shown. All doubts are resolved in favour of the validity of the Act. If it is fairly and reasonably open to more than one construction, that construction will be adopted which will reconcile the statute with the Constitution and avoid the consequence of unconstitutionality.”

In terms of s 20 (1) of the Interpretation Act [*Chapter 1:01*]

“(1) Every statutory instrument shall be published in or with or as a supplement to the *Gazette* and shall come into operation on the date of its publication unless some other date is fixed by or under the statutory instrument for the coming into operation thereof”

The 2003 regulations, which embodied s 15 came into effect on 1 January 2004. However, on that date s 15 was inoperable and because it was never set aside it remained valid until 16 January 2015, when it was repealed and substituted. It was however saved by the promulgation with retroactive effect of s 10 (2) (q) of the VAT Act. I hold that it is deemed to have been valid with effect from 1 January 2004 and was therefore valid at the time the amended assessments in issue were raised.

Counsel for the parties agreed that the presumption of validity operated in favour of s 15 of the 2003 regulations. Their point of departure was on whether this Court could declare the section invalid on appeal. Mr *Bhebhe* submitted that I could not while Mr *de Bourbon* submitted that I could. The answer to the dispute was provided by MAKARAU J in *Martin Sibanda & Anor v Benson Chinemhute & Anor* HH 131/2004 at p 7 in these words:

“A declaratory order is sui generis relief that only this court can grant..... Thus the power to issue a declaratory order is not available in all courts that apply the common law. It is specific to this court. It is common cause that the Labour Court has not been specifically empowered to issue declaratory orders as this court has been. It cannot create such a relief or the procedure for granting such relief as it is not a court of inherent jurisdiction.”

The Fiscal Appeal Court is a creature of statute. It is not empowered to make declaratory orders. In the absence of such a declaration, s 15 remained valid until the date of its repeal and substitution. Its efficacy was saved by s 10 (2) (q) (i) of the VAT Act with retroactive effect to 1 January 2004.

Was s 15 of the original s 15 of the Regulations ultra vires s 10 (2) (q)

Mr *de Bourbon* correctly submitted that the meaning rendered to s 10 (2) (q) would determine the outcome of these appeals. The appellants submitted that notwithstanding the retroactive device used by Parliament these Regulations were invalid. What s 10 (2) (q) did was to zero rate, subject to subs (3) thereof, the specified categorized services supplied by the operator of a facility designated as a tourist facility in terms of SI 106 of 1996 as amended from time to time. The proviso authorised the Minister to make regulations removing the zero rating on any such class of service and impose the standard rate.

The essential elements of s 10 (2) (q) are:

- a. The supply of services would be charged with VAT under the general section were s 10 not in existence;
- b. Such supply of services shall, if it complies with s 10 (3) be charged with VAT at the rate of *zero per centum*;
- c. The services are supplied by the operator of a facility designated under the Tourism Act [Chapter 14:20] as a tourist facility of a class specified in the First Schedule of the Tourism (Designated Tourist Facilities) (Declaration and Requirements for Registration) Regulations SI 106 of 1996, as amended from time to time;
- d. Acceptable documentary proof provided to the Commissioner by the registered operator for the applicability of zero rating.

The First Schedule of SI 106 of 1996 specifies the following classes:

First Schedule: Designated Tourist Facilities:

- (a) All premises and places where the business of supplying tourist with accommodation for reward is conducted including-
 - (i) Boats/houseboats
 - (ii) ..
 - (iii) ..
 - (iv) Camps, hotels
- (b) Hiring of the following by any tourist: list transportation modes
- (c) Services or facilities provided to tourists by: lists hunting operations, incentive travel organisers, tour operators
- (d) Visitor attractions including game parks, farms, sanctuaries, cultural villages
- (e) Visitors activities including canoeing, rafting, cruising, bungee jumping, horse riding, golf
- (f) Restaurants whether in hotels or others

The designated facilities consisted of any services, premises, place or thing. The underlined words underscore the obvious fact that the designated facilities target one class of recipient, the tourist. From a grammatical perspective, the tourist is the subject while the designated facilities are the direct objects upon which the subject acts. In other words, without the tourist

there are no designated facilities to talk about. That in my view is the import of the First Schedule of SI 106 of 1996.

The thrust of Mr *de Bourbon*'s submission was that this Court cannot read into section 10 (2) (q) any qualification necessary to enable ZIMRA to exact VAT dependent upon the identity or residence of the entity to whom any of the appellants provided a service. He argued that whether the service was provided to a tourist or a local entity the effect for the designated tourist facility was the same. It was zero rated. The contention that there is no distinction in the manner in which VAT is charged between a tourist and a local provider is in my view incorrect.

The contention must be measured against the relevant provisions of the Tourism Act [Chapter 14:20]. The relevant provisions are s 2, the definition section and s 35, the designation section. The definitions of "designated tourist facility", "domestic excursionist or tourist", "excursionist", "operator", "registered tourist facility", "tourist", "tourism industry" and "visitor" supply the context in which the contention must be determined. These are defined thus:

"visitor" means any person whose usual place of residence is outside Zimbabwe and who visits Zimbabwe for a period not exceeding one year for any reason other than immigration or employment remunerated from within Zimbabwe."

"tourist industry" includes all businesses, enterprises and activities which provide tourist facilities, including any such businesses, enterprises and activities carried on by the State, a statutory body or a local authority";

"tourist" means a visitor who spends at least one night in Zimbabwe and whose journey is for any one or more of the following purposes—(a) a holiday;(b) recreation;(c) health;(d) study;(e) religion;(f) sport;(g) business;(h) a meeting;(i) visiting friends or relatives;(j) work that is not remunerated from within Zimbabwe";

"registered tourist facility" means a designated tourist facility which has been registered (in terms of this Act)";

"operator", in relation to a tourist facility, means any person who conducts or operates the tourist facility or who is responsible for its management;

"excursionist" means a visitor who does not spend one or more nights in Zimbabwe;

"domestic excursionist or tourist" means a person whose usual place of residence is in Zimbabwe and who visits or travels to any part of Zimbabwe for the purpose of tourism or an excursion;

designated tourist facility” means any service, premises, place or thing which the Minister has declared to be a designated tourist facility in terms of section *thirty-five*;

The first point underscored by the definition section is that the distinction between a “tourist” and a “domestic excursionist or (domestic) tourist” is based on the “usual place of residence”. Again, a visitor is distinguished from a domestic tourist by his or her usual place of residence. It would appear from their respective definitions that “tourist” and “visitor” denote the same meaning. A tourist is a visitor whose usual place of residence is outside Zimbabwe and who spends at least one night in Zimbabwe for any one or more of the ten activities that are listed. The second point is that a “designated tourist facility” is any service, premise, place or thing declared by the Minister to be a designated tourist facility in terms of s 35. Section 35 states that:

“35 Designation of tourist facilities

The Minister, after consultation with the Board, may by statutory instrument declare that—

- (a) any service whatsoever provided for tourists; or
- (b) any premises or place in or on which a service referred to in paragraph (a) is provided, or
- (c) any premises, place or thing whatsoever which, in the Minister’s opinion, affords an amenity to tourists;

shall be a designated tourist facility.”

It is clear that the service, premise, place or thing designated as a tourist facility is designed to serve the tourist, who is defined as a visitor whose usual place of residence is outside Zimbabwe, who spends at least one night and whose purpose for coming is to carry out any one or more of the ten enlisted activities. It seems to me that both the Tourism Act and its subsidiary legislation, SI 106 of 1996 identify the designated tourist facility with the tourist in clear and unambiguous language.

By making reference to SI 106 of 1996, which came into effect on 1 January 1997, the retroactive s 10 (2) (q) (i) of the VAT Act incorporates into the VAT Act and its consequent Regulations, warts and all, the corresponding identification of “designated tourist facility” with “tourist” as defined in the Tourism Act. I reiterate the point that the designated tourist facility was made for the tourist and is therefore synonymous with the supply of services to the tourist. The tourist is an intrinsic cog in the designated tourist facility. The tourist was the only class of recipient to whom the designated tourist facility applied. Any other interloper was excluded. The respondent was therefore correct to correlate zero rating with the supply of the service to a tourist. The reference to SI 106/1996 identifies the tourist as the recipient of the supply of

service rendered by the operator of a facility designated in terms of the Tourism Act as a tourist facility of a class specified in its First Schedule.

