

REPORTABLE (15)

ZIMBABWE REVENUE AUTHORITY
v
STANBIC BANK ZIMBABWE LIMITED

SUPREME COURT OF ZIMBABWE
GUVAVA JA, MAVANGIRA JA & ZIYAMBI AJA
HARARE, MAY 22, 2017 & FEBRUARY 22, 2019

T Magwaliba, for the appellant
A P de Bourbon with *D Ochieng*, for the respondent

MAVANGIRA JA: This is an appeal against part of the judgment of the Special Court of Income Tax Appeals.

BACKGROUND

On 18 November 2012, the appellant issued to the respondent three amended assessments for the tax years ending December 2009, December 2010 and December 2011. The first of these assessments related to computer software acquired by the respondent which the appellant disallowed as capital expenditure and therefore not deductible under s 12 (2) (a) of the Income Tax Act [*Chapter 23:06*] (“the Income Tax Act”). The second related to the dividends that the respondent held for its customer, Portland Pretoria Cement Limited. The assessments also related to a loan which the respondent received from Standard Bank Limited in South Africa for the value of ZAR 27 632 795, 71 out of which it paid off ZAR 3 597 753, 73 and had the balance written off. The appellant reckoned the whole amount of the loan as the respondent’s taxable

income for the year 2009 as a ‘grant or subsidy’ in terms of s 8 (1) (m) of the Income Tax Act. The assessments related as well to Nostro accounts transactions which the appellant determined to be interest earning deposits for the years ending 2009, 2010 and 2011. The appellant imposed a 100 percent penalty by way of additional tax on the computer expenditure and the Nostro accounts. It imposed a 50 percent penalty on Portland Pretoria Cement Limited dividends.

In a letter dated 17 December 2012, the respondent, through its legal practitioners, objected, in terms of s 62 of the Income Tax Act, to the amendments and the penalties imposed on it by the appellant. The proviso to s 62 of the Income Tax Act reads:

“Provided that, if the Commissioner has not notified the person who lodged the objection of his decision on it within three months after receiving the notice of objection, or within such longer period as the Commissioner and that person may agree, the objection shall be deemed to have been disallowed.”

The appellant’s Commissioner-General failed to notify the respondent within three months of the taking of the objection to its decision thereon. Acting on the assumption that the objection had been disallowed, the respondent invoked s 62 (4) of the Income Tax Act. It noted an appeal to the Special Court for Income Tax Appeals on 27 March 2013 in terms of s 65 of the Income Tax Act.

The Commissioner-General wrote a letter to the respondent on 3 April 2013 acknowledging receipt of a letter dated 27 March 2013 informing it of the respondent’s intention to appeal to the High Court. In that letter, the appellant explained that the delay in responding to the objection was due to the complexity of the issues involved and sought to extend the period of three months by an additional two months in terms of the proviso to s 62 (4) of the Income Tax Act. It would then make a determination and communicate it to the respondent. The respondent

replied by a letter dated 5 April 2013 acknowledging receipt of the letter of 3 April 2013 but did not accept the position that the Commissioner General of the appellant could unilaterally extend the three-month period. It argued that that could only be done with the consent of the respondent. It insisted that it had properly filed its notice of appeal in the Special Court for Income Tax Appeals.

On 19 April 2013, the appellant communicated its determination on the objection. Regarding the disallowing of the software expenditure deducted from the respondent, the appellant denied the applicability of the principle of legitimate expectation that the respondent, relying on a letter dated 18 May 1999 by the Commissioner General, had invoked and relied upon. It contended that such letter was a non-binding private opinion and was not directed to the respondent. It maintained that the expenditure was of a capital nature and on that basis held that the ground of objection was disallowed in full.

The grounds of objection relating to the taxability of the dividends from Portland Pretoria Cement Limited and the written off loan were disallowed in full. In relation to the taxability of the amounts deemed to have accrued to the respondent on the Nostro accounts, the appellant did not make a determination but stated that it was still looking into the issue. Accordingly it suspended payment of tax in respect of the issue as it was still to be resolved. The penalties were waived in full except for the 50 percent penalty levied upon US\$ 2 521 340.44 relating to the Portland Pretoria Cement deal. Consequent to the determination of the objection, the appellant issued an amended notice of assessment on 29 April 2013.

The court *a quo* settled the issues between the parties, deciding the matter partly in favour of the respondent and partly in favour of the appellant. The court *a quo* dealt with the appeal by the respondent on five issues that arose from the amended assessments issued to it by the appellant. It allowed the appeal in respect of the dividend transaction and the written off loan and set aside the amended assessment of 20 May 2013 along with the penalty imposed thereon. It also directed the appellant to issue an amended assessment for the year ending 2009 to give effect to the outcome of the appeal and the deduction of the sum of US\$ 2 521 340.44 from the taxable income of the respondent. Of particular interest to this appeal is the fact that the court *a quo* dismissed the appeal in respect of the claim for deduction of software expenditure and directed the appellant to allow the deduction of the special initial allowance in respect of the expenditure on the software. The appellant is now appealing against the finding made after the court *a quo* had agreed with it that the computer software constituted capital expenditure but held that the respondent was entitled to a special initial allowance.

ISSUE

The appellant has appealed to this Court on three grounds namely, that:

1. The Special Court for Income Tax Appeals erred in finding as it impliedly did that the Income Tax Act as it existed in the year 2009 prescribed the deduction of a special initial allowance in respect of expenditure of a computer software in terms s 15(2)(a) as read with the Fourth Schedule to the Act.
2. The Special Court for Income Tax Appeals further consequently erred in directing the Appellant to issue a further amended assessment allowing the deduction of special initial

allowance in terms of the Income Tax Act when there was no such allowance permissible for such expenditure.

3. The court *a quo* further erred in directing the Appellant to refund the Respondent the balance due taking into account the deduction of such special initial allowance.

On the basis of these grounds, it therefore sought the following relief:

WHEREFORE the Appellant prays that the appeal be allowed with costs and the order of the Special Court for Income Tax Appeals be and is hereby amended by the deletion of para 4(b) and reference in para 5 to para 4(b) relating to the refund of amounts arising from special initial allowance.

The issue that arises before the court is whether a special initial allowance could be deducted in respect of the software expenditure by the respondent. The court *a quo* answered this issue in the affirmative. It is important to look at the relevant provisions dealing with special initial allowance.

THE PROVISIONS

The starting point is s 15 (2) (a) and (c) of the Income Tax Act which provides as follows:

“(2) The deductions allowed shall be—

- (a) expenditure and losses to the extent to which they are incurred for the purposes of trade or in the production of the income except to the extent to which they are expenditure or losses of a capital nature
- (b) ...
- (c) the allowances in respect of –
 - (i) ...

- (ii) articles, implements, machinery and utensils belonging to and used by the taxpayer for the purposes of his trade;
- (iii) ...
which are provided in the Fourth Schedule. ”

The section provides for deductions for expenses and losses incurred for the purposes of trade or in the production of income unless such expenditure or losses are of a capital nature. It is however read with the Fourth schedule to the Income Tax Act. Before amendment in 2014 and for the relevant period covered by the amended assessment, that is, 2009, para 2 of the Fourth Schedule provided as follows:

“Deduction of special initial allowance

2. If the taxpayer so elects (which election shall be binding) an allowance (hereinafter called a special initial allowance) in respect of capital expenditure incurred by the taxpayer during the year of assessment on—
 - (a) the construction of new farm improvements, industrial building, railway lines, staff housing or tobacco barns; or
 - (b) additions or alterations to existing farm improvements, industrial buildings, railway lines, staff housing or tobacco barns; or
 - (c) the purchase of articles, implements, machinery or utensils; used by the taxpayer during such year for the purposes of his trade subject to the conditions mentioned in, and calculated in accordance with, paragraphs 9 and 10:

Provided that—

- (i) if farm improvements, industrial buildings, railway lines, staff housing or tobacco barns are constructed or articles, implements, machinery or utensils are purchased in one year of assessment and first put into use in a later year of assessment, then the special initial allowance shall be allowed in the year of assessment in which such asset is first used;
- (ii) in the case of articles, implements, machinery or utensils, the special initial allowance shall only be allowed if the Commissioner decides, having regard to the use to which such articles, implements, machinery or utensils were put by the taxpayer in the year of assessment in which they were first put into use or the next following year of assessment, that the articles, implements, machinery or utensils were purchased by the taxpayer wholly or almost wholly for the purposes of his trade;
- (iii) the special initial allowance shall not be allowed in respect of articles, implements, machinery or utensils purchased by the taxpayer and leased to another person for use by him unless the taxpayer establishes to the satisfaction of the Commissioner that—

- A. at the termination of the period of the lease, he is entitled to the return of the articles, implements, machinery or utensils concerned and no option to purchase or other right in relation to the acquisition or disposal of the articles, implements, machinery or utensils concerned is or will be given to the lessee or any other person; and
- B. the articles, implements, machinery or utensils concerned were not purchased by him for the purpose of being leased to a particular person with the intention of giving that person or any other person an option or other right such as is referred to in paragraph A.”

The Fourth Schedule in my view constitutes an exception to the provision of s 15 (2) (a) of the Act which does not allow deductions in respect of capital expenditure. The Schedule then allows for the deduction of certain capital expenditure identified therein. Before the 2014 amendment, the capital expenditure that qualified for deductions included the purchase of articles, implements, machinery or utensils used by the taxpayer during the relevant year for the purposes of his trade. Such articles, implements, machinery or utensils were not specified and had to pass the test of being purchased for the purposes of the trade of a person.

In 2014, the Fourth Schedule was amended. The amendment introduced the definition of articles, implements, machinery and utensils to include computer software in the Fourth Schedule as follows:

(1) In this Schedule—
“articles, implements, machinery and utensils” includes tangible or intangible property in the form of computer software that is acquired, developed or used by a taxpayer for the purposes of his or her trade, otherwise than as trading stock;
[Definition inserted by Act 11 of 2014]

It did not end there. It further provided the definition of computer software:

“computer software” means any set of machine-readable instructions that directs a computer’s processor to perform specific operations;
[Definition inserted by Act 11 of 2014]”

Before amendment by Act 1 of 2014 the Fourth Schedule to the Income Tax Act did not define articles, implements, machinery and utensils nor did it have the definition of computer software.

SUBMISSIONS BEFORE THIS COURT

The appellant contended that in granting the special initial allowance, the court *a quo* made a decision on a matter that was not properly before it. Mr *Magwaliba* for the appellant argued that in determining the issue, the court *a quo* erred at law as the matter that was before it was the question of whether or not the expenditure on software was of a capital or revenue nature. He further argued that the question of the special initial allowance was not brought before the court *a quo* by the respondent as, in its objection against the amended assessments, the respondent never related to a claim for special initial allowance. The reason for not making such a claim, he argued, being that a claim for special initial allowance by its nature constitutes an admission that the software in issue is a capital asset. This would then not tally with the claim by the respondent that the computer software constituted expenditure of a revenue nature.

Mr *Magwaliba* also argued that the respondent could not move for such relief predicated on the exact antithesis of the position it had taken in relation to the nature of the expenditure that the software constituted. To buttress the argument, he cited the case of *Hlatshwayo v Mare & Deas* 1912 AD 243 at 259 which proscribes approbation and reprobation or the taking of two positions that are inconsistent with each other. He argued that the “reference” made by Mr *de Bourbon* to the special initial allowance was not and could not be construed as a

“prayer” for such allowance, neither could it be, in light of the position taken by the respondent in the treatment of the computer software.

He argued further that the allowance could not have been allowed as at 2009 because the amendment which introduced computer software as expenditure of a capital nature qualifying for special initial allowance came into being in 2014 and became effective as from 2015.

Mr *Magwaliba* further submitted that not all capital expenditure necessitated the claim for special initial allowance but only those which are specified in the Fourth Schedule. As at 2009, the word “articles” did not include “computer software”. He argued further that a taxpayer who wants to claim special initial allowance must make an election to claim such allowance and part of that election is to accept the computer expenditure as of a capital nature. He submitted that the issue of special initial allowance was not argued in the court *a quo*.

On the other hand, Mr de Bourbon for the respondent submitted that the present appeal raises two issues. Firstly, the respondent discards as wrong, the assertion that a taxpayer who claims expenditure to be of a revenue nature cannot claim the deductions that are allowed for capital expenditure as set out in the Income Tax Act. He submitted that in the court *a quo* the respondent argued that the software was of a revenue nature and that alternatively if it was found to be of a capital nature, special initial allowance ought to be allowed for it. He submitted that the order by the court *a quo* in respect of the allowance was, in terms of that alternative position, rightly made.

Mr *de Bourbon* further submitted that the fact that a taxpayer makes an incorrect claim does not preclude such taxpayer from the benefits in respect of what is then later found to be the correct position. He contended that the purpose of the whole system of assessment and appeal is to determine the correct amount of taxable income in the hands of the taxpayer and then to apply to that correct amount the provisions of the Finance Act [*Chapter 23:04*] and the Income Tax Act.

In heads of argument filed with this Court, Mr *de Bourbon* submitted as follows:

“4. On behalf of the Respondent it was argued at the hearing below that the expenditure was indeed other (of a?) revenue nature, but in the alternative it was submitted that if the approach of the Respondent was found to be incorrect, the respondent was entitled to claim as against the capital expenditure the special initial allowances set out in the Fourth Schedule to the Income tax Act. The learned Judge agreed with the Appellant that the expenditure was not of a revenue nature but other (of a?) capital nature. The learned Judge therefore confirmed the amended assessments, but equally confirmed that the appellant was entitled to the special initial allowance on that capital expenditure. It is submitted that the learned Judge acted correctly in that regard.”

It was also his submission that the extent of any moral turpitude in the approach of the taxpayer is dealt with by the imposition of additional tax-penalties and not by precluding a claim that could be legitimately made in terms of legislation. He submitted that the respondent is merely a party to a dispute as to the correct treatment of admitted expenditure, which dispute was resolved by the court *a quo*. In response to the argument that as at 2009, computer expenditure did not fall in the ambit of capital expenditure for which special initial allowance could be claimed, he submitted that the respondent’s stance was that the fact of the amendment does not mean that computer software was previously not part of “articles, implements, machinery or utensils” alluded to in the Fourth Schedule.

Mr *de Bourbon* cited the case of *AS School & Ors v Zimbabwe Revenue Authority* HH 314/16 where the court held that the introduction of a specific provision relating to teachers did not mean that the law prior to the introduction of the amendment did not cover teachers. He further submitted that the appellant had not examined the statute as it existed at the relevant time in respect of assessments for the year ending 31 December 2009. It was his submission that there was no definition of the term “articles, implements, machinery or utensils” in the Schedule and that as a result such words must be given their ordinary meaning to ascertain whether or not they cover computer software.

It was also submitted that there was no dispute that the computer software was purchased “wholly or almost wholly” for the purposes of the trade of the respondent. Furthermore, that the requirement to claim the allowances was never an issue between the parties. He argued, on the strength of *Commissioner for Inland Revenue v Simpson* 1949 (4) SA 678 (A) at 695 that in the interpretation of fiscal legislation, one must look to what is clearly said. He contended that the meaning of the words “articles, implements, machinery or utensils” was considered in the case of *Commissioner of Taxes v C* 1981 (2) SA 298 (ZA) which followed the decisions of *Secretary for Inland Revenue v Charkay Properties (Pty) Ltd* 1976 (4) SA 872 (A) and *Jarrold (Inspector of Taxes) v John Good and Sons Ltd* [1963] 1 All ER 141 (CA).

After quoting the portion of the judgment in *Commissioner of Taxes v C* (*supra*) to the effect that the word “article” has a wide connotation and that it relates to a material thing which is not so merged with other things so as to lose its separate identity as an article, he argued that although computer software cannot be described as material or tangible, it undoubtedly is an

article. He argued that it can be sold or bought and is readily identifiable as being distinct and separate as from one person to another. He argued that in general parlance computer software is an article or implement or utensil which in the modern world is used just as machinery for the furtherance of a business.

It was also Mr *de Bourbon*'s contention that the 2014 amendment clarified the term(s) "articles, implements, machinery or utensils" to include tangible and intangible property in the form of computer software. It was submitted that if the legislature intended to introduce a brand new concept, it would have added "computer software" to the list of "articles, implements, machinery or utensils". Consequently, there was no change brought by the amendment, only clarification. He submitted that words and language evolve.

ANALYSIS

Mr *Magwaliba*'s heads of argument aptly put this matter in its proper perspective and the articulation therein has been particularly helpful in the preparation of this judgment.

He submitted that the only issue relating to computer software that was placed by the appellant before the Special Court for Income Tax Appeals was whether the expenditure for the purchase of such software was an expense of a revenue or capital nature. This arose because the appellant had provided for it as an expense of a revenue nature and therefore an allowable deduction in terms of s 15 (2) (a) of the Income Tax Act. The issue was never whether the respondent ought to have been allowed a special initial allowance.

In its letter of objection in terms of s 62 of the Income Tax Act, the respondent also confined itself to the said issue. Paragraph 1 of the said letter is headed “Software Deduction” and has five subparas numbered 1.1 to 1.5. It is devoted to the question of whether the expenditure was an allowable deduction in terms of s 15 (2) (a) of the Income Tax Act. The contentions therein were firstly, that the respondent had a legitimate expectation that the software would be treated as an expense of a revenue nature, the legitimate expectation arising from a letter written by the predecessor to the appellant’s Commissioner General to Messrs Ernst and Young. Secondly, that the letter constituted a non-binding private opinion which applied to the respondent in terms of s 5 (2) of Schedule 4 to the Revenue Authority Act. Thirdly, that upon proper interpretation, s 15(2)(a) of the Income Tax Act permitted the nature of such expenditure as an allowable deduction.

It is significant that s 65 (4) of the Income Tax Act provides as follows in relation to appeals lodged to the Special Court for Income Tax Appeals by taxpayers:

“At the hearing of any such appeal the arguments of the appellant shall be limited to the grounds stated in his objection:
Provided that the High Court or the Special Court which hears such an appeal may, on good cause being shown or by agreement by the parties grant leave to the appellant to rely on other grounds.”

A perusal of the record clearly shows that the Special Court for Income Tax Appeals granted to the respondent a special initial allowance which was not founded on the grounds set out in the letter of objection dated 17 December 2012. This is so because a claim for special initial allowance would by its nature be an admission that the software in issue was a capital asset. However, in *casu* the respondent’s contentions throughout and as set out in the letter of objection

referred to above were to the contrary, it being contended that it was expenditure of a revenue nature. The Income Tax Act does not provide for expenditure of a revenue nature to qualify for a special initial allowance except in accordance with s 15 (2) as read with the Fourth Schedule.

In its case before the Special Court for Income Tax Appeals the respondent (then as appellant) agreed that the software expenditure was an expense of a revenue nature. In its paragraph 13 the respondent summed up its stance in relation to the software. The paragraph reads:

“The Appellant contends that as a matter of fact and as a matter of law it did not purchase the computer software in question, but merely acquired a right to use such software in accordance with the license agreement, and that accordingly such expenditure incurred in the acquisition of the right to use the software was not an expense of a capital nature, but was expenditure incurred for the purposes of trade or in the production of income by the Appellant.”

With this as its pronounced stance, the respondent could not, without abandoning its argument, move for relief which was predicated on an exact antithesis of its given position. In the words of DE VILLIERS JP in *Hlatshwayo v Mare & Deas* 1912 AD 242 at 259, dealing with a similar principle of pre-emption:

“At bottom the doctrine is based upon the application of the principle that no person can be allowed to take up two positions inconsistent with one another, or as is commonly expressed to blow hot and cold, to approbate and reprobate.”

Before the Special Court for Income Tax Appeals the respondent did not seek any order in respect of the grant of special initial allowance. In the last of 15 paragraphs that dealt with the issue of computer software the following submission was made on behalf of the respondent:

“It is therefore submitted that based on the evidence presented to this Honourable Court, including the terms of the licence agreement, as that evidence is applied to the legal approach to this issue as determined in the cases cited, there can be no doubt that the

Appellant incurred the costs of acquiring the right to use the computer software in circumstances which render those costs as being of a revenue nature.”

Thus the respondent did not raise the issue of a special initial allowance in the letter of objection or in its case and heads of argument in the Special Court for Income Tax Appeals. It was only in oral submissions that for the first time the respondent’s counsel in the court *a quo* made the following submission in which some kind of “claim” is made to a special initial allowance:

“The second question that can be put Mr President to demonstrate the fallacy of the approach of ZIMRA is this; if it is a capital asset of 2(.) (w)hatever it is million, where has ZIMRA allowed the SIA on that. If you have a capital asset you are entitled to pay SIA, where has ZIMRA allowed that. ZIMRA has not approached this rationally. I will be making the same point in respect of the fourth issue. It is simply latched on to this, in our submission incorrect approach that what is in your public financial statement must be what you pay tax on.”

This submission was not made and cannot be viewed as a prayer for a special initial allowance. It was in fact a question posed to demonstrate a point in counsel’s argument. In any event, he could not make such a prayer as it had no factual background in the matter presented to the court *a quo*. The submission could not therefore be the basis for the court *a quo*’s judgment.

A reading of the judgment of the court *a quo* will show that in the portion where the President dealt with the question of the nature of computer software (pages 2 to 13 of the judgment), he devoted most of his time to dismissing the respondent’s argument that the expenditure was an allowable deduction in terms of s 15(2)(a) of the Income Tax Act. He dismissed it on the grounds that the nature of the computer software was such that it was an asset which gave the respondent an enduring benefit and was therefore not deductible in terms of

s 15(2)(a). Furthermore, that there was no practice established by the respondent as generally prevailing in terms of which such a deduction could be allowed.

The President's conclusion on the issue reads:

“In the light of these findings, I agree with Mr *de Bourbon* that the respondent is obliged to allow the deduction of special initial allowance on the cost of the software in question at the rate prescribed in the Income Tax Act.

I, therefore, hold that software expenditure was of a capital nature. The respondent correctly disallowed the claim for deduction of US\$2 329 776.85 from the appellant's tax return for the year ending 31 December 2009.”

The paragraphs preceding these concluding paragraphs make no reference to any argument presented to the court by the parties in respect of special initial allowance. It is not proper for a court to determine a matter which is not raised or argued before it or to determine a matter on the basis of a point that was not raised before it. See *Proton Bakery (Pvt) Ltd v Takaendesa* 2005 (1) ZLR 60 (S) at 63.

No evidence was placed before the court *a quo* showing that the cost of computer software was expenditure of a capital nature such as would qualify for a special initial allowance. Such evidence was important because the special initial allowance is not allowable in respect of all forms of capital expenditure as claims for a special initial allowance are regulated by s 15(2)(c) as read with the Fourth Schedule to the Income Tax Act. As indicated earlier in this judgment, the definition section of the Fourth Schedule was only amended by the Finance Act (No. 3), Act No. 11 of 2014 which defined articles, implements, machinery and tools and included computer software which was also defined in that Act. Before the amendment computer software had not been included or made mention of.

Section 13 of the Finance Act (No. 3) Act No. 11 of 2014 amended the Fourth Schedule to the Income Tax Act with effect from 1 January 2015, to make expenditure in respect of computer software subject to special initial allowance. It must follow that as at 2009, while computer software of the nature in issue might have been of a capital nature, it was not specified in the Fourth Schedule for purposes of deduction of a special initial allowance. There was therefore no provision as at 31 December 2009 on the basis of which para 4 (b) of the order by the Special Court for Income Tax Appeals to the appellant to allow the deduction of a special initial allowance in respect of expenditure on software could be sustained.

A fortiori, para 5 of the order of the court *a quo* directing the appellant to refund the balance due to the respondent arising from the implementation of para 4 (b) cannot be sustained as there was no obligation on the part of the appellant to grant the respondent a special initial allowance in respect of such expenditure of US\$2 239 776.85.

What therefore comes to the fore is that when the court *a quo* ordered the appellant to allow the deduction of the prescribed special initial allowance in respect of expenditure on computer software and purportedly in terms of the Income Tax Act, the Income Tax Act did not at the material time prescribe any special initial allowance in respect of computer software. The order of the court *a quo* is thus inconsistent with the Act. It being in conflict with the Act, it is therefore incapable of implementation.

The prayer by Mr *Magwaliba* on behalf of the appellant for amendment of the order of the court *a quo* by the deletion of para 4(b) as well as the reference in para 5 to para 4(b) must,

in the circumstances, succeed. Although this conclusion seems to me to be clear and unavoidable, the following discourse ensues if only for the purpose of further showing justification for the success of the appeal.

The court *a quo* dealt with the issue of the computer software with a two pronged approach. It firstly dealt with whether or not the expenditure on such software constituted expenditure of a capital or revenue nature. It found that the expenditure was of a capital nature and that the appellant was obliged to grant the respondent the deduction of special initial allowance. The respondent's case against the appellant in the court *a quo* had been that the expenditure on software had to be classified as expenditure of a revenue expenditure and not as of a capital nature as the appellant had sought to do. The court *a quo* agreed with the appellant on the conclusion but went on to order for the allowing of the special initial allowance. In so doing, the court *a quo* did not deal with or pay heed to the amendment and its effect on the Fourth Schedule.

The deduction of a special initial allowance as formulated in the Fourth Schedule is subject to or dependent upon an election by the taxpayer. The election is binding. However, no distinct claim in its papers for such allowance by the respondent was placed before the court *a quo* specifically in relation to the Fourth Schedule. Hill¹ dealt with a similarly worded provision for special initial allowance and opined:

“The allowance is granted only if the taxpayer so elects. Such election is virtually automatic in the case of all companies and those of individuals with high levels of taxable income, in order to obtain the advantage of the early deduction.”

¹ Income Tax in Zimbabwe, Fourth Edition, Butterworths 1997 p118

A claim for a deduction was however made in respect of a tax “ruling” dated 18 May 1999 by the Commissioner of Taxes in the Department of Taxes. It was made in response to a letter from Ernst and Young dated 24 November 2008 requesting, essentially, to be informed of the Department’s practice in the treatment of computer expenditure in relation to s 15 (2)(a) of the Income Tax Act.

The “ruling” was to the effect that computer software constituted a consumable item whether or not the taxpayer owned it and as such was deductible in term of s 15 (2)(a) of the Income Tax Act. It also dealt with whether such costs could be capitalised as had been asked by Ernst and Young. The court *a quo* found that such letter was not a generally binding ruling and was not binding at all in 2009. Regardless of this fact, the respondent was granted a special initial allowance in terms of the Fourth Schedule.

The further difficulty with the respondent’s approach is that in its case before the court *a quo* it did not make a claim in the alternative for special initial allowance in the event that it was wrong in classifying computer software expenditure as being of a revenue nature. The election was obliquely made, or more accurately, referred to, in a contentious statement by Mr *de Bourbon* whilst making submissions in the court *a quo*. The specific issue of special initial allowance was not argued or ventilated by the parties before the court *a quo*.

Whilst it is a fact, as submitted by Mr *de Bourbon*, that generally a party can make claims in the alternative, it is also a fact that in the case of a special initial allowance in terms of the Income Tax Act, an election ought to be made even though the Act does not state when such

election is made. It cannot however, be the position of the law, that the election could be made before the Special Court for Income Tax Appeals or before this Court. As Mr *Magwaliba* aptly put it, that election is made in or during the arrangements of a taxpayer's affairs and that did not happen in this case.

For this reason, we found the submission made by the respondent's counsel on this point to be of no assistance to this Court in the determination of this appeal favourably for the respondent. He submitted that because the Act, while requiring an election to be made, does not state when such an election is to be made, it follows that in a matter such as in *casu* where there are appeal proceedings against a decision of the Commissioner General, and the contentious issue is resolved by a finding that expenditure on computer software is not of a revenue nature, the respondent can, after such finding, successfully make a claim for special initial allowance.

An election not having been made and the matter not having been raised and ventilated before it, it was thus not open to the court *a quo* to grant to the respondent a special initial allowance in respect of the computer software. In any event, such an election could not have validly been made before the amendment introduced by Act No. 11 of 2014.

Mr *de Bourbon* argued that computer software is covered by the word "article" in the provision in the Fourth Schedule. He argued that language evolves and that an article covers computer software, in the sense of it being "an article used by the taxpayer during such year for the purposes of his trade." Furthermore, that the amendment merely clarified a position that was already provided for before its enactment.

In *Secretary for Inland Revenue v Charkay Properties (Pty) Ltd* 1976 (4) SA 872, the court dealt with the meaning of “articles” in the context of “machinery, implements, utensils and articles used by the taxpayer for the purpose of his trade” in terms of s 11(e) of South Africa’s Income Tax Act, 58 of 1962. In dealing with the meaning of “articles”, the court held:

“The word “article” is of a wide and somewhat vague or definite connotation. Its ordinary meaning, relevant here, is a material thing forming part of, or coming under the head of, any class (*Oxford English Dictionary*, meaning IV, 13 and 14; and Webster, *Third New International Dictionary*, meanings 5a and 6a). The phrase quoted above itself identifies the particular class of things in question. “Articles” there thus means the class of all those material things that are used by the taxpayer for the purpose of his “trade”. “Things” means, of course, material entities or objects of any kind. “Trade” is also comprehensively defined in sec. 1 of the Act as including “every profession, trade, business, employment, calling, occupation or venture, including the letting of any property”. Hence the class of things involved is of considerable amplitude....Moreover the preceding words “machinery, implements, utensils”, do not sufficiently point to any *genus*; so no reason exists for not giving that word the ordinary, wide connotation canvassed above.”

The approach of the court was to use the ordinary meaning of the word as the Act did not define it and according to the ordinary meaning, the word must be construed widely. In *Quarries Ltd v Federal Commissioner of Taxation* [1961] HCA 69; 106 CLR 310, the High Court of Australia dealt with the word “articles” albeit in the context of “plant or articles”. Taylor J said the following:

“Article”, of course, is an extremely wide word and it is undefined. But this may be of no more consequence than it was thought to be in *M’Intyre v. M’Intee* (1915) SC (J) 27 where Lord Strathclyde observed: “The statute gives us no definition of ‘article’. That is not surprising, for everyone understands the meaning of ‘article’. A more comprehensive word could not by any possibility have been used” (1915) SC (J), at p 28.

