CA (PVT) LTD
versus
THE COMMISSIONER GENERAL OF THE ZIMBABWE REVENUE AUTHORITY

FISCAL APPEAL COURT
KUDYA J
HARARE 9 June 2016 and 21 May 2019

VAT Appeal

AP de Bourbon, for the appellant
S Bhebhe, for the respondent

KUDYA J: This is an appeal against the amended assessments in respect of value added tax, VAT, and penalties which were raised against and imposed on the appellant by the respondent in the aggregate sum of US$ 1 696 008.76 for the period January 2009 to December 2014.

The background

The appellant, a local incorporated company, is a wholly owned subsidiary of a Dutch company which in turn is wholly owned by E, an American company. E is a wholly owned subsidiary of a worldwide renowned American holding company[1] with business interests in more than 200 countries and territories.[2] The holding company prides itself in being:

> "A global family of people working together to bring consumers a wide array of beverage choices to meet their beverage needs each and every day".

And further recognises that:

> "We are honoured for over a century, we have been invited to be part of the consumers' everyday lives; from their simplest routines to their social celebrations. Consumers have trusted our products and brought them into their homes to be enjoyed by the whole family."

The holding company assigned the rights to its trademarks and brands in connection with the manufacture and sale outside the United States of America of concentrates, beverage bases and syrup used in the production of beverages to E. E, therefore holds both the right to

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[1] P6 of r 5 documents-letter dated 18 December 2014 from tax consultants to the respondent
[2] Q. 18 p177 of the appellant's bundle

produce beverages throughout the world including in Zimbabwe, Zambia and Malawi and to maintain, promote, protect and grow the brands consonant with the brand strategy prescribed by the holding company. It was common cause that E has never been resident nor present in Zimbabwe. The appellant provided services to E for which it was paid a service fee. In turn E executed a Service Agreement[3] with the appellant on 1 January 2007 for delineated services for which it was paid without novating the preceding Service Agreement of 1 January 1996[4] between them.

In terms of the 2007 Service Agreement the appellant primarily provided brand stewardship services and checked the correct advertising of the brands for which it earned service fees of costs plus a 5% mark-up in Zimbabwe. The paper trail for payment by the appellant to a local supplier constituted of a proforma invoice or cost estimate, approval thereof by the Regional Manager, one HM, who had cut his teeth in the same position in both South Africa and Tanzania before moving to Harare in 2010, issuance of a purchase order, supply of the service and payment invoice.

The brands covered in Zimbabwe consisted of the names of the "wide array of beverages choices" covering a coterie of carbonated soft drinks, cordials, juices and water. The brands were marketed through syrup making plants, bottling plants and product manufacturers around the world. The syrup plant, which supplied the basic patented ingredients for these various products to Zimbabwe and other countries in Central Africa was based in Swaziland.

Unlike the 2007 agreement, which was silent on the countries to which it related, the 1996 agreement covered Zimbabwe, Zambia, Malawi, Mozambique and Angola. In the 1996 agreement E authorised the appellant to provide to the manufacturers, sellers and distributors, defined in that agreement as "Authorised Bottlers", of beverages and syrups, defined therein as the "Products" manufactured in countries outside the United States of America consulting services pertaining to the manufacture, quality control and marketing of the Products and the additional services in the field of finance, external affairs, human resources, management of information systems and technical fields connected with the manufacture and sale of the Products. Apparently the American holding company executed separate agreements with the Authorised Bottlers and E that assigned the holding company's rights and obligations over the Authorised Bottlers to E. E in turn assigned those rights and obligations to the appellant. In terms of the fifth preamble to the 1996 agreement, E desired "to engage the appellant to perform

[3] P 171-174 of r 5 documents
[4] P6-9 of respondent's bundle

certain services for Authorised Bottlers in the five countries, in connection with the activities to be developed by the Authorised Bottlers in accordance with the term of their agreement with the American holding company."

In terms of clause 1 of the 1996 agreement, the appellant was mandated to supply directly to the Authorised Bottlers of the Products the eight specified Bottler Services in the 5 countries. These were:

(a) Research on and development of the production, sale and distribution phases of the Authorised Bottlers' business relating to the products and evaluation of such research and development;
(b) Advice, guidance and assistance on all phases of the Authorised Bottlers business as it relates to the Products including production, marketing and administration functions and recommendations for the improvement of the Authorised Bottlers performance results;
(c) Research on and development on new Products and packages for possible sale in the Territory;
(d) Advice and guidance of quality assurance and analysis of Products manufactured by Authorised Bottlers in the Territory;
(e) Make recommendations to E on all matters relating to the services performed under this agreement;
(f) Initiate and solicit ideas from Authorised Bottlers in all matters relating to the services to be performed under this agreement; and
(g) Advice and assistance regarding personnel and human resources matters and external affairs which may affect E and the American Holding Company's activities in or relations with the Authorised Bottlers in the Territory."

The 1996 Service Agreement dealt with the services provided to the Authorised Bottlers and pertained to the beverages and syrups manufactured, distributed and sold by them. On the other hand the 2007 agreement pertained to the provision of services related to and in support of the marketing by the appellant of the trademarked Beverages assigned to E by four foreign entities, which included the holding company. In terms of the first preamble, E held the right to market these brands by contracting with service providers for the performance of services related to or in support of the marketing of the trademarked beverages. The 2007 agreement did not deal with the manufacturing aspects covered in the 1996 agreement. It however entrenched E's right to engage service providers to market the trademarked beverages in specified countries. The second and third preamble to the 2007 agreement acknowledged the expertise and know-how of the appellant in the marketing of beverages. "The marketing of the Beverages" was defined in these two preambles to include "the enforcement of all quality standards and specifications captured in the agreements between the four foreign entities and the party authorised to prepare, package, distribute and sell the Beverages in the Territory" and "sales, advertising, promotion and business development."

In the 2007 Service Agreement, E and the appellant agreed in clause 1 and 13 that:

1. The appellant shall provide the following services to E related to and in support of marketing the Beverages in accordance with the instructions it shall receive from E from time to time:
   a. Advice and guidance to third party marketing service providers in the areas of marketing, advertising and sales promotion, within the strategic guidelines and initiatives developed by E for the brands, including advising on the funds necessary for the promotion and advertising of the Beverages;
   b. Recommendations to E with respect to E or its affiliates participation, if any in the bottlers' marketing or promotion expenditures and/or in the conduct of E's or its affiliates own marketing or promotion expenditures;
   c. Performance of other services to E, including gathering information and preparing documentation related to researching and determining economic, regulatory, technical and marketing conditions that impact upon the marketing of the Beverages and performing administrative or financial services in support thereof to maximize business system efficiencies;
   d. Advice and guidance in connection with management information services, computer software programs and communication technologies in general;
   e. Technical and quality control services to ensure that Beverages are manufactured to the specifications of the four foreign entities and
   f. Advice to E in implementing the rights and obligations of the four foreign entities in the territories and to provide any other services related herewith

   Notwithstanding any of the foregoing clauses of this Paragraph 1 or any other provision of this Agreement, the scope of the appellant's authority shall be specifically limited to those activities requested by E and in no event shall the appellant be authorised to enter into contracts on behalf of or in the name of E.

13. This Agreement supersedes all other agreements between the parties on the subject matter herein covered."

The broad timelines

On 16 February 2015 the respondent issued a total of 67 amended VAT assessments for the period January 2009 to December 2014. The appellant objected to these assessments on 6 March 2015. The objection was disallowed on 8 June 2015. The appellant lodged its notice of appeal on 30 June 2015 and filed its case on 31 August 2015. The respondent filed the Commissioner's case on 13 October 2015.

The issues

The two issues that were referred on appeal at the pre-trial hearing of 22 March 2016 were:

1. Whether or not the services rendered by the appellant to E, [for which E paid] were supplied directly in connection with movable property in Zimbabwe at the time the services were rendered; and
2. Whether or not it was appropriate for the respondent to levy penalties as it did, or at all

The evidence of the Regional Franchise Manager

At the appeal hearing, the appellant called the evidence of its Regional Franchise Manager, HM. He testified that the appellant was not involved in the production and manufacture of the products and the supply of syrup. Rather, this was the contractual mandate of three bottling companies, DB, SCZ and MBC and five plants in Zimbabwe, three plants and two bottlers in Zambia and three plants and one bottling company in Malawi. The appellant was contractually obligated to propagate and promote the brands that were connected with these products and conduct market research on the market size and growth opportunities in each of these three countries. The Franchise Regional Manager stated that he devoted 10% of his time to Malawi, 15% to Zambia and 75% to Zimbabwe. He stated that branding was often times dictated and guided by the overarching and innovative global markets reach of E. He explained that market research impacted on existing product lines and container sizes and could drive the introduction and launch of new products, such as CZ and MM in the local market.

He produced exh 1, the executive summary of the three major services allegedly provided to E by the appellant that are detailed in the 223 paged appellant's bundle of documents. These fall under the rubric of firstly, marketing, secondly market research and determination of brand health and lastly the enforcement of standards and implementation of policies emanating from E.

Marketing:

The underlying marketing objective of the appellant was to steward and grow the brands by assessing and reporting on the consumer dynamics in Zimbabwe and localising global campaigns by developing locally relevant marketing initiatives through various line media platforms such as billboard artworks, wallscapes, photography, electronic and print media and leveraging music and catchy lyrics. In contradistinction, the bottlers were allegedly responsible for launching the campaign to external stakeholders and consumers, the production of point of sale consumer materials for use in the local market, executing campaign materials in the market and manufacturing and distributing the branded products.

The campaign referenced by the witness in appendix 1[5] of the appellant's bundle of documents consisted of a campaign collated on 25 September 2015 and launched globally some two months before the witness testified, long after the period covered by the amended assessments. The witness failed to indicate when the campaign was conceived and the nature and extent, if any, of the appellant's participation in the conception of the campaign. He was

[5] P 1 to 96 of appellants bundle of documents

content to portray the appellant as a supporting appendage to E in the promotion, broadcast and roll out of its international brands in Zimbabwe. He, however, averred that the appellant sought to customize the global campaign to local culture, jingles and languages and indicated that the campaign materials were printed and distributed in local points of sale by the bottling companies. He maintained that the appellant unlike the bottling companies was not involved in the manufacturing of the branded products. He was also content to say that the vehicles used to conduct the 2015 campaign were similar to those that were used in the campaigns conducted during the period covered by the assessments.

The witness unwittingly revealed the connection between the products or beverages and the function of the appellant in sensitizing the market to new products by reference to consumer resistance to any new products that contained less sugar than the original products. He concentrated his testimony on the 2015 launch to the detriment of the launches, if any, which fell within the period covered by the amended assessments. The brand depicted in appendix 1 consists of pictures of the signature beverage name and script on containers such as bottles, cans and glasses with the visible effervescing contents of the product being exchanged and imbibed by people of all shapes and sizes. There are trendy taglines tracing the time line from 1886 to 2009 and captions of revellers falling in love, deriving pleasure, having meals at home, and invitations to fun, savouring the taste and some headlined the shopper's toolkit and depicting brotherly love. The name of the signature product and the product is featured prominently in the full throttle marketing scheme.

Development of marketing strategies for different varieties

The sole witness further testified that the role of the bottlers and plants was to produce, distribute and sell the beverages and in the process exploit the opportunities disclosed by the marketing research for the different product varieties including any new products that they were contractually obligated by the American holding company to produce, distribute and sell. The market research conducted by the appellant was based on the appellant's wide knowledge of the local market dynamics and consumer responses the results of which were relayed to E for inclusion in the development of business strategies and plans in support of the brand growth and value. He intimated that market research was conducted at least once a year while the "Brand Health Tracking" was conducted at least four times a year. He further referred to the BMi Research[6] entitled "The 2016 Annual Quantification Report on Commercial Non-

[6] P 129-130 of appellant's bundle BMi Research (Pty) Ltd, a South African registered company

Alcoholic Ready to Drink Beverages- Executive Summary" dated 8 April 2016, appendix 2[7]. The report reproduced 10 slides consisting of the research objectives, research methodology, definitions, macro-economic trends, production, annual distribution, annual packaging, market share of the brands, copyright and disclaimer and contact details.

The objectives of the research were, firstly, to quantify the local non-alcoholic ready to drink beverages market by volume and value, secondly to categorise the volume by channel, region, product and packaging, thirdly to highlight current trends in volume and value for each category and lastly to forecast the likely volumes for 2016 and 2020.

The methodology involved on-site market appraisals of product availability by a senior researcher, contacting major manufacturers, importers and governmental bodies by telephone or in person, comparison between the data collected from the participants and historical information supplied by packaging suppliers, analysing the data to ascertain market trends, undertaking desk research to supplement and substantiate market data, publication and distribution of reports to subscribers and participants. The channels covered in the research were general dealers, liquor stores, garage forecourts, restaurants, hospitality centres, public and sports bars, hypermarkets and supermarkets and wholesale outlets. Included in the market research was an analysis of the performance of the local economy and the impact it had on the private consumption expenditure of households and other consumers.

Apparently, the local economy heavily depended on mining and agriculture. Contraction was experienced between 1998 and 2008 but real growth of 10% per year was recorded between 2010 and 2013 and thereafter it slowed down to 3% in 2014. The summary looked at the impact of the purchasing power parity, inflation rate and population growth rate and the Gross Domestic Product Year on Year rate between 2013 and 2015 and the effect of currency fluctuations in the multi-currency basket used in Zimbabwe after February 2009 on the production and consumption of the ready to drink beverages.

The research on production was divided into three segments of total market size, total market growth and total market forecast. The product categories were bottled water, dilutables; ready to drink energy drinks, ready to drink fruit juices, ready to drink iced tea, ready to drink sports drinks and sparkling soft drinks. Under the first segment, the research covered the 2015 year and recorded the volumes in million unit cases and their respective greenback values. In pole position were dilutables followed by sparkling soft drinks and bottled water. The second

[7] P 07-130 of appellant's bundle of documents

segment looked at the period 2014 to 2016. The average growth rate between 2014 and 2015 was 4.8% while the estimated growth rate from 2015 to 2016 was 5.8%. The actual and estimated growth rate for each product category was highlighted[8]. Bottled water showed phenomenal growth, followed by energy drinks, fruit juices, iced tea and sparling soft drinks. Dilutables had the lowest growth rates. The product category growth rate trend forecast for 2014 to 2016 and 2014 to 2020[9] mirrored the actual and estimated market growth trend.

The total annual channel demand was classified under specified clusters of wholesalers and retailers while the distribution was categorised under the aegis of each of the ten political provinces in Zimbabwe. The types of packaging consisted of cans, cartons, glass, and plastic. The total demand by pack size was highlighted.

The market share for the brands on each product category in 2014 and 2015 were compared with the rest of the market. The total market share for the brands was over 62% but sparkling soft drinks were over 80%, dilutables over 79% and fruit juices over 27% in each of the two years. The regional market share was in excess of 68% in all the provinces and 63% in respect of dilutables. The channel market share was even higher for these two product categories[10]. The report also covered the packaging market share rate for each category. The share for dilutables and sparkling soft drinks was in excess of 80%.

I make two findings from the detailed marketing research activities. The first is that they were conducted by a South African Company for the American holding company and not by the appellant for E. The witness's testimony did not disclose the link between the South African researchers and the appellant. In my finding, the research cannot be attributed to the appellant. The second finding is that the efficacy of the research depended on the actual sales of the beverages that were made in Zimbabwe during the period covered by the research. It looked at the historical data of the beverages that were in Zimbabwe at the time covered by the research. To the extent that the market research related to 2014, it was in my view directly related to the beverages that were in Zimbabwe in that year.

The Brand Health Tracker-

Appendix 3[11] dated 6 April 2016 was produced by TNS for C Southern Africa and not the appellant. The sole witness called by the appellant did not disclose the link between the researcher and C Southern Africa and the appellant. Appendix 3 tracked markets in Zimbabwe,

[8] P113 of appellant's bundle.
[9] P 114 of appellant's bundle
[10] P 121-128 of the appellant's bundle
[11] P 131-166 of the appellant's bundle

Zambia, Malawi, Botswana, Namibia and Angola quarterly through the medium of random house selection, quota selection within the house, quotas on region, age, gender, national urban and rural sample, GE 11-49, gender and all classes. With specific reference to Zimbabwe the research methodology utilized a Shona and English questionnaire which was divided into three sections of frequency and brand health, occasion and situational equity and shopper information and key shopper insights. The questionnaire incorporated three new brands. The research was conducted against the backdrop of the 2015/2016 economic environment characterised by "an extreme economic down turn with the largest banks running out of the greenback, severe drought and rife malnutrition". The researcher relied on a BMi forecast predicting the "continued decline of the food and drink industry due to soft domestic demand, food deficit and booming informal food and drink industry and a GDP of 1.1% in 2016 on the heels of a 2015 recession and lower mass grocery retail prices and aggressive price competition by new players".

The research tracked the market share trends in the carbonated soft drinks, ready to drink juices, cordials, bottled water, sports and energy drinks and iced tea products based on the strong brand equity and consumer preferences in a competitive Zimbabwean landscape. The research showed that in both in the home and out of the home consumption rates were based on availability, affordability and functional considerations such as health, fun and stress relief. The consumption of the products of the American holding company especially its signature carbonated soft drink, juice cordials and ready to drink packed juices in comparison with the products of other bottlers and plants topped the list of consumptions. At pages 149-151 of the appellant's bundle these products were referred to as brands. The conclusion derived from the research was that most consumption occurs in the home. The favourite out the home beverages were carbonated soft drinks, hot tea and alcohol. The researcher recommended the maintenance of marketing and tactical strategies in-home and out-of-the-home consumptions. It observed that beyond the favourite two carbonated soft drinks, there was an opportunity to try other brands and encourage their consumption as they were often adversely affected by availability and affordability.

It seems to me that like in regards to marketing research, the brand tracker research was directly based on the sale of E's products in Zimbabwe, notwithstanding the valid observation made by Mr *Bhebhe*, for the respondent that the brand tracker research fell outside the relevant years to which the assessments relate.

Ensuring compliance and implementation of policies

The witness disclosed that appendix 4, the comprehensive policy document dated 25 September 2015, reproduced some of E's mandatory policies for implementation such as the Responsible Marketing Policy and Global School Beverage Guidelines[12] which precluded directly marketing the brands to children[13] under the age of 12 where such children constituted 35% or more of the target audience and especially primary schools without the consent of the school authorities or the parents or the caregivers of the underage children. It emanated from the American holding company's Chief Marketing Officer and was an update of the Responsible Marketing Policy of 2009 as amended in 2014.[14] It applied to all the beverages in the stable of the holding company. In the foreword, addressed to "All Associates Worldwide" the Chief Marketing Officer underscored the "critical aspect of building our reputation, brands and business" and emphasised that "the responsibility for training, execution and compliance (was) a truly cross-functional effort in close collaboration with our bottling and agency partners."[15] The witness reiterated the point made in the appellant's case that the appellant worked to ensure adherence and compliance with all standards and policies prescribed worldwide by the holding company with particular reference to responsible marketing of the brands, the American holding company's products, quality and technical compliance by the bottlers and monitoring certain principles laid down for the guidance of the bottlers.[16] In fulfilment of its contractual obligations to E, notwithstanding the absence of any privity of contract with the bottlers, the appellant provided guidelines to the bottlers, tracked compliance and reported progress on the policy. Apparently, the bottlers operated within the terms of agreements entered into with the American holding company.

The witness maintained that the work and campaigns undertaken by the appellant together with the strategies applied were meant to support the brands in Zimbabwe. He, however, only became aware of the 1996 Service Agreement after the service of the

[12] P167-223 of appellant's bundle
[13] Under media platforms such as television shows, print media, websites, social media, movies, SMS and e-mail marketing and digital media on billboards and on any device such digital billboards, smart phones, mobile phones and tablets, the internet, You Tube, video blogs SnapChat, Facebook, Twitter. The envisaged marketing communication would not directly appeal to such children through the use of celebrities and characters, movie tie-ins related to movies, games and contests, branded toys and branded sponsorship of sporting and entertainment events whose primary appeal is to such children and images of the products being consumed by such children without an adult.
[14] P 180 of the appellant's bundle
[15] First para on p 168 of appellant's bundle
[16] Para 15.3 of the appellant's case

respondent's bundle, filed on 30 May 2016. And only then did he realise that the 1996 agreement related to 5 countries while the 2007 omitted mention of any country.

I reproduce three definitions found in the policy document[17], which I believe will assist in the resolution of this matter. These are "Marketing" defined thus:

> "The term marketing includes all publicly disseminated commercial advertisements in media that is produced directly by or on behalf of marketers and intended primarily to promote products or to influence consumer behaviour."

Under "Our Products" the policy documents stipulates that:

> "The Policy applies to all the holding company's brands and products".

And branded toys are defined as:

> "Toys that feature one of our Company's logos or trademarks" (the signature drink script and identifiable iconography).

The witness stated that appellant also tracked whether the bottlers were compliant with the "Supplier Guiding Principles and Workplace and Human Rights Policy", which required them to adopt responsible workplace practices that respect human rights and applicable core international conventions and local environmental and labour laws.

It seems to me that the reference made to compliance by the bottlers necessarily involved the appellant in the direct production of the products manufactured by the bottlers.

The differences between the 1996 and 2007 Service Agreements

The Beverages in the 2007 agreement were referred to as Products in the 1996 agreement. Unlike in the prior agreement, the territories were not identified in the subsequent agreement. In the prior agreement the appellant's expertise and know-how was identified. The prior agreement related to the direct provision of services to the Authorised Bottlers that covered the whole business operations of the bottlers from manufacturing to sales of the Beverages.[18]. The subsequent agreement covered the marketing of beverages and excluded from its reach the manufacture of the beverages.

In oral submissions Mr *de Bourbon* criticised the poor draftmanship of the 2007 Service Agreement and sought to equate upper case Beverages with the right to market brands and lower case beverages with the right to brand. In my view, his contentions would wreak violence to the definitions of the two words in the first preamble to the agreement. The lower case beverages referred to the individual trademarked products produced under licence from each of the four foreign entities while the upper case Beverages was a collective term for all these

[17] P 173 of the appellant's bundle
[18] Preamble 4 and 7 on page 6 of the respondent's bundle of documents.

"wide array of beverages". Indeed the definition of beverages in the first preamble was in consonance with the reason why E engaged the appellant as set out in the second preamble and the expertise that the appellant paraded in the third preamble. It was to market the Beverages and not the brands. I do not agree with Mr *de Bourbon's* contention that the "services related to and in support of marketing Beverages" was a "poor shorthand" for the right to market brands that was assigned to E in the first preamble. In my view, the words in the first preamble commencing from "shall assist" to the end of that preamble define what "having the right to market brands" connotes, that is, the right related to or in support of the marketing of the trademarked beverages. In simple terms the right to market brands as used in the 2007 agreement is synonymous with the right to market the beverages. What is apparent from the first clause in 2007 agreement is that E and the appellant agreed that:

> "The appellant shall provide the following services to E related to and in support of the marketing of the Beverages in accordance with instructions it shall receive from E from time to time……..“Notwithstanding any of the foregoing clauses of this Paragraph 1 or any other provision on this agreement, the scope of [the appellant's] authority shall be specifically limited to those activities requested by E and in no event shall [the appellant] be authorised to enter into contracts on behalf of or in the name of E."

The effect of the above cited provision was to constrict the rules of engagement to the marketing of Beverages rather than the marketing of brands.

But even if Mr *de Bourbon* was correct that the phrase "in relation to or in support of marketing the Beverages was a poor shorthand for marketing brands", he had two hurdles to surmount. The first was whether the marketing of the brands was not intrinsically the same as the marketing of beverages. There was a poor attempt by E to separate the two. This was apparent from the definition of branded toys which made it crystal clear that the brand was indistinguishable with the toy which it branded. The same applies in my view with equal force to the brands attached to the beverages. The attempt to separate the brand from the Beverages was utterly nullified by the segmentation in appendix 3 which like appendix 4 at pp 149-151 of the appellant's bundle of documents equated the Beverages with the brands. To the same effect was the understanding of the sole witness for the appellant who under cross examination defined the "brand" as synonymous with "the trademarks" attached to the beverages. After all, the accent of the Responsible Marketing Policy cited at the commencement of this judgment and the definition of marketing found in the same policy has always been "intended primarily to promote products or influence consumer behaviour".

The second hurdle arose from the wording of clause 13 of the 2007 agreement. In my view, the effect of clause 13 was to save the provisions in the 1996 agreement that were not specifically covered in the 2007 agreement. Thus even if I were to assume that the 2007 agreement dealt only with the marketing of brands and not Beverages, the preamble in the 1996 agreement prescribed the purview of the appellant's expertise in such areas as the provision of consulting services in the manufacture, quality control and marketing of the trademarked beverages and syrups and in finance, external affairs, human resources, management information systems and technical fields connected with the manufacture and sale of the Products. In fact the whole of clause 1 of the 1996 agreement gave the appellant overarching powers to act for and advise E in regards to the listed array of activities that it was permitted to do, which covered almost all the business activities performed by the bottlers in the manufacture, preparation, promotion, distribution and sale of beverages. The subject matter of manufacturing beverages was not dealt with in the 2007 agreement and therefore in accordance with clause 13 of the 2007 agreement remained extant as between E and the appellant. Consequently, I hold that the submission advanced by Mr *de Bourbon* in his written heads that the prior agreement was irrelevant to the issues before this Court[19] was incorrect.

The assessment of the evidence of the Regional Franchise Manager

The opening and closing words of clause 1 of the 2007 agreement undermined the probative value of the Regional Franchise Manager's testimony. The appellant was required to act on the specific instructions of E in the period covered by the VAT assessments. Rather than produce those instructions, the witness chose to rely on appendices 1 to 4 as summarised in exh 1, which fell outside the period covered in the appeal. He failed to disclose why he did not produce the instructions for the relevant period. The veracity of his testimony was not saved by the concession made in the pleadings by the respondent that "certain services" were rendered by the appellant to E. It was clear to me that despite this concession, the fact that the appellant saw it fit to lead evidence on the instructions that were purportedly given outside the prescribed period demonstrated its appreciation that it had a duty to establish on a balance of probabilities the instructions that it received and the services it rendered during the period covered by the VAT assessments. It was imperative that this be done in view of the concession made by the witness under cross examination that in "each and every year there is a different campaign that we run". The witness evidence dismally failed to establish such evidence. In the light of clause 13 of the 2007 agreement, his insistence that the appellant did not render marketing services but grew the brands in Zimbabwe sounded hollow.

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[19] P3 para 4 last sentence.

The witness was an experienced employee of the appellant who was in charge of the administrative apparatus of the appellant. He had worked in similar capacities in both Tanzania and South Africa. Any modicum of diligence on his part would have established the existence of the 1996 agreement and its import. The probabilities emanating from his failure to produce instructions covering the tax assessment period, to my mind establishes that he was aware that those instructions were detrimental to the appellant's case. I find that he therefore deliberately feigned ignorance of the 1996 agreement. In any event, his testimony failed to link the appellant with the appendices summarised in exhibit 1, which were demonstrably prepared by third parties.

I am therefore unable to accede to Mr *de Bourbon's* request that I accept the sole witness's evidence in its entirety. It seems to me that the provision of services to the non-resident company in respect of the brands and beverages was seamless, holistic and indivisible and not severable as the witness sought to portray in his testimony. The drinks and containers constituted movable property situated in Zimbabwe at the time the services were rendered, a point conceded to by the sole witness under cross examination and not negated by his attempt in re-examination to refer to new products that were introduced in Zimbabwe subsequent to the VAT assessment period under appeal.

The legal submissions

The appellant submitted that the services it rendered to E, captured in the re-opened returns between February 2009 and January 2015 were zero rated for VAT purposes. The respondent submitted that the services were standard rated. Mr *Bhebhe* strongly argued that the appellant had failed to discharge the onus on it to show that the decision to standard rate the services provided to E was wrong. He contended that the promotion of the brand was predicated on the sale of the products to which the brand was affixed.

In order to answer the first issue referred on appeal I must look to the relevant legislative provisions on which the appeal is based.

The legislation

Section 10 (2) (l) and (3) of the Value Added Act *[Chapter 23:12]* is relevant to the main issue referred on appeal. It reads:

> "(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—

(*l*) the services are supplied for the benefit of and contractually to a person who is not a resident of Zimbabwe and who is outside Zimbabwe at the time the services are rendered, not being services which are supplied directly in connection with:

(ii) movable property situated inside Zimbabwe at the time the services are rendered, except movable property which:

A is exported to the said person subsequent to the supply of such services; or

B forms part of a supply by the said person to a registered operator and such services are supplied to the said person for purposes of such supply to the registered operator;

and not being services which are the acceptance by any person of an obligation to refrain from carrying on any trade, to the extent that the carrying on of that trade would have occurred within Zimbabwe; or

(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.

Both counsel agreed that the import of section 10 (2) (l) is to allow zero rating of services supplied by a person or company within Zimbabwe for the benefit of and contractually to a person who is not resident in Zimbabwe and is outside Zimbabwe at the time the services were supplied, provided the provisions of subsection (3) of the same section are met. The registered operator who applies the rate of zero *per centum* is obliged to obtain and retain documentary proof that is acceptable to the Commissioner substantiating its entitlement to zero rating. It was common cause that the appellant did not obtain and retain the documentary proof that is envisaged by s 10 (3) of the Value Added Tax Act. The submission by Mr *de Bourbon* in his written heads that "no issue arises as to the fact that the Appellant has complied with section 10 (3) of the VAT Act"[20] was misconceived as was the contention made in oral argument that this subsection did not form part of the respondent's case. I reiterate the warning given to all appellants by MCDONALD ACJ in *L* v *Commissioner of Taxes* 1975 (2) SA 649 (RAD) at 652 that:

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

Whether s 10 (3) of the VAT Act was established by the appellant

It was therefore remiss of the appellant to seek to rely on what the respondent, on whom no onus lay, did not do in order to save its appeal from collapse. Clearly, s 10 (3) constituted an essential requirement to the applicability of zero rating of the services supplied by the appellant to E. The duty to produce such documentary proof lay on the appellant. The vouchers raised by the appellant and the payment invoices issued to the appellant would constitute documentary proof substantiating the entitlement to zero rating acceptable to the

[20] Last sentence of para 6 on p 5 of the appellant's written heads of argument

Commissioner. A sample of such invoices, under the moniker "Consolidated Affiliate Advice" are to be found on pages 176 to 195 of the r 5 documents. I am thus satisfied that the provisions of s 10 (3) were thus established by the appellant.

Whether the services were supplied for the benefit of and contractually to a person who is not a resident of Zimbabwe and was outside Zimbabwe at the time the service was rendered.

It was common cause that the appellant executed two service agreements with E which was not resident in Zimbabwe and was outside Zimbabwe at the time the agreements were executed. The services that the appellant rendered during the period of the assessments were not established by the appellant. The only credible services arising from the two agreements produced in evidence were the marketing of branding services rendered to E by the appellant in Zimbabwe, Zambia and Malawi and the marketing of beverage services rendered to both E and local bottlers and plants in Zimbabwe, Zambia, Malawi, Mozambique and Angola. The services were rendered for the benefit of and contractually to E. The preamble and clause 1 of both agreements clearly and unambiguously mandated the appellant to render the services to E and for the benefit of local third parties such as authorised bottlers who manufactured, distributed and sold the beverages to which the brands were affixed. The information gleaned from Appendices 1 to 4 of the appellant's bundle demonstrated that the services that could possibly have been rendered by the appellant, whether they be characterised as the marketing of brands or the marketing of beverages were directly connected to the sale of beverages. The phrase "the benefit of and contractually to" are not qualified by such words as the "sole" or " dominant" or "main" or one of the main" and in my view do not require the Commissioner or on appeal the Fiscal Appeal Court to assess the extent of the " benefit of" and contractual link to the affected taxpayer. Two legal principles favour construing the words in favour of the taxpayer. The first is that they must be given a wide ambit because the Legislature did not qualify their application and secondly if at all the words could be construed as ambiguous then the *contra fiscum* rule would favour interpreting them in favour of the taxpayer. On the basis of these two principles, I would find that the appellant established on a balance of probabilities that the services rendered to E were rendered for the benefit of and contractually to E, a non-resident, who was outside Zimbabwe at the time the services were so rendered.

The next sub- issue that arises is whether the services were supplied directly in connection with movable property situated in Zimbabwe at the time the services were rendered.

Whether the services were supplied directly in connection with movable property situated in Zimbabwe at the time the services were rendered

While the sole witness called by the appellant valiantly attempted to demonstrate that branding constituted a separate and distinct concept of creating awareness and brand equity in both old and new products, I was satisfied from the literature produced by the appellant and the definition of brand proffered in his oral testimony that the term was used interchangeably with either the trade mark or distinctive sign on a product or service to which it was attached or with the product.

In *Protective Mining & Industrial Equipment Systems (Pty) Ltd (formerly Hampo Systems (Pty) Ltd)* v *Audiolens (Cape) (Pty) Ltd* 1987 (2) SA 961 (A) at 979A-C GROSSKOPF JA stated that:

> "The use by manufacturers of distinctive marks upon goods which they have made is of very ancient origin, but legal recognition of trademarks as a species of incorporeal property was first accorded by the Court of Chancery in the first half of the nineteenth century. The right of property in a trade mark had special characteristics. One, which it shared with patents and with copyright, was that it was a monopoly, that is to say, it was a right to restrain other persons from using the mark. <u>To be capable of being the subject matter of property a trade mark had to be distinctive, that is to say, it had to be recognisable by a purchaser of goods to which it was affixed</u> as indicating that they were of the same origin as other goods which bore the same mark and whose quality had engendered goodwill. Property in a trade mark could therefore only be acquired by public use of it as such by the proprietor and was lost by disuse." **(**Underlining mine for emphasis**)**

Again *Fick* v *Woolcott and Ohlsson's Cape Breweries* 1911 AD 214 approved in the subsequent cases of *Pietermaritzburg Corporation* v *South African Breweries Ltd* 1911 AD 501 at 517 and in *Receiver of Revenue Cape* v *Cavanagh* 1912 AD 459 at 463, held that a liquor licence "has a commercial value apart from the premises to which it relates and that separate value, not being real property, cannot be rated" nor did it constitute "immovable property".

The Zimbabwe Trademarks Act [*Chapter 26:04]* in s 2 defines a trade mark thus:

> "trade mark" means a mark which is used or proposed to be used in relation to goods or services for the purpose of—
>
> (*a*) indicating a connection in the course of trade between the goods or services and some person having the right, either as proprietor or as registered user, to use the mark, whether with or without any indication of the identity of that person; and
>
> (*b*) distinguishing the goods or services in relation to which the mark is used or proposed to be used, from the same kind of goods or services connected in the course of trade with any other person;

It seems to me that a trade mark derives its efficacy from trade of goods or services to which it is affixed as a badge of origin. It does not appear to me to have an independent existence. The contrary case of L*iebenberg* v *Koster Village Council* 1935 TPD 413 at 417-418 by TINDAL AJP and SOLOMON J held that electricity, being in nature an energy, could not constitute "movables sold and delivered" as it could not be "taken possession of physically" appears to me to be distinguishable on the facts from the present matter.

I have already found the extent to which both the 1996 and 2007 agreements governed the relationship between E and the appellant. That finding abnegates the argument advanced by Mr *de Bourbon* that the 2007 agreement superseded the 1996 agreement. The 1996 agreement clearly granted the appellant the right to provide consulting services in the manufacture, quality control and marketing of the trademarked beverages and syrups defined in that agreement as products and in the 2007 agreement as beverages. In addition, the appellant was to provide these services in the finance, human resources, management information systems and technical fields connected with the manufacture and sales of the products in the Territory in accordance with the agreements executed between the holding company and the bottlers. The 1996 agreement was replete with the services rendered ostensibly to E but in reality to the bottlers in connection with the production, sale and distribution phases of the beverages and syrup in the bottler's business. The right of the appellant to superintend over the manufacture of trademarked products in the Territory was not superseded by the 2007 agreement. Rather, the latter agreement merely emphasised the provision of services related to the marketing, research and enforcement of the brands of E. The latter agreement did not take away the provision of services to E in connection with the manufacture, distribution and sale of the beverages. The prior agreement allowed the appellant to be directly involved in the production, distribution and sales of the beverages.

It was common cause that the beverages were contained in a variety of trademarked packaging made of glass, plastic and paper. The brands, being in essence trademarks, were attached to the packaging. The only purpose of marketing and promoting, researching and growing the brand names and their value was to sell the beverages. It was common cause that the beverages, as defined by the appellant as products in the 1996 agreement and Beverages in the 2007 agreement constituted movable property. Mr *de Bourbon* contended that trademarks and distinctive marks on goods are recognised as separate movable property in their own right, incorporeal in many instances but nonetheless identifiable as property. I hold that the trade marks affixed to the containers and products and the products in their own right constituted movable property physically situated in Zimbabwe as contemplated in *Torf's Estate* v *Minister of Finance* 1948 (2) SA 283 (N) at 293 which held that goodwill was an incorporeal movable property.

Now, unlike goodwill which cannot be seen or touched, the appellant's trademarks can be seen and touched. They are affixed or attached to beverages or products. They are marketed with and on the beverages. In the campaign reported in appendix 1 and the research set out in appendix 2, the Annual Quantification Report, the brands are indistinguishable from the beverages. In my finding, both the campaign and report were directed at the beverages.

The meaning of directly in connection with

The phrase directly in connection with connotes a link between the service provided and the movable property to which such service attaches. It was common cause that the appellant rendered services directly to the non-resident company in connection with the brands. The appellant contended that no such services were rendered directly in connection with the beverages. Mr *de Bourbon* submitted that the absence of any relationship between the bottlers and the appellant negated the existence any services that were supplied directly in connection with the beverages, such as their manufacture, production, or sale. Rather, the services were provided directly in connection with the brands which those trademarks represented and not any item upon which the brands might be placed. The appellant recognised that the manufacture or production of the beverages and the containers of the beverages and sale of the finished product would be adequate to meet the "directly in connection with movables situated in Zimbabwe" requirement[21]. It was therefore common cause that the beverages fell within the category of movable property[22]. As long as the beverages were in Zimbabwe, and the services were being rendered directly in respect of those beverages, the identity of the custodian thereof was irrelevant. In those circumstances, the provision in question was properly applied by the respondent. The services provided by the appellant of marketing and promoting awareness of the brand pertained to and were associated with the sale of the beverages, a factor not disproved by appendices 1 to 4, which related to 2015/2016 years of assessment and not the ones under challenge. The brand affixed to the product was one with the product and the non-existence of the product in Zimbabwe would have rendered, the agreement nugatory.

In a local case which went on appeal to the South African Appellate Division of *Olley* v *Maasdorp & Anor* 1948 (4) SA 657 at 665-6 WATERMEYER CJ suggested that the word "direct' was analogous to "immediate" and at 667 "indirect pecuniary interest" was synonymous with "a financial benefit from". The Appellate Division was there seized with the interpretation of

[21] Para 17-19 p 10-11 of the appellant's written heads of argument
[22] Note 20 and last sentence of para 25 page 13 of the appellant's heads of argument

the words "any direct or indirect pecuniary interest in any contract with the municipality" in s 17 (2) of the Municipality Act (Southern Rhodesia Statutes) [*Chapter 97]*. He stated that:

> "As to the meaning of the words ["any direct or indirect pecuniary interest in any contract with the municipality"] it seems to me *prima facie* that the person has a pecuniary interest in a contract if he is so connected with its existence or performance, or in other words so circumstanced with respect to it, that his financial position is affected by it either beneficially or detrimentally. It is somewhat difficult to draw a clear line of distinction between a pecuniary interest in a contract which is direct and one which is indirect because the words have no precise legal meaning, but it is clear that the Legislature, by using both words, direct and indirect, intended to extend the <u>disqualification beyond the immediate parties</u> to the contract". (Underlining mine for emphasis)

In the present matter the immediate parties to the contract were the appellant and E. There were two features in the contract which also made the bottlers immediate parties to the contract. The first was the allusion in the preambles of the two contracts to the accrual of benefits to the bottlers. In these circumstances, the absence of a direct contract between the appellant and the bottlers would be of no moment. The legislative provision is properly engaged by a demonstrable proximate and intended link between the provision of the service to the non-resident and the movable property physically situated in Zimbabwe. Neither the question of ownership of the beverages nor the personages to whom the service and benefits accrue at the crucial time of linkage is relevant to the determination of whether the service and the movables were directly connected.

The contention by Mr *de Bourbon* that marketing relates to the business of the bottlers and not to the beverages was self-defeating bearing in mind that the business of the bottlers was to manufacture, distribute and sell beverages. In terms of the contract, appellant supplied services for the benefit of E which was outside Zimbabwe at the time the services were rendered. These services were supplied directly in connection with movable property, the beverages, situated in Zimbabwe at the time the services were rendered.

Apportionment of the VAT liability between Zimbabwe, Malawi and Zambia

The sole witness indicated in his testimony that he conducted 75% of his duties in Zimbabwe, 15% in Zambia and 10 % in Malawi. Two factors militate against his testimony despite the fact that it was not controverted by the respondent by way of any contrary evidence or cross examination. The first was the point correctly taken by Mr *Bhebhe*, that apportionment was not raised in the letter of objection of 6 March 2015. It was remiss of the appellant to smuggle into evidence such testimony without the consent of the respondent or leave of the Court. The second factor was that the witness was not the sole employee of the appellant and his sole conduct was inadequate to constitute the apportionment of the services rendered by the appellant. In any event in the absence of the instructions issued to the appellant by E and any supporting documents on the nature and extent of such services it is impossible to determine the veracity of the sole witness's apportionment.

Conclusion

The determination of the respondent firstly that the services were rendered directly in connection with the brand of soft drinks situated in Zimbabwe and secondly, that the brand marketing advertisement and other services related to standards, directly in connection with the soft drinks situated in Zimbabwe, both of which could not be zero rated was unassailable. Accordingly, the objection was correctly disallowed.

Penalties

In assessing the appropriate penalty I am obliged to consider the triad of the offender, the offence and the interests of society. Mr *de Bourbon* did not address me on the factors that I must consider in favour of the offender. The evidence revealed that it was generally a law abiding corporate citizen, which always endeavoured to honour its tax obligations. Indeed it paid the assessments and penalties when called upon to do so. It appeared to have been co-operative during the investigations. The offence is always treated in serious light. Every taxpayer is obliged to pay its fair share of the tax burden. There were disquieting features in the manner the appellant conducted its appeal which raised its moral turpitude. I did not believe that the appellant was unaware of the 1996 agreement. In his written heads Mr *de Bourbon* gave the wrong impression that the respondent abandoned the 2007 appeal due to a change in currency. The facts disclosed that the objection raised by the appellant on 13 November 2006 was disallowed on 6 June 2007. Clearly, it must have been the appellant who abandoned the appeal. The abandonment obviously vindicated the respondent's position disclosed in the "advice" it rendered to the appellant that s 10 (2) (l) of the VAT Act did not cover the appellant's position.

The second disquieting feature arose from the failure by the appellant to disclose the instructions received from E during the VAT period. The probabilities must have been that those instructions negated the appellant's position that the services were rendered for marketing brands and not for the services related to both the manufacture of beverages by the bottling companies and the marketing of those self-same beverages. The last disquieting feature was that it must have been obvious to the appellant that quality control of standards and specifications was directly in connection with the products manufactured by the bottlers. I am unable to conceive of how such a service could be done in the absence of the beverages. Clearly, even though the failure to pay its VAT obligations was not motivated by an intention to avoid or postpone liability for the payment, the appellant's moral turpitude was very high. After all, the failure to pay the VAT on time prejudiced the fiscus' revenue collection efforts. In any event, the appellant was precluded by the provisions of s 33 (3) (a) of the VAT Act from introducing the issue of penalties on appeal because it failed to raise it in the objection or seek the consent of the respondent or leave of the Court to do so. I am satisfied that a penalty of 50% is most appropriate in the circumstances of this case. The penalty imposed by the Commissioner is accordingly confirmed.

Costs

I agree with both counsel and am satisfied that this is not a matter for which an adverse order for costs can me made against either party. I do not find the grounds of appeal frivolous. Accordingly, each party shall bear its own costs.

Disposition

In the premises the appeal is dismissed in its entirety with each party to bear its own costs.

Gill Godlonton & Gerrans, the appellant's legal practitioners
Kantor and Immerman, the respondent' legal practitioners