The essence of s 10 (2) (q) (i)

The retroactive section 10 (2) (q) (i) in the enabling legislation charged value added tax for the supply of services of a designated tourist facility specified in the First Schedule of SI 106 of 1996 at zero per cent. The proviso to para (q) of section 10 (2) in question allowed the Minister to make VAT Regulations, in terms of s 78, to substitute the standard rate charged under s 6 (1) of the VAT Act for the zero rate. It reads:

“78 Regulations

- (1) Subject to subsection (3), the Minister may make regulations prescribing anything which under this Act is to be prescribed or which in his opinion is necessary or convenient to be prescribed for carrying out or giving effect to this Act.
- (2)
- (3) Regulations in terms of subsection (1) may provide for the manner in which sales of goods which are rated at zero *per centum* in terms of section *ten*, or on which no tax is payable in terms of subsection (1) of section *eleven* are to be dealt with.”

S 78(1) authorises the Minister to make regulations that give effect to the provisions of the VAT Act. Such regulations may in terms of subs (3) thereof indicate the administrative mechanisms for discharging zero rated and exempted sales of goods. The meaning ascribed to s 78 (1), with reference to the similarly worded s 89 (1) of the Insurance Act [*Chapter 24:07*], was decided by ZIYAMBI JA in *Trust Insurance Brokers v Minister of Finance and Anor* 2008 (1) ZLR 318 (SC). That provision provided that:

- “(1) The Minister may make regulations prescribing *anything* which under this Act is to be prescribed or which, in his opinion, is necessary or convenient to be prescribed, for carrying out or giving effect to this Act”

In that case, the appellant sought a declaration of invalidity against s 14 of the Insurance (Amendment) Regulations 2005 (No. 6) SI 59/2005 published by the Minister in terms of s 89 (1) of the Insurance Act in the High Court. In s 4 and s 14 of the regulations the Minister had supplemented the registration and deregistration requirements, respectively, that were stipulated in the Insurance Act. The application was dismissed in the High Court by KAMOCHA J in *Trust Insurance Brokers v Minister of Finance and Anor* HB 13/2007 on the ground that the phrase “or which, in his opinion, is necessary or convenient to be prescribed, for carrying out or giving effect to this Act” conferred on the Minister untrammelled powers to legislate beyond what he construed to be the “not exhaustive” “things listed in s 89 (2)”³³. On appeal ZIYAMBI JA granted the declaration sought and held at 325D-E that:

³³ P5-6 of the cyclostyled judgment

“Clearly, the power granted in s 89 to the Minister is to enact regulations necessary for the administration of the Act as it stands, not to amend the Act. By setting additional qualifications for registration as well as requiring registered brokers to re-register on pain of de-registration, the Minister exceeded the power granted to him in s 89.”

The learned judge of appeal remarked in passing that she would have declared s 4 of the regulations void and of no force or effect had the appellant sought such an order but could not do so as such an order had not been requested.

The reliance placed on the High Court decision by Mr *Bhebhe*, in the face of the contrary Supreme Court decision on point, was totally misplaced. It was common ground that the Minister made the original regulations in terms of s 78 of the VAT Act. It would appear that other than section 15, with which we are concerned; all the other sections were validly enacted. The impugned section was made subject to s 10 (2) (q) of the VAT Act. The import of s 15 of the regulations was to zero rate services rendered by the designated tourist facility “to a person who is not a resident of Zimbabwe and who is required under the Exchange Control Act [*Chapter 22:05*] to pay for such services in foreign currency.” I agree with the submission made by Mr *Bhebhe* in his supplementary heads that at the time s 15 was made, a tourist or visitor would fall squarely into the ambit of a non-resident required to pay in foreign currency regard being had to the definition of foreign resident and the method for determining residence set out in ss 2 and 3 of the Exchange Control Regulations SI 109/1996. I also agree that the appellant and other tour operators as Zimbabwe residents fell outside the purview of s 15³⁴.

The alternative submission by Mr *de Bourbon* that the original regulations were *ultra vires* the enabling Act lacks merit. The person identified as the non-resident who was required to pay in foreign currency in terms of the Exchange Control Act was the tourist, on whose behalf a designated tourist facility was created. The regulations correctly targeted the recipient of the class of services as required by the retroactive section. This was in accordance with the very basis upon which SI 106 of 1996 was founded.

The redundancy submission

In both para 20 of his additional heads and para 11 of his supplementary heads and in his oral submissions Mr *de Bourbon* submitted that the concept in both the old and new regulations of identifying the recipient with payment in foreign currency was redundant at the time the amended assessments were issued because Zimbabwe operated a dollarized economy. The submission overlooked the twin requirements for the recipient based zero rating. The

³⁴ Para 14.4-14.6 of supplementary heads of 20 November 2015

person must not only be required to pay in foreign currency but must also not be a resident of Zimbabwe. Even though the appellants paid in foreign currency, they were residents of Zimbabwe and therefore fell outside the ambit of the closing words in the retroactive section. The submission was therefore devoid of merit.

The impermissibility of reading into the section recipient based charging of VAT

It is correct, as adverted to under construction of legislation above, that a Court of Law is prohibited from ascertaining the intention of the Legislature by surmise. The meaning of surmise was correctly captured in *S v Burger, supra* by CORBETT AJ, as he then was, first at 308 and then at 309 as follows:

“Further, it has been emphasised that it is dangerous to speculate as to the intention of the Legislature and what seems an absurdity to one man does not seem absurd to another: to justify a departure from, or amendment of, the language of the statute the absurdity must be ‘utterly glaring’ and the intention of the Legislature must be clear and not a mere matter of surmise or probability. (*Shenker v The Master, supra* at p. 143; *Savage v CIR, supra* at p 409). To quote the words of DAVIS J in *de Villiers v Cape law Society* 1937 CPD 428 at 432:

‘It is not enough to come to the conclusion that the amendment ‘probably’ expresses the intention: in my opinion the Court must be certain that it does so: otherwise as Ulpian says, it is better to adhere to the strict wording of the law.’”

And at 309:

Finally, it should be observed that, generally speaking, the language of a statute should not be extended beyond its natural sense and proper limits in order to supply omissions or defects. The Court cannot supplement an Act to provide a casus omissus, for to do so would be to make laws. (*Union Government v Thompson* 1919 AD 404 at pp 425-427; *Osaka Merchantile Steamship Co. Ltd v SAH& R* 1938 AD 146 at p.180; *Walker v Carlton Hotels (SA) Ltd* 1946 AD 321 at p 330.)

SHEARER J in *Ex parte Lynn & Ors* , supra at 803 warned by a timely reference to the sentiments of DE VILLIERS JA in *Principal Immigration Officer v Hawabu & Another* 1936 AD 26 at 31 that:

“ It is true that, even, where the words of an Act are capable of one meaning only, there is an exceptional class of extreme cases in which courts of law have felt themselves compelled to “ modify” or “cut down” or “vary” the words of the Legislature. In a sense this might be called amputation rather than interpretation.”

A Court of Law has leeway to render an interpretation which accords with the intention of the Legislature as gleaned from both the textual language and its contextual setting. A glaring absurdity outside the contemplation of the Legislature calls for an abandonment of textual oddities. Again, in *R v Patel & Anor* 1944 AD 379 at 388 CENTLIVRES JA after

referring to *Venter's case, supra, R v Jaspan & Another* 1940 AD 9 and *Storm & Co v Durban Municipality* 1925 AD 49 said:

“These case cases are however, authorities for cutting down or restricting the language used by the Legislature when that course is justified by a consideration of the intention and object of the Legislature. They are not authorities for adding to the language of the language used by the legislature”

It seems to me that the interpretation I render neither amputates, supplants nor supplements the words of the Legislature. Rather, it illuminates the intention of the Legislature by drawing on the meaning of designated tourist facility as defined in the Tourism Act. The clear and unambiguous intention of the Legislature has always been to zero rate the consideration paid by the tourist for services rendered to him by the designated tourist facility and standard rate consideration exchanged between two local operators for services rendered by the one to the other.

The contra fiscum argument

The *contra fiscum* principle is part of our law. It simply permits a Court of Law in the case of legislative ambiguity in a fiscal statute; to render an interpretation which places the lesser burden on the subject, if it is reasonably capable of such a construction. I find that the principle has no application in the present appeals.

The effect of the absence of the regulations

In the absence of regulations made by the Minister, the respondent would have to resort to the retrospective provision. It is deemed to have come into operation on 1 January 2004. Ordinarily, the provision of services by a designated tourist facility operator would be subject to value added tax at the standard rate, but for the zero rating allowed by s 10 (2) (q) (i). The construction I have rendered to this provision is that it zero rates the classes of service provided by the designated tourist operator to tourists. It does not zero rate those services provided by the designated tourist operator to all non-tourist recipients. It is apparent to me that the appellants would not escape re-assessment on the basis that 2003 regulations failed to cater for the VAT liability of designated tourist facility operators. They all fall into the taxing ambit of the retrospective provision.

Did the each appellant provide a service to the identified local operators?

In determining this issue I find the guidance proffered in the English Supreme Court case of *Secret Hotels Ltd (formerly Med Hotels Ltd) v The Commissioner for Her Majesty's Revenue and Customs* [2014] UKSC 16 apposite. In doing so I remain cognisant of the apt

warning so ably made by INNES CJ in *Commissioner for Inland Revenue v George Forest Corporation Ltd* 1924 AD 516 at 528 to guard against reliance on case authorities that are based on statutes which are not identical with our own. The PRESIDENT of the Court LORD NEUBERGER in para [30] stated that:

“Where the question at issue involves more than one contractual arrangement between different parties, this Court has emphasized that, when assessing the issue of who supplies what services to whom for VAT purposes, “regard must be had to all the circumstances in which the transaction or combination of transactions takes place” per Lord reed in *Revenue and Customs Commissioners v Aimia Coalition Loyalty UK Ltd* [2013] 2 All ER 719 para 38. As he went on to explain, this requires the whole of the relationship between the various parties being considered.”

The same sentiments were expressed in the consolidated customer loyalty rewards case in para [60] that:

“[60] All the circumstances in which the transaction takes must be examined in order to determine firstly if there are 2 or more distinct supplies or one single supply and secondly whether in the latter case, that single supply is to be regarded as a supply of goods or services”

I find that the appellants provided services to the identified local operators for which they received commission at the end of each monthly cycle. The commission was vatable at the standard rate in the hands of each appellant. It is necessary to emphasize that the service which they supplied meets the s 6 (1) requirements of a taxable supply. In any event what each appellant did in referring the tourist met the s 2 (1) VAT Act definitions of services, supplier and supply³⁵. In view of my findings, I am further satisfied that the appellants have failed to establish a case for unbundling the service supplied to the local operator and the booking done for the tourist between these two.

I hold that each appellant supplied services to local operators for two reasons. Firstly, in para 12.1 of the 12 July 2012 heads the appellant contended that what B permitted A to retain of the total amount paid by C was a commission. I found on the facts that the position of A in that equation was analogous to that of each appellant and that of B was equivalent to that of the local third party operator. Secondly, like in *T (Pvt) Ltd v Zimra* 2015 (1) ZLR 530 (H) where IATA deducted the commission due to the travel agent from the gross sum paid by the

³⁵ “services” means anything done or to be done, including the granting, assignment, cession or surrender of any right or the making available of any facility or advantage, but excludes the supply of goods, money or any stamp, as contemplated in paragraph (c) of the definition of “goods”;
“supplier”, in relation to any supply of goods or services, means the person supplying the goods or services;
“supply” includes all forms of supply, irrespective of where the supply is effected, and any derivative of “supply” shall be construed accordingly;

passenger and remitted the net amount to the airline, the amount retained constituted part of the consideration that was due to the local activity provider from the tourist. The retained amount represented a diminution of the consideration due to the local operator.

Thirdly, the retained amount could not have been consideration paid by the tourist for a service rendered to him by the Tours desk for two reasons. The first was that the amount only became due to each appellant after the tourist had undertaken the service with the local third party. The second was that a tourist who utilised the services of the Tours desk but did not undertake the activity provided by the local third party did not pay any consideration for the service provided to such tourist by the tours desk. The contention, backed by the sole witness' oral testimony, that the retained amount constituted a tours desk fee was as ingenious as it was palpably false. Despite the appellants' contentions to the contrary I find that the appellants provided an inter operator service to the local operator. In consequence of these findings I agree with Mr *Bhebhe* that any reliance placed on the zero rating provisions of s 10 of the VAT Act constitute an implicit recognition that the disputed supply was a taxable supply³⁶. His contention is fully supported by the opening words of subsection (2) of section 10, which read:

“(2) Where, but for this section, a supply of services would be charged with tax at the rate referred to in subsection (1) of section *six*, such supply of services shall, subject to compliance with subsection (3) of this section, be charged with tax at the rate of zero *per centum* where—
“

The submission made in para 31 of the 11 July 2012 heads that it was not the intention of the Legislature to charge VAT where the retention, even though attributed as payment from the local operator was in essence a zero rated payment by the tourist for services rendered to him by the local operator is devoid of merit. It simply ignores the fact that the retention constituted a diminution of the local operator's consideration. The payment constituted consideration for the supply of services between two local operators, which fell squarely within the requirements of s 6 (1) and outside the ambit of s 10 (2). LORD CAIRNS in *Partington v Attorney-General* 21 LT 370 at 375 says the taxpayer must in those circumstances be taxed. The appellants come within the letter of the law, they must each be taxed. They each arranged their respective affairs in such a way that they fell into the ambit of s 6 (1) of the VAT Act.

Whether the appellants complied with s 10(3) of the Value Added Tax Act

³⁶ Para 8 of the supplementary heads filed on 20 November 2015

In the penultimate sentence to para 15 of the Additional Heads, Mr *de Bourbon* made the cryptic statement that “section 10 (3) had no relevance to the present matters “. Mr *Bhebhe* addressed the issue in detail in para 15 of his supplementary heads. It seems to me that it is an essential requirement of the clear and unambiguous s 10 (2) (q) that the zero rating of the supply of services can only be invoked if the provisions s 10 (3) are complied with. The contention advanced Mr *de Bourbon* in para 15 of his supplementary heads that the issue was raised for the first time in the respondent’s supplementary heads was of no moment. I am reminded of the poignant but apt remarks of McDONALD ACJ in *L v Commissioner of Taxes* 1975 (2) SA (RAD) 649 at 652A³⁷ that:

“It was for the appellant to examine all the grounds upon which his appeal might fail and only proceed after having done so.

It is not clear to me why such a remark was made, when the issue in question was first raised by the appellant. It was within Mr *Bhebhe*’s rights to respond thereto. Again, it constituted an essential requirement of the applicability of zero rating on the services supplied by the operator of the designated tourist facility.

The registered operator who applies zero rating shall obtain and retain such documentary proof substantiating its entitlement to apply the zero rating under s 10 that is acceptable to the Commissioner. It seems to me that the appellants established that each appellant retained copies of the vouchers issued to the tourist to access the activity and invoices issued by the providers to settle payment constituted the contemplated documentation that would have been sufficient to satisfy the Commissioner of each appellant’s entitlement to zero rating had the other requirements been established. The respondent did not controvert these documents at any time during the investigations, assessment, objection, and at the hearing. I would have found that each appellant did comply with the requirement prescribed in s 10 (3) of the VAT Act.

Whether the actions of each appellant constitute the rendering of a service, and if so, whether those services were rendered to the foreign tourist or to the provider of the activities in Zimbabwe

³⁷ Which I cited at p 26 in *SDC Ltd v C-G Zimra* HH /2018

I find that each appellant rendered a service to both the tourist and the local activity provider but the retained amount like in *T (Pvt) Ltd v Zimra, supra*, constituted commission paid by the local activity provider for the services rendered to it by each appellant.

Whether the difference between the amount paid by the tourist to each appellant and that paid by each of the appellant to the provider of the activities, which difference is retained by the appellants is vatable

The retained amount was vatable in the hands of each appellant.

Penalty

The imposition of a penalty is authorised by s 39 (2) (a) (i) of the VAT Act in an amount equal to the unpaid tax, in addition to such tax. However, the Commissioner and the Court on appeal, may in terms of s 39 (5) remit in whole or in part any penalty or interest where the failure to pay tax was not due to an intent to avoid or postpone liability for the payment of the tax if two conditions are met. The first is that after factoring interest due on the unpaid tax, the taxpayer sustained a financial loss on the supply and a loss of the interest due to the fiscus. The second is that the taxpayer, after factoring interest due to the State on the unpaid amount, did not benefit financially by failing to pay the amount due timeously.

Mr *de Bourbon* adopted hook, line and sinker the initial heads of argument filed on 11 July 2012, which to his mind adequately addressed the issue of penalties. Mr *Bhebhe* wrongly treated the appeal against penalties as a review of the correctness of the Commissioner's decision on the point. It is trite that this Court deals with penalties afresh and makes its own decision on penalties unaffected by the Commissioner's determination. The principles that guide this Court were set out in *PL Mines (Pvt) Ltd v Zimbabwe Revenue Authority* 2015 (1) ZLR 708 (H). I apply the triad of the "offence", the offender and the interests of society in determining the appropriate penalty.

The original heads which were adopted by Mr *de Bourbon* addressed the individual circumstances affecting the appellants. The appellants were good and law abiding and co-operative corporate citizens who timeously complied with their tax obligations before the new assessments were raised. In view of the provisions of s 69(1) of the VAT Act, which deem VAT to be included in the consideration received by registered operators for the supply of services, I do not find the failure by each appellant to charge VAT mitigatory. Each appellant is deemed to have benefitted from the VAT that was due to the fiscus but was not remitted.

However, each appellant has other tax obligations such as Income Tax, PAYE which are bound to affect the appellant's cash flow.

The appellants established that they did not intend to avoid or postpone liability for the payment of VAT. They relied on a wrong construction of the law. The fact that the Commissioner reduced the initial penalty imposed from 100% to 20% confirmed the absence of any intention to avoid or postpone liability. The appellants did render a service, however miniscule, for which they did not charge the tourist. However, the failure to remit VAT was a serious infraction of the responsibility bestowed upon each appellant by Parliament.

The interests of society require that every taxpayer meets its fair share of the tax burden. Penalties are designed to cover both individual and general deterrence. While the appellants rendered a service to the tourist, it must have been apparent to them as it would to any reasonable business operator that the rack rate arrangement constituted a reduction to the consideration due to the third party activity provider. Clearly, their actions prejudiced the fiscus in accessing the funds which were in essence due to it. There was some measure of moral blameworthiness on the part of the appellants which justify the imposition of a deterrent penalty. The appellants did not supply any financial figures to back up the extent and nature of any hardship occasioned by the imposition of a penalty in the magnitude suggested by the respondent. Neither did they justify a total waiver of the penalty nor the alternative imposition of the measly penalty of 1%.

On the basis of the scanty information gleaned from the pleadings and evidence it seems to me that a penalty equivalent to the one imposed by the Commissioner of 20% would be appropriate.

Costs

Mr *Bhebhe* correctly contended that all the grounds of appeal deliberately misrepresented the findings of Commissioner during the investigations and in his determination. The first and third wrongly portrayed the impression that the Commissioner charged VAT on services rendered to the tourist. The second correctly averred that in law VAT was chargeable against the recipient of the consideration but wrongly averred that the appellants were not recipients of any such consideration. The penalty based ground was unsubstantiated. I agree that the first three grounds of appeal were misconceived. However, the real issues calling for determination were agreed at the pre-trial hearing in line with s 4(1) and (4) of the Fiscal Court Act [*Chapter 23:02*] which enjoins the Court, with the consent of

the parties to deal with the real issues between the parties as best as it can in an informal and expeditious manner. This was the position adopted by the respondent at the pre-trial hearing. It raised no exception or other special plea to the grounds of appeal. In regards to penalties, the appellants detailed the legal bases for the reduction of the penalty. In terms of s 10 of the Fiscal Court Act [*Chapter 23:05*], the Court:

“shall not make any order as to costs unless it is of the opinion that the decision appealed against is grossly unreasonable or that the grounds of appeal therefrom are frivolous; but in either event it may make such order as to costs as it thinks fit.”

While three of the grounds of appeal were frivolous these were impliedly amended at the pre-trial hearing and the issues agreed were certainly arguable and not frivolous. In any event, the fourth ground was not frivolous. I would have ordered each party to bear its own costs.

Accordingly, I would have dismissed each appeal on the merits with each party to bear its own costs.

Disposition

I, however, strike off the appeals from the roll on the basis enumerated in the preliminary points.

Accordingly, it is ordered that:

1. Each appeal be and is hereby struck off the roll
2. Each party shall bear its own costs.

Dube Manikai and Hwacha, the appellants' legal practitioners
Kantor and Immerman, the respondent's legal practitioners