The court in that case was confronted with the argument that the use of “articles” was restricted by the word “plant”. Such argument is not relevant to this judgment. No argument has been advanced that articles, implements, machinery or utensils must be construed as denoting a

genus. A reading of the applicable provision shows that the nexus connecting all these words is that they all must be used for the purposes of the trade of the taxpayer.

From the foregoing, the word “article” is ordinarily given a wide meaning. While the ordinary meaning of the word leads to the conclusion that it is of wide application, courts do not ascribe the intention of clarification of legislation on the legislature in a vacuum.

This Court was referred to the case of *AS Schools & Ors v ZIMRA* HH314/16 for the proposition that amendments can clarify the law.

In *AS Schools v Zimbabwe Revenue Authority* SC 61/17 UCHENA JA stated:

“Mr *Magwaliba* for the respondent therefore submitted that the amendment did not bring in a new thing, but was legislated to clarify existing legislation. I agree. It is not unusual for the legislature to clarify legislation whose wording would have caused disputes. In this case the wording of s 8(1) (f) I (a) (iv) had caused disputes between the six appellants and the respondent in the 2009 and 2010 income tax years which had not been resolved at the time of the amendment”.

What is of significance is the fact that in *casu* *Mr de Bourbon* did not provide any clear justification for the contention that the amendment merely clarified an already existing position of the law. Clarification means what is expressly stated by an amendment was already there even before amendment. Such clarification ought to arise out of a need. It cannot be based on conjecture. There has to be a basis for the amendment to be interpreted as mere clarification. No such basis was pleaded before this court. In the absence of such a basis the amendment must be read and be applied as it is.

In *Amberley Estates (Pvt) Ltd v Controller of Customs and Excise* 1986 (2) ZLR 269 (SC), GUBBAY JA (as he then was) dealt with the import of the word “includes” in the definition of “manufacture” in terms of s 2 of the Customs and Excise Act and held:

It is to my mind clear that by the use of the word “includes”, the Legislature intended to extend the meaning of “manufacture” in its ordinary, popular and natural sense, to embrace the specially mentioned activities of “mixing, brewing, distilling” or “production” about which there might have been disputes whether they came within the overall process of manufacture. (See *R v Ah Tong* 1919 AD 186 at 189; *R v Debele* 1956 (4) SA 570 (AD) at 575). Much the same view was expressed by Young J in *E S & A Robinson (Rhodesia)(Pvt) Ltd v Macintyre* NO 1962 (2) SA 638 (SR) at 644A.

The effect of the word “includes” is thus understood as an extension of the ordinary meaning of the word to be defined. In this case, the amendment was through an inclusion to “articles, implements, machinery or utensils” of tangible or intangible property in the form of computer software acquired, developed or used by a taxpayer for the purposes of his or her trade otherwise than as trading stock. The amendment then defined computer software. That this was an inclusion or in a way, an addition to “articles, implements, machinery or utensils” is further buttressed by the fact that in including “tangible or intangible property in the form of computer software acquired...”, the amendment also introduced a separate test for the inclusion of the said computer software. It ought to be acquired or developed or used by a taxpayer for the purposes of his or her trade and that it must not be used, developed or acquired as trading stock.

In the Fourth Schedule, in relation to “articles, implements, machinery or utensils” the test is already laid out in para 2 (c) as “that the articles, implements, machinery or utensils were purchased by the taxpayer wholly or almost wholly for the purposes of his trade.” If computer software was already included in the Fourth Schedule before the amendment, as argued for the

respondent, then there would have been no need to provide a specific test to be provided for it as the amendment does.

While it must be accepted that generally legislation can be amended to clarify the position at law, it is not enough for a litigant to urge this Court to find in favour of such an interpretation without showing the basis for such a conclusion.

DISPOSITION

Accordingly, I find that the appeal has merit and must succeed. Costs will follow the cause. It is therefore ordered as follows:

1. The appeal is allowed with costs.
2. The order of the Special Court for Income Tax Appeals is amended by:
 - (i) the deletion of subpara (b) of para 4, and
 - (ii) the deletion of the reference in para 5 to para 4 (b) such that where it reads “para 4 (a) to (d)” will now read “para 4 (a), (c) and (d)”

GUVAVA JA I agree

ZIYAMBI JA I agree

Advocates’ Chambers, appellant’s legal practitioners

Atherstone & Cook, respondent’s legal practitioners