

GTO ASSOCIATION  
versus  
THE COMMISSIONER-GENERAL-ZIMRA

FISCAL APPEAL COURT  
KUDYA J  
HARARE, 14 June 2016 and 4 July 2019

### **Value Added Tax appeal**

*D Ochieng*, for the appellant  
*T Magwaliba*, for the respondent

KUDYA J: This is a value added tax appeal to determine the eligibility of the appellant, a *universitas*<sup>1</sup>, for registration as a registered operator in terms of s 24 of the Value Added Tax Act [*Chapter 23:12*] and assessment to Value Added Tax in the 2010, 2011 and 2012 tax years of assessment.

### **The background**

GD (Pvt) Ltd, the developer, took transfer of a certain piece of land situate in the district of Lomagundi, Annexure A, measuring 11,9950 hectares on 20 September 1979. The whole of Annexure A was registered in favour of LNW on 31 August 1962. A dam was subsequently constructed on the land. The developer designed a township with various stands, roads and other infrastructure on the property and applied for a subdivisional permit in terms of the Regional Town and Country Planning Act [*Chapter 29:12*]<sup>2</sup> to form the G D Township on the shores of the dam. The permit was duly granted on 3 October 1988 and subsequently amended on 25 July 1989<sup>3</sup>. The requisite General Plan of the Township was filed with the Surveyor-General on 6 September 1989. By resolution of 31 October 1989, the Directors donated *inter vivos* the land to the “Trustees for the Time Being of the Appellant” who took transfer on 11 October 1994<sup>4</sup>. The appellant took over the implementation of the

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<sup>1</sup> Annexure A ,clause 1 (a) p 14 of respondent’s case replicated on p 58 of the r5 documents, separate from its members and with perpetual succession and a right to sue and be sued

<sup>2</sup> Act 22/1976

<sup>3</sup> P 1-9 of exh 1

<sup>4</sup> P10-12 of the appellant’s bundle of documents, Exh1

design from the developer and undertook to develop the property in terms of its constitution and in accordance with the dictates of the permit. The change of land use from agricultural to residential and recreational use resulted in the creation of 217 stands consisting of 10 commercial, 195 residential, 3 water storage stands and 9 public open spaces<sup>5</sup>.

In terms of clause 7 of the sub divisional permit, an 18 m long Council road was to be constructed at the expense of the developer and vested in the Local Authority. However, clause 8 prescribed that *“all other roads shall remain in the ownership of the applicant and shall be constructed and maintained by the applicant company.”* In terms of clause 9 a reticulated water supply system from a source and of a quantity acceptable to the Provincial Medical Director of Health was to be provided by the permit holder at its cost to all the 217 stands to a specification approved prior to installation by and to the satisfaction of the Provincial Water Engineer before the stands were transferred by the Registrar of Deeds and prior to occupation by individual stand holders. Likewise in terms of clause 10, an approved sewerage system at the cost of the applicant had to be in place before transfer could be passed to each individual stand holder.

The respondent commenced a full scale tax investigation of the appellant in April 2014<sup>6</sup>. In the course of the investigation and at the request of the respondent, on 15 May 2014<sup>7</sup> the Chairman of the appellant indicated the six services that the appellant provided to the residents of the township. On 9 June 2014 the respondent compulsorily registered the appellant for VAT before issuing VAT schedules for the calendar years 2010 to 2013 on 12 June 2014<sup>8</sup>.

<b>YEAR</b>	<b>CONSIDERATION</b>	<b>OUTPUT TAX</b>	<b>PENALTY</b>	<b>TOTAL US\$</b>
2010	141 400	18 443.47	18 443.47	36 886.95
2011	162 735	21 226.30	21 226.30	42 452.61
2012	169 623.60	22 124.74	22 124.74	44 249.48
2013	179 485	23 411.08	23 411.08	46 822.20
<b>TOTAL US\$</b>	<b>653 243.60</b>	<b>85 205.59</b>	<b>85 205.59</b>	<b>170 411.24</b>

<sup>5</sup> Pp1-2 and 9 of exh 1; stands 3 and 8 were allocated to the BT Rural-District Council, 6 ha, being 20% of commercial stands and 17 ha being 12½% of the other stands were vested in the State

<sup>6</sup> Supplied the sub-division permit of 3 October 1988 and its amendment of 25 July 1989, Constitution and Bye-Laws of the Association and financial statements for 2012 and 2013 p 1-2 of r 5 documents

<sup>7</sup> P 4 of r 5 documents

<sup>8</sup> P 5-8 of r 5 documents

In a letter dated 16 June 2014 the appellant disputed that it was eligible for both VAT registration and assessment<sup>9</sup>. On 23 July 2014<sup>10</sup>, the respondent conceded that the supply of water from pipes for domestic purposes was exempt but maintained that the appellant remained eligible for both VAT compulsory registration and assessment.

On 3 November 2014<sup>11</sup> the respondent issued another set of schedules, summarised in the table below, which excluded the supply of water in each of the years in question.

<b>YEAR</b>	<b>CONSIDERATION</b>	<b>OUTPUT TAX</b>	<b>PENALTY</b>	<b>TOTAL US\$</b>
2010	113 369	14 787.27	14 787.27	29 574.53
2011	132 364	17 264.86	17 264.86	34 529.73
2012	142 641.60	18 605.35	18 605.35	37 210.70
2013	148 862	19 416.79	19 416.79	38 833.60
<b>TOTAL US\$</b>	<b>537 236.60</b>	<b>50 657.48</b>	<b>50 657.48</b>	<b>140 148.56</b>

On 8 December 2014 the appellant engaged the services of a tax consultant<sup>12</sup>. Thereafter, on 18 December 2014, 12 and 13 January 2015 and 8 October 2015 the respondent issued 17 monthly value added tax notices of assessment against the appellant in the aggregate amount of US\$100 543.30<sup>13</sup> inclusive of penalties at the rate of 100 % for the months commencing from January 2010 to December 2012 but excluding March and April 2011 on the basis firstly that the levies paid by the stand holders to the appellant were in respect of vatable supplies and secondly that the levies collected in respect of its administration and management of the Township were collected in the furtherance of trade carried on by the appellant. On 23 January 2015 the appellant, through its tax consultant, lodged an objection<sup>14</sup>. The respondent failed to make a determination to the objection within the statutory period of three months. In terms of s 32 (4) of the VAT Act, the objection was accordingly deemed disallowed. However, on 2 September 2015<sup>15</sup> the respondent disallowed the substantive grounds in the objection of 23 January 2015 and confirmed the exclusion of the income derived from the supply of water and interest paid to the appellant from the VAT assessments. In addition, the respondent waived the penalty in full. The appellant filed its

<sup>9</sup> P 9-10 and para 6.1-6.3 of the objection of 23 January 2015 of r 5 documents

<sup>10</sup> P11-12 of r 5 documents

<sup>11</sup> P13-17 replicated on p 41-44 of r 5 documents, however total charged for 2010 on p 41 amounts to US\$35 004.54

<sup>12</sup> P 18 r 5 documents

<sup>13</sup> P19-37 and conveniently listed and summarised at p 41 of r 5 documents and reproduced on p 33-51 of Commissioner's case

<sup>14</sup> P38-40 of r 5 documents and replicated on p 52-54 of commissioner's case

<sup>15</sup> Pp56-57 of the r 5 documents and reproduced p57-58 of the Commissioner's case

notice of appeal on 1 September 2015 to which was attached the trial balance for 2010<sup>16</sup> and the income statements for both 2011 and 2012<sup>17</sup> with comparative figures for the previous years. The comparative figures for 2010 on the 2011 income statement were revised by the incorporation of provisions and appropriations<sup>18</sup>. The respondent filed the Commissioner's case on 8 October 2015.

At the appeal hearing, the appellant led evidence from its Honorary Treasurer, a retired chartered accountant of some 50 years' experience who was self-employed as a financial consultant and who produced exh 1. He became a member of the appellant in 2000 and was appointed its honorary accountant in 2012 before he was made the Honorary Treasurer in 2013. In his capacity as the honorary accountant he reviewed the appellant's 2011 financial affairs on 18 June 2012<sup>19</sup>. The respondent did not call any oral evidence. Both parties further relied on the facts agreed at the pre-trial hearing of 14 March 2016, the documents attached to the pleadings and on the r 5 documents.

### **The statement of agreed facts**

The parties agreed that:

1. The appellant is a registered non-profit making universitas separate from the freehold stand holders who formed it to administer and manage the affairs of the Township in accordance with a written constitution filed of record<sup>20</sup>.
2. The appellant holds title through its trustees to 10 stands within the Township and the rest of the properties within the township are owned by its members<sup>21</sup>.
3. The appellant is authorised at its Annual or Extraordinary General meeting to set levies and other charges payable by the stand holders in amounts sufficient to cover the expenses for administering and managing the affairs of the Township.
4. The appellant used to collect and remit rates due to Zvimba Rural District Council from stand holders prior to the tax years in dispute.
5. The income received from levies, water and other imposts and expenditure incurred in the tax years in dispute appear in the financial statements filed of record.<sup>22</sup>
6. On 12 May 2014, the respondent's Regional Manager requested *inter alia* for information on the services the appellant offered its members. The information was availed on 15 May 2014 by the appellant's chairperson who indicated that the appellant provided potable water and storage of water in reservoirs, collection and

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<sup>16</sup> Annexure A to the notice of appeal

<sup>17</sup> Annexure B and C to notice of appeal

<sup>18</sup> Annexure B to notice of appeal

<sup>19</sup> Financial Statements on pp79-82 of r 5 documents

<sup>20</sup> Pp 58-74 r 5 documents and annex A pp 14-30 of Respondent's case

<sup>21</sup> Para 5 and 6 of notice of appeal

<sup>22</sup> Pp76 to 81 of r 5 documents

disposal of refuse and the provision of security and maintenance of both internal and access roads and cutting of verges services to its members.<sup>23</sup>

7. The water supplied to the members was pumped into two reservoirs from the dam and was treated and reticulated to the stand holders by both gravity and electricity and generators.
8. The appellant provides security at the main boom gate and patrols the Township and employs casual workers to cut grass on the verges of the roads and not on the individual stands.
9. The appellant employs 7 people including the administrator who keeps its books of account and office equipment
10. It invests funds and earns interest and receives income from transmission towers, mooring and boat shed rentals and the Marina.
11. The appellant levies a fixed water charge separately from the actual metered consumption charge and the general levy.
12. A sample of a tax invoice dispatched to members in arrears every month was filed of record.<sup>24</sup>
13. The Respondent regarded the activities of the appellant as taxable supplies made to the members in the course of trade for consideration, which exceeded the threshold for registration as a VAT operator of US\$60 000.
14. The respondent compulsorily registered the appellant issued VAT schedules incorporating penalties of 100% on 12 June 2014<sup>25</sup>. On 3 November 2014 the respondent issued amended value added tax schedules of US\$29 574.53 for 2010, US\$34 529.73 for 2011, US\$37 210.70 for 2012 and US\$ 38 833.60 for 2013 in the aggregate of US\$140 148.54 inclusive of penalties of 100%.<sup>26</sup>
15. The respondent treated income from interest and fixed water and actual water consumption as exempt and excluded it from the VAT assessments.

## **The issues**

At the pre-trial hearing of 14 March 2016 the following issues were referred on appeal:

1. What services does the appellant render to its members
2. What amount was the total expenditure incurred by the appellant in making available the supply of water to its members for the respective tax years 2010, 2011 and 2012
3. Whether or not the appellant was providing services to its members in the course of trade in exchange for a consideration during the tax years 2010, 2011 and 2012
4. Whether or not the value of the taxable supplies of the appellant exceeded US\$60 000 per year to warrant the appellant's registration for VAT purposes

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<sup>23</sup> P3-4 of r 5 documents and 31 of Commissioner's case

<sup>24</sup> P 75 of r 5 documents dated 31 May 2014 and replicated on p 32 of Commissioner's case

<sup>25</sup> Pp 5-8 of r 5 documents for each respective calendar year in the sum of US\$36 886.95 for 2010, US\$42 452.61 for 2011, US\$ 44 249.48 for 2012 and US\$ 46 822.20 for 2013

<sup>26</sup> Pp13-17 of r 5 documents

5. Whether or not the appellant was liable to pay VAT in the amounts assessed by the respondent

### **Resolution of the issues**

I proceed to determine the issues *seriatim*.

*What services does the appellant render to its members?*

The appellant is a voluntary and non-profit organisation, separate and distinct from its members, which was formed to manage and control and regulate the Township for the benefit of its members, the registered stand holders. In terms of its constitution it is imbued with both perpetual succession and the right to sue or be sued. According to para 2 of Part 1 to the Schedule of Documents to the Discovery Affidavit filed of record on 11 April 2016 by the appellant's sole witness, the appellant holds registered title through its Trustees to 11 properties 10 of which are in the Township. The power to own property accords with clause 58 of the appellant's constitution. Under cross examination, the sole witness reluctantly conceded that the eleventh property was held outside the Township. In terms of clause 5, the appellant was empowered to make rules and bye-laws for the general use and enjoyment of the stands, roads, facilities and amenities in the township. It was at the annual or extraordinary general meetings that the appellant by ordinary resolution fixed the estimated amounts payable by members and their due dates. A defaulting member was liable to legal action, discontinuance of the customary services, cessation of road use and ejection. In terms of clauses 7, 8, 10, 15, 16 and 59, the appellant kept its own books of account and records and held annual general meetings in each of the tax years under consideration<sup>27</sup>.

In *Maseti v Key NO & Ors* 1951 (2) SA 187 (C) HERBSTEIN J defined the phrase "for services rendered" in s 8 (1) of the South African Act 23 of 1920. That subsection provided that:

" Each local council may make bye laws in regard to any matter referred to in or committed to it under sec 6 and may prescribe the fees which shall be payable for any services rendered."

At p 192D the learned judge stated that:

"The phrase "for services rendered" is in common use and its ordinary meaning is that something has been done for the benefit of some person, e.g., supplying of a particular need. When one speaks of a fee for services rendered one means payment of a sum of money as compensation for an act which has been performed or a need which has been provided."

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<sup>27</sup> Paras 2 and 8 of Part 1 of the schedule of documents to the discovery affidavit annex A pp 14-30 of respondent's case replicated on pp 58-74 of r 5 documents

In s 2 of our VAT Act [*Chapter 23:12*] “services”, “supplier”, “supply”, “taxable supply” and “invoice” and taxable invoice are defined as follows:

“services” means anything done or to be done ...or the making available of any facility or advantage,”

“supplier”, in relation to any supply of goods or services, means the person supplying the goods or services;

“supply” includes all forms of supply, irrespective of where the supply is effected, and any derivative of “supply” shall be construed accordingly;

“taxable supply” means any supply of goods or services which is chargeable with tax under paragraph (a) of subsection (1) of section six, including tax chargeable at the rate of zero *per centum* under section ten;”

“invoice” means a document notifying an obligation to make payment;

“tax invoice” or “fiscal tax invoice” or other word or phrase denoting an invoice of tax for the making of taxable supplies, means a document provided by a registered operator, or printed by a fiscalised electronic register or fiscal memory device used by a registered operator, for the purpose of section 20;”

The services that the appellant renders to its members are set out in clause 41 and 54 of its constitution. Clause 44 stipulates that:

“The Association shall provide its customary services, including the supply of water, to all members who have duly completed, signed and submitted their Membership Acceptance Forms and whose levies are not in arrears for three months or more. If any Member does not submit a duly completed and signed form within twenty-one (21) days of the request or fails or refuses to pay any levy within three (3) months of its due date, the Association acting through its Management Committee, shall be entitled to discontinue providing some of its customary services to such Member and/or in respect of his stand, to deny the use of the road system to the Member and any occupants of or visitors to his stand, to obtain such other relief as is requisite in the circumstances and to recover all its legal costs on the legal practitioner and own client scale.”

Clause 54 deals with two kinds of gross persistent misconduct. The first involves the intolerable or insupportable conduct or behaviour of a member or his visitor or occupant against a member, visitor or occupant of any other stand in the Township which disregards written notices from the Management Committee to desist. The second covers a member who fails or refuses for three months to pay levies from time to time imposed by the Association. In both instances the Management Committee of the Association:

“shall be entitled to discontinue providing some or all of the services which would normally be supplied to the Member and/ or in respect of his stand to deny the use of the road system to the Member and any such occupants and visitors from his stand, and to obtain such other relief as is requisite in the circumstances, and to recover all its costs on the legal practitioner and on client scale.”

In regards to the failure to pay levies on time is added to the principal amount interest at a rate set by the Association or the Management Committee and compounded on the first day of each month, legal costs at the scale of legal practitioner and client and any legitimate collection commission.

These customary services were in my view independent of the rates, levies and/or other charges in respect of members' stands which were raised by the Zvimba Rural District Council and the Zimbabwe National Water Authority, ZINWA in respect of which the appellant acted as a collection and remittal agent of the members. Some of the customary services appear in clause 33 of the constitution, where the appellant is empowered to accumulate funds from members for its capital and recurrent expenditure. These are specified as:

“such as those arising in relation to the repair and maintenance of the roads in the Township, the provision of water, the removal of refuse and the running of the Township and the affairs of the Association in general.”

To similar effect is clause 37 which requires members to meet:

“ the cost of capital expenditure in the same proportion in which they are responsible for meeting the costs of the services provided by the Association and they may not decline to meet the cost of any communal services provided by the Association, even if they are able to provide any such services for themselves.”

It is noteworthy that the appellant conceded during the investigations and in oral evidence that the provision of water and removal of refuse were some of the supplies offered to members despite reference to capital and recurrent expenditure in clause 33. In the analysis of costs over activities and analysis of income over activities the specific services provided by the appellant were identified as water, refuse, security of own property, own property and roads etcetera and others, in which was included cutting grass, rentals of transmission tower and boat sheds and marina. Indeed in para 12 of the notice of appeal, the appellant averred that the services it provided the members for a fee were reflected in the accounts as fees for leasing, mooring and shed rentals and other sundry income. All these constituted the services provided by the appellant. The appellant averred that the respondent was wrong in holding that the appellant provided security services and repair and maintenance of roads services to members. Mr *Ochieng* for the appellant, equated the funds raised from the members for road repair and maintenance to a call on shares by a private company to its members and submitted that the payment under this head was not for services rendered to the members but for a statutory duty required of the appellant. The essence of his



submission was that the payments under this head were to fund the appellant's own activities and did not therefore constitute the provision of a service to any one nor the engagement of trade.

The onus on appeal lies on the appellant in terms of s 37 of the VAT Act to show that the respondent's decision in that respect was wrong. It failed to discharge that onus. The letter from its chairman of 15 May 2014 proved to be an insurmountable hurdle. The chairman categorically stated and identified the number of services the appellant provided to its members. He enumerated them as the provision of potable water, the storage of water in reservoirs, the collection of refuse, the disposal of refuse, the provision of security and the maintenance of roads, both internal and access roads, including the cutting of verges. It is these self-same services that are set out in clauses 33, 41 and 54 of the constitution. In the face of these indisputable facts, I find the evidence of the sole witness to the contrary misconceived, disingenuous, contrived and palpably false.

It is correct that in terms of condition 8<sup>28</sup> of the sub divisional permit the ownership, construction and maintenance of roads in the Township was in the first instance reposed in the developer but as correctly submitted by Mr *Ochieng* was by operation of law transferred to the appellant lock, stock and barrel as a continuing obligation by registration of title on 11 October 1994. Mr *Ochieng* contended on the authority of *Liebenberg v Koster Village Council* 1935 TPD 413 at 416-417 that the fulfilment of a statutory duty for a fee fell outside the ambit of trade. The basis of that finding was that a local authority did not supply services for a fee for gain but did so in fulfilment of a social service. He further contended in the alternative that the appellant was supplying the service to itself and not to its members. Contrary to Mr *Magwaliba's* argument, I am satisfied that the requirement to construct and maintain and repair roads in the township was a statutory duty imposed on the appellant by clause 8 of the sub divisional permit, which it inherited from the initial developer. In my view, that clause did not preclude the appellant from levying service charges from its members for the repair and maintenance of these roads. After all, these roads were constructed and are maintained for the use of the members, their visitors and occupiers. By its own admission, the appellant did levy for such a service. The *Liebenberg* case, *supra*, does not support the contention advanced by Mr *Ochieng*. The submission that it was rendering a statutory service to itself for which no VAT was payable was therefore incorrect.

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<sup>28</sup> P 4 of exh 1

Lastly, Mr *Ochieng* contended that the security services referred to in the financial statements and analyses of activities were supplied to itself and not to its members. The witness testified that the appellant contracted a private security company to supply guards who manned the main entrance and patrolled the township. It seems clear to me that the nature of the security services offered belie any suggestion that they were for the benefit of the appellant. I, therefore agree with Mr *Magwaliba's* contention that the security services were for the benefit of the members.

I am satisfied that by virtue of its corporate status, the appellant rendered to itself the administrative and management services, captured in its financial statements as overhead expenses. It was distinct and separate from its members and employed both permanent and casual staff members for its own account. The services provided to the appellant by its staff members were distinct and separate from the services that those staff members supplied on behalf of the appellant to its members. In my view, it defies both law and logic to regard the members as the recipients of the services provided by the appellant's employees to the appellant itself. I therefore agree with Mr *Magwaliba* that the cost of such services cannot be apportioned to the various services rendered by the appellant to its members. The appellant did not disclose the method that it employed to compute the consideration it received for the services that it rendered to its members. In order to break even, the appellant would be expected to include the total cost of the services rendered in the amount charged to the recipient of the service.

I therefore hold that the appellant supplied the provision of water and its storage in reservoirs, the collection and disposal of refuse, the provision of security and maintenance of roads, both internal and access roads and the cutting of verges and the cutting of grass services to its members. In addition, in terms of clause 32 of its constitution, the appellant acted as an agent for the members in collecting and paying rates, levies and other charges for the stands to the responsible local authority and the Zimbabwe National Water Authority for no consideration. It was only in respect of the clause 32 collections that the appellant acted as a collection agent for the members to settle the common expenses due to these two statutory bodies.

*What amount was the total expenditure incurred by the appellant in making available the supply of water to its members for the respective tax years 2010, 2011 and 2012*

The determination of the total expenditure incurred in the supply of water would assist in computing the appellant's income that was subject to VAT. As the appellant is a not for gain organisation whose expenses are met by its members, the expenditure for the supply of water would represent the income raised by the appellant for that purpose. Additionally, as such income was by virtue of s 11 (j) of the VAT Act as read with Part 1 (1) if the VAT (General) Regulations exempted from VAT, it would abate the vatable supplies. Mr *Ochieng* submitted that the total amount incurred in the supply of water to members consisted of the specified direct costs, the proportionate apportionment of the general overheads and provisions and appropriations that were compiled by the witness and embodied in his analysis of costs over activities in respect of each year on pp13 to 15 of exh 1. The contrary submission by Mr *Magwaliba* was that the computation of VAT was based on the invoice value of the supply of water and not on the cost of that supply. He attacked the cost over activities analyses as duplicitous, unconventional and unorthodox afterthought exercises in creative accounting embarked upon *ex post facto* the investigations for the sole purpose of minimizing the appellant's VAT liability. The onus fell on the appellant to establish on a balance of probabilities the total cost that it incurred in providing water to its members. The invoices that it issued to the members during the relevant tax years were not produced. The sample invoice dated 31 May 2014 issued in arrears indicated a fixed cost and a metered cost whose computation was not explained. Mr *Magwaliba* contended that in the absence of such an explanation the invoice value represented the correct cost of that supply. The net result of Mr *Magwaliba*'s submissions being that the whole amount invoiced under general levy was vatable because it represented the income paid or payable to the appellant for all the other services that it rendered to its members.

#### *The relevant legislative provisions*

The answer to the question concerning which of the values amongst the invoice value, the actual cost or the payments received for the supply of water should be exempted from the appellant's VAT liability is found in ss 11 (j) and 14 of the Value Added Tax Act and s 9 as read with Part 1 (1) to the First Schedule and s 17 of The Value Added Tax (General) Regulations SI 273/2003.

Section 11(j) of VATA provides that:

#### **11 Exempt supplies**

The supply of any of the following goods or services shall be exempt from the tax imposed in terms of paragraph (a) of subsection (1) of section six

- (j) the supply of such goods or services as are prescribed in regulations made in terms of section *seventy-eight*

And Part 1 (1) to the First Schedule of the Regulations made in terms of s 78 of the Act state that:

The following goods or services in respect of which the exemption under paragraph (j) of section 11 of the Act shall apply, shall be as follows—

- (1) water supplied through a pipe for domestic use;

The accounting basis for VAT is prescribed in section 14 of the Act and 17 of the Regulations in these terms:

**14 Accounting basis**

- (1) In this section

“payment” shall mean payment of consideration which reduces or discharges any obligation, whether an existing obligation or an obligation which will arise in future, in respect of or consequent upon, whether directly or indirectly, the purchase price.

- (2) Every registered operator shall account for tax payable on an invoice basis for the purposes of section *fifteen*:

Provided that regulations made under section *seventy-eight* may provide for circumstances where, upon a written application to the Commissioner, a registered operator may account for tax payable on a payments basis.

**17. Accounting basis**

- (1) Subject to section 14 of the Act a registered operator may apply to account for tax on a payment basis if the operator is—

- (a) a local authority; or  
(b) a public authority; or  
(c) an association not for gain.

- (2) Once an application is approved it may be changed if an application for the change is made to and approved by the Commissioner:

Provided that no application for change of accounting basis shall be accepted by the Commissioner if the application is made within a period of twelve months from the date of the last approved application.”

Section 11 (j) of the Act as read with Part 1(1) of the Regulations exempts water supplied through a pipe for domestic use from VAT liability. Mr *Ochieng* incorrectly submitted that the exemptions prescribed by these legislative provisions related to the activity and not to the consideration paid in *lieu* of the activity. It seems to me that the exemption relates to the tax that would have been charged in terms of s 6 (1) (a) of the Act but for the exemption. The computation of such a tax would have been based on the value of the taxable supply of the exempted activity. Such value is based on the open market value of the service and is captured in the tax invoice issued to the recipient by the supplier. The accounting basis of such a supply is prescribed in s 14 of the Act and s 17 of the Regulations. The tax payable must be accounted for on an invoice basis unless the Commissioner authorizes on application

accounting on a payment basis. It seems to me that the tax invoice generated by the registered operator must state on the face of it the value of the activity supplied, which value originates with the registered operator. It was on that basis that the Commissioner assessed the appellant to VAT and upon which Mr *Magwaliba* relied for his submission.

In the present case, the appellant did not produce the tax invoices which were issued to the members during the three tax years in question. It relied on the specific line items captured in the 2010 trial balance and 2011 and 2012 income and expenditure statements. In his testimony the sole witness called by the appellant stated that the amounts that were invoiced under water were in the sum of US\$ 34 073 in 2010, US\$ 43 993 in 2011 and US\$ 49 180 in 2012. He conceded that the figures of US\$102 683 for 2010, US\$ 113 754 for 2011 and US\$84 596 for 2012 were computed for the water account for the first time in March 2016 long after the investigation had commenced. The total direct costs for the supply of water computed by the witness with the help of the bookkeeper were in the sum of US\$ 79 004 in 2010, US\$ 90 307 in 2011 and US\$ 88 283 in 2012.

The witness did not create any new figures but utilised the figures in the trial balance and financial statements in accordance with the generally accepted accounting standards to determine the actual cost of supplying water through a pipe for domestic use that ought to have been captured under the specific headings of fixed and metered water in the tax invoices. The evidence demonstrated that the witness revised the 2010 accounts on 18 June 2012 when he compiled the 2011 financial statements by providing for irrecoverable stand holders accounts and depreciation on fixed assets and by making appropriations to the capital account. Otherwise both the 2011 accounts and the 2012 accounts, which were prepared on 19 March 2013, embodied these provisions and appropriations. The revision and the compilation of the accounts in question predated the VAT investigations. The witness acted as he did because he was bound by the tenets of his accounting profession to prepare accounts that met the generally accepted accounting standards. It was obvious from his explanation that the original 2010 accounts had been prepared by a person who lacked the necessary skills. The respondent did not lead any evidence to controvert the correctness of the format and the figures used by the witness in revisiting the 2010 accounts and in preparing the 2011 and 2012 accounts. The only thing that the respondent did and which Mr *Magwaliba* adopted was to insist that the appellant be bound by the invoice values of the supply of water that were captured in the original and revised accounts in question.

I accept, as submitted by Mr *Magwaliba* that VAT is levied on the value of the supply recorded on the invoice. While the relevant invoices were not produced, the respondent conceded that the sample invoice generally captured the information on the invoices dispatched to the members during the period to which the appeal relates. The respondent did not dispute these invoices recorded a specific line item synonymous with a general levy. It seems to me that the witness discharged the onus on the appellant to show on a balance of probabilities that a portion of the value of the supply of water was incorporated in the general levy. He establish by his evidence that the amounts shown against fixed and metered water were based on estimates agreed to in advance at the prior year annual general meeting. He also established that at such annual general meetings the general levy was designedly introduced for incorporation in the invoice to *inter alia* cover any shortfalls on the water account. In my view, he correctly surmised that the figures for the fixed and metered water were mere estimates that did not represent the actual value of the supply of water. And the method by which the appellant sought to demonstrate the actual value of the supply of water was to show how much it cost to provide that supply to its members; hence the cost over activities analyses presented in exh 1.

In the absence of any contrary analyses produced by the respondent, the court is obliged to examine whether the appellant's analyses correctly capture the cost of supplying piped water for domestic use to its members. The accuracy of the direct costs for the supply of water other than those in respect of bank charges and protective clothing were not seriously challenged by Mr *Magwaliba*. I accept the explanation proffered by the witness in respect of bank charges and protective clothing. It was that even though the appellant did not keep a separate bank account for water activities, the bookkeeper was able to ascribe these bank charges specifically to water because they concerned the movement of funds related to the purchase of water equipment. In any event, in comparison with the full expenses for these two line items, the questioned amounts were so small as to remove any spectre of suspicion. Accordingly, I accept that the direct costs represented a portion of the cost of supplying water to the members, which was extracted by the bookkeeper from her individual payment records.

I, however, do not accept that the general overheads, which were computed in the aggregate sum of US\$ 19 993 in 2010, US\$23 411 in 2011 and US\$39 024 in 2012 by the witness should have been apportioned against water in particular and all the activities in general. This is because firstly, by the witness's own admission such an apportionment of

general overheads to each activity by dividing the total direct costs by the total direct cost for water and then multiplying the result by the total general overhead costs was abnormal, secondly, the formula used was as inappropriate as it was unreliable and lastly, that the general overheads did not cover any costs for supplying water to the members but covered costs of the services that the appellant supplied to itself. The supply of such services would not ordinarily be vatable under s 6 (1) of the Act.

It seems to me to accord with the generally accepted commercial and accounting standards to make provision for depreciation and to make appropriations to the capital account. I accept the witness' testimony that the appropriations to the capital account were made from the income raised from the members. As the purchase of capital items to which the appropriations relate would not constitute the supply of a service to the members, the income raised for that purpose would not be subject to VAT. The appellant ought to have expensed these appropriations in 2010 and did do so in the revised 2010 accounts and the original 2011 and 2012.

In regards to the provisions for doubtful and bad debts under the alias of irrecoverable stand holders accounts, the appellant wrongly expensed them without first establishing that there was uncertainty of the likelihood of recovering these debts through the recovery mechanisms embodied in the appellant's constitution against defaulters. See *BT (Pvt) Ltd v Zimbabwe Revenue Authority* 2014 (2) ZLR 640 (H) at 657E. Accordingly, I hold that the provision for these debts was incorrectly included in the cost of supplying water to the members.

As a result of these findings the sum of US\$ 8 437 apportioned to general overheads and US\$ 7 104 provided for irrecoverable stand holder accounts in 2010, and the respective sums of US\$ 12 770 and US\$ 8 140 in 2011 and US\$ 13 548 and US\$12 212 in 2012 must be deducted from the total cost computed by the appellant of supplying water to its members of US\$102 683 in 2010, US\$113 754 in 2011 and US\$84 596 in 2012. Accordingly, the cost of supplying water to the members, in my computation, was US\$87 142 in 2010, US\$ 92 844 in 2011 and US\$58 836 in 2012.

*Whether or not the appellant was providing services to its members in the course of trade in exchange for a consideration during the tax years 2010, 2011, 2012 and 2013*

The answer to this question lies in part in the definition of trade couched in s 2 of the VAT Act in the following words:

“trade” means—

(a) in the case of any registered operator, other than a local authority, any trade or activity which is carried on continuously or regularly by any person in Zimbabwe or partly in Zimbabwe and in the course or furtherance of which goods or services are supplied to any other person for a consideration whether or not for profit, including any trade or activity carried on in the form of a commercial, financial, industrial, mining, farming, fishing or professional concern or any other concern of a continuing nature or in the form of an association or club

Provided that—

V. any activity, shall to the extent to which it involves the making of exempt supplies, be deemed not to be the carrying on of a trade;

The essential elements of trade are therefore:

- a. any registered operator or any other concern of a continuing nature or in the form of an association or club other than a local authority
- b. Which carries on any trade or activity continuously or regularly wholly or partly in Zimbabwe
- c. In the course or furtherance of which goods or services are supplied to any other person for a consideration whether or not for profit and
- d. Excludes any activity to the extent to which it involves the making of exempt supplies.

It was common cause that before the compulsory registration of 9 June 2014, the appellant was neither a registered operator nor a local authority. It, however, was an association not for gain which fell into the category of “any other concern of a continuing nature or in the form of an association or club”. In addition, it carried on activities of a continuous or regular nature in Zimbabwe in the course or furtherance of which services were supplied to its members “not for profit”. It seems to me that the levies paid by members for the services constituted consideration, which is defined by reference to the supply of goods or services to any other person to include:

“any payment made or to be made, ....., whether in money or otherwise, or any act or forbearance, whether or not voluntary, in respect of, in response to, or for the inducement of, the supply of any goods or services, whether by that person or by any other person, but does not include any payment made by any person as an unconditional gift to any association not for gain:”

The general levies were either paid by or became payable from the members “in respect of” or “in response to” or “for the inducement of the supply of services” emanating from the appellant. Clause 41, which empowers the appellant to cut the supply of services to a member who defaults in making payment of the general levies clearly constitutes an



inducement clause. However, by operation of law, the activities that the appellant carried out in relation to exempt supplies did not constitute trade.

It was also common ground that s 6 of the Act prescribes the goods or services that are eligible for VAT. Such taxable supplies must emanate from a registered operator who has either voluntarily registered or been compulsorily registered in terms of s 23 (4) (b) of the VAT Act. The services that are taxable consist of either the standard or the zero rated supplies or both. In terms of proviso V to the definition of trade, the supply of exempt supplies do not constitute trade and therefore fall outside the eligibility matrix for registration. In *casu*, the supply of refuse, security, repairs and maintenance of roads and other taxable services to members were for consideration. The total consideration paid by the members in 2010 was in the sum of US\$ 85 053 comprised of US\$62 128 for security, US\$ 1 251 for refuse and US\$ 21 674<sup>29</sup> for other taxable services. In 2011 the total consideration received by the appellant was in the sum of US\$60 543 comprised of security and road of US\$37 579, refuse of US\$ 1 724 and other taxable services of US\$21 240. Lastly in 2012 the aggregate consideration was in the sum of US\$ 94 670 comprised of US\$ 81 080 for security and roads, US\$2 506 for refuse and US\$11 084 for other taxable services.

The argument made by Mr *Ochieng* that a statutory duty in respect of road repairs and maintenance did not attract VAT was misconceived. VAT is levied on the supply of a service to any person other than the registered operator. Even though the appellant had a statutory duty to maintain the roads, it supplied a service for the use of the road to the members who paid for the repairs and maintenance necessitated by such use. The payment constituted consideration for the use of the road, which constituted the supply of a service. I further agree with Mr *Magwaliba* that the appellant is an association not for profit which supplies services to members of water, electricity, repair and maintenance of roads, cutting grass, refuse collection in return for the payment of levies for which VAT is due. In any event, the presentation of trade and sundry creditors in its financial statements demonstrated that the appellant was engaged in trade in each of the financial years under consideration<sup>30</sup>.

Accordingly, I am satisfied that other than the supply of water, all the other supplies were made by the appellant to its members in the course or furtherance of trade as defined in the VAT Act in each of the three tax years in question.

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<sup>29</sup> Other taxable services comprised of mooring and boat shed rentals of US\$ 4 144, sundry income US\$9 635 and transmission towers of US\$700 in aggregate of US\$ 21 674

<sup>30</sup> Balance sheet for 2011 and comparative 2010 figures p 80, and for 2012 on p 87 of r 5 documents

*Whether or not the value of the taxable supplies of the appellant exceeded US\$60 000 per year to warrant the appellant's registration for VAT purposes*

In terms of the appellant's income over activities analyses in exh 1, the vatable supplies amounted to US\$22 925 in 2010, US\$22 964 in 2011 and US\$ 13 590 in 2012. In view of my finding that security services and road repairs and maintenance services were vatable, even if I were to accept the total costs computed by the appellant for the supply of water in each year of US\$ 102 683, US\$113 754 and US\$84 596, respectively, the aggregate consideration paid to the appellant for the services rendered to its members would be in the sum of US\$ 85 053 for 2010, US\$60 543 for 2011 and US\$94 670 for 2012. These would all be in excess of the minimum compulsory annual taxable threshold of US\$60 000, which was necessary for either voluntary or compulsory VAT registration. However, in view of my findings that the cost of the supply of water was US\$87 142 in 2010, US\$ 92 844 in 2011 and US\$58 836 in 2012, it must follow that the difference between these amounts and the amounts computed by the appellant in respect of each year of US\$ 15 541, US\$20 910 and US\$25 760 must be added to US\$85 053, US\$60 543 and US\$ 94 670 to give taxable amounts of US\$100 594 for 2010, US\$ 81 453 for 2011 and US\$ 120 430 for 2012.

Accordingly, the appellant was properly compulsorily registered for VAT by the respondent.

*Whether or not the appellant was liable to pay VAT in the amounts assessed by the respondent*

The respondent assessed the appellant for value added tax on both the invoiced value of the supplies for services rendered and the levies collected for its administration and management of the Township. The latter was levied on the basis that the amounts were collected in the course or furtherance of any trade carried out by the appellant. The consideration for administration and management of the township was incorporated in the general levy from which both recurrent and capital expenditure was met. The raising of levies was covered in clauses 32 to 40 of the appellant's constitution. Clause 33 provided that:

“It is also recorded that Members from time to time need to raise funds between and from themselves for the purposes of meeting items of capital and recurrent expenditure incurred in relation to their stands, such as those arising in relation to the repair and maintenance of the roads in the Township, the provision of water, the removal of refuse, the running of the Township and the Affairs of the Association in general.”

The supply of goods or services to meet its own requirements would ordinarily fall outside the ambit of trade. This is apparent from the meaning of “for services rendered”

found in *Maseti v Key NO & Others, supra* at 192E and “remuneration for services rendered by him in his trade” in *Liebenberg v Koster Village Council, supra* at 416- 417. In the latter case TINDAL AJP said:

“The supply by a municipality of sanitary services was a governmental function and not a buying and selling one. It does not buy and sell sanitary services....so sanitary fees are really to be regarded as a sanitary tariff or rate. It is neither remuneration nor price. It is a compulsory tax levied upon an owner or occupier...A person who carries on a trade does so for some personal advantage. That is the case where an individual carries on a trade and where a company carries on trade; it does so for the profit of shareholders. But it seems to me that the activities of a municipal corporation are essentially different. The fact that it may make a profit out of certain services rendered by it does not necessarily show that it carries on a trade....the test is the nature of the activities carried on by the local authority. It seems to me that is really the test applied in *Alberts v Roodepoort-Maraisburg Municipality* 1921 TPD 123 namely that the services rendered were rendered by the local authority in the course of activities carried on not for its own advantage but in the exercise of statutory powers given to it to be exercised for the benefit of the inhabitants of the municipality as a whole.”

However as already noted above, where the consideration for the supply of such goods or services is raised from members as an inducement for the supply of other goods or services to those members, such supply would constitute trade, as defined in the VAT Act. It must *a fortiori* follow that such a supply of services by the appellant to itself would be taxable. This finding totally eschews Mr *Ochieng's* contention and Mr *Magwaliba's* concession that the cost recovery aspect of the general levy did not constitute a taxable supply.

The formula used by the respondent to compute the taxable income in respect of each year was derived from the financial statements supplied by the appellant, similar to the ones attached to the notice of appeal. In 2010 the income earned was US\$ 147 441. The respondent deducted the invoice value of water of US\$34 073 and interest of US\$ 6 042 to arrive at the taxable supplies of **US\$107 326**. The taxable supplies in 2011 were income of US\$ 176 357 less invoiced water of US\$ 43 993 less interest of US\$13 622 of **US\$ 118 742** and in 2012 US\$ 191 821 less invoiced water of US\$ 49 180 and interest of US\$22 198 leaving taxable supplies of **US\$ 120 443**.

I have already indicated the value of the taxable supplies computed by the appellant through its witness. They amounted to less than US\$30 000 in each year. While the respondent utilised the correct formula, he applied the wrong invoiced value of water. The appellant established on a balance of probabilities that the general levy incorporated a portion of the value of the supply of water, which was invoiced in the general levy. The established value of water incorporated in the general levy together with the specified invoiced value of

water and interest must be deducted from the total income earned to compute the taxable supplies. In my estimation the taxable supplies would appear to be in the sum of US\$100 594 for 2010, US\$ 81 453 for 2011 and US\$ 120 430 for 2012.

### **Conclusion**

Accordingly, I find that the formula used by the respondent to assess the appellant for VAT was basically correct. That formula entailed deducting from the total income accruing to the appellant firstly, the cost of the supply of water to the members indicated in the financial statements for fixed and metered water, secondly, a portion of the cost of supplying such water incorporated in the general levy and thirdly interest and any other legally permissible deductions. The balance of the income inclusive of income in respect of administration and management was all vatiable on the basis that it was either derived from services rendered by the appellant to its members, other third parties or itself in the course or furtherance of trade.

### **Penalties**

In the exercise of its discretion, the respondent properly waived the penalties in full in its belated determination of 2 September 2015. Mr *Magwaliba* confirmed the position in both his oral and written submissions. I uphold the respondent's position in this regard.

### **Costs**

Notwithstanding the call for costs by the respondent, I do not find the grounds of appeal to have been frivolous so as to warrant an adverse order of costs against the appellant. I will order each party to bear its own costs.

### **Disposition**

Accordingly, it is ordered that:

1. The amended monthly value added tax assessments issued by the respondent in respect of the tax years ended 31 December 2010, 31 December 2011 and 31 December 2012 are hereby set aside.
2. The respondent shall issue further monthly value added tax amended assessments against the appellant in respect of the tax year ended 31 December 2010, 2011 and 2012 that accord with this judgment by:
  - a. deducting the specified invoice values of water recorded in the appellant's financial statements,

- b. computing and deducting the appropriate apportionment for the value of water supplied from the general levy and utilizing my calculations of taxable supplies of US\$100 594 in respect of the 2010 tax year, US\$ 81 453 for the 2011 tax year and US\$ 120 430 for the 2012 tax year in the event that they are correct.
  - c. deducting any interest received by the appellant and any other permissible deductions.
  - d. waiving penalties in full
3. Each party shall bear its own costs.

*Wintertons*, the appellant's legal practitioners