

AFROCHINE SMELTING (Pvt) Ltd
versus
THE ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
MUCHAWA J
HARARE, 20 November 2023 & 29 February 2024

Urgent Court Application

Mr *T Mpofu*, for the appellant
Mr *S Banda*, for 1st respondent
No appearance for the second respondent

MUCHAWA J: In this urgent court application for a declaratory order, the applicant seeks the following order:

“IT IS ORDERED AS FOLLOWS:

1. It be and is hereby declared that:
 - a. The applicant having sold its product FCA EX- works the “gross fair market value” for purposes of s 37(9) of the Finance Act [*Chapter 23:04*] is the face value of the invoice or price the mineral was sold at the place of such sale, namely in Zimbabwe.
 - b. The exclusion of the cost of freight by reason of the terms of sale was not a deduction made by the applicant, neither would it have been impermissible had it been a deduction made by the applicant.
2. In the result, the applicant is not liable for the amount, penalty and interest assessed by the respondent as being due from it for mining royalties in the total sums of USD 2 872 897.89 and ZWL 97 682 345. 37 respectively and the assessments to the effect are set aside.
3. Alternatively, it is declared that reference to double the amount of royalties payable “does not mean 200% penalty but rather the principal amount due for royalty plus 100%.
4. Consequently, that the penalty calculated at 200% is set aside and the respondent is directed to amend its assessments accordingly.”

The applicant is a private company with limited liability duly registered in terms of the laws of Zimbabwe. It is a large-scale producer and exporter of ferrochrome, an alloy of chromium iron and carbon used in steelmaking.

The respondent is a statutory body created in terms of the Revenue Authority Act [*Chapter 23:11*] which is responsible for assessing, collecting and accounting for revenue on behalf of the State through the Ministry of Finance.

Background Facts

On 16 June 2023, the respondent delivered a letter to the applicant in which it presented its tax review findings for the period 2019 to 2021. I wish to reproduce the contents of this letter as they are crucial.

“RE: PRESENTATION OF TAX REVIEW FINDINGS FOR THE PERIOD 2019- 2021:
AFROCHINE SMELTING PVT LTD BP NO 200116318.

Reference is made to the above subject pertaining to tax review for the period 2019 to 2021, The following issues were noted:

1. Under Declaration of Royalties on Minerals

Analysis of documentation submitted to this office concerning the payment of royalties on minerals to Zimbabwe Revenue Authority by the bank on behalf of Afrochine Smelting Pvt Ltd, showed that the royalties on minerals was under declared. The company should have paid royalties on minerals based on the gross sale value as shown in the sales schedule from 2019 according to s37(9) of the Finance Act [*Chapter 23:04*]. This resulted in some periods having under declared royalties on minerals, the difference between the declared royalties and the calculated royalties either resulted in overstated or under declared amount. See attached schedule.

2. Adjustment of the Ocean Freight Charges

Bases (sic) on the sales contract Ref No. 166/2020 PART 3.1; an ocean freight charge of US \$ 0,10/1b was deducted Fastmarkets Ferro – Alloy Price which was used as a benchmark for pricing ferrochrome price to reach an ex work price of US\$.0.60/1b. The deducted amount (ocean freight) was added back to ex – works price and the royalties were recalculated based on the gross fair market price according to s 37(9) of the Finance Act: [*Chapter 23:04*]

May you therefore kindly go through the findings established during the tax review for royalties on minerals tax in USD amounting to US\$ 2 872 895. 89 as per attached schedules. The amount includes principal of US \$ 880 361.54, penalty of US \$ 1 760 723.09 charged at 200% according to s 37(5) of the Finance Act [*Chapter 23;04*] and interest of US \$ 227 772.24. The local currency debt due to RBZ retention policy in apportioning of payment of royalties on minerals in local currency is ZWL 97 682 345. 37. This amount includes a principal of ZWL 22 507 851.49, penalty of ZWL 45 015 702.97 charged at 200% and interest of ZWL 30 154 75.91.

May you please revert by Thursday 22 June 2023 on the findings established of which failure to respondent will result in the position being considered final and assessments raised based on the findings established.”

After this letter the applicant rejected the findings by the respondent and appealed to the Commissioner by letter on 26 June 2023. It appears there was some engagement between the parties which did not yield any results. The respondent then sent a reminder to the applicant to settle the outstanding tax debt on 16 October 2023. This was to be settled by 23 October 2023 failing which the respondent would institute a recovery measure without further correspondence.

Issues for determination

The applicant has set out three issues as falling to be determined by this court. These are accepted by the respondent. These are they:

1. Did the applicant err in declaring royalty on the face value of the invoice based as it was on the ex-works price of 10 cents less than the Fast Markets Ferro Alloys price?
2. Was the exclusion of the cost of freight from the invoice value a deduction from the gross fair market value and if it is whether it is proscribed by s 37 (9) of the Finance Act?
3. Whether reference to “double the amount of royalties payable” as the primary civil penalty means 200% penalty over and above the royalty due.

I proceed below to determine each of those issues:

Did the Applicant err in declaring royalty on the face value of the invoice based as it was on the ex – works price of 10 cents less than the Fast Markets Ferro Alloys price?

Mr *Mpofu* submitted that the real dispute is whether the applicant must charge and declare its royalties based on free carrier ex works or on the basis of cost insurance and freight CIF. It is common cause that the word market benchmark as given is 70c ex Hong Kong. He averred that it should be accepted that it would be 60c ex Selous Zimbabwe. He further contended that there is no possibility of the mineral being sold at below market price and it was indeed sold on the basis of a correct market price.

The question of whether the invoice should have been ex works or ex- destination was said to be easily resolved through an important principle of tax law. The principle is that the tax man cannot tell a subject of the state how to conduct its business. Reference was made to the case of *G Bank v Zimbabwe Revenue Authority* HH 207/15. It was argued that as long as the price is the gross market value price and the purchaser is not given a discount, the rest is a business decision which takes into account its many sensitives and the taxman cannot tell a party how to

run its business. In this case the taxman is impugned for impliedly saying that all sales must be CIF and this, it is averred the taxman cannot do.

Regarding the relevant legal framework, the applicant states that the Mines and Minerals Act [Chapter 21:05] in s 244 and 245 is the principal Act which sets out that royalties are to be paid. The Finance Act, on the other hand is said to be the levying Act which then provides that such royalties are deducted on the prescribed minerals at source based on the face value of the invoice thereof. S 37 of the Finance Act is the one which is said to spell out how royalties are due as does S 37 A. This is said to provide that the amount due is based on the face value of the invoice which is what the applicant did.

On the other hand, the respondent states that it is not enough to use the face value of the invoice to calculate the royalty payable. Ms *Banda* submitted that royalties are a government's way of obtaining a share of a finite resource that is being taken away from the country by a miner or some compensation for the loss of such finite resource. It is stated that different jurisdictions have different ways of calculating the share or compensation to be collected.

It is agreed that s 244 and 245 of the Mines and Minerals Act, is the parent Act which obligates the miner of a registered mine to pay royalties. It is then the Finance Act in its s 37 and the Schedule to Chapter VII which sets out how such royalties are to be calculated as it provides the rates of levying royalties for each of the minerals.

That rate is alleged to be stated as a percentage of the gross fair market value of the mineral produced. The method of computation is said to be clearly spelt out in s 244 and 245 of the Mines and Minerals Act as read with the schedule to Part VII (s 37) of the Finance Act.

The applicant is said to be wrong in arguing on the basis of the then s 37A (1) of the Finance Act which provided that from 1 January 2010 and for every subsequent year of assessment, certain persons were designated as agents of the respondent in deducting royalty based on the face value of the invoice.

S 37 A (1) it is argued, must be read in the context that it was providing a mechanism for collection of royalties at source by appointing agents of the respondent to collect royalties. These would collect the royalty based on the value of the invoice and the rates in the schedule to s 37 of the Finance Act. Having such agents collect based on the face value was alleged to be merely for convenience. These appointed agents would not need to bother themselves by determining what

the gross fair market value of the mineral was. This would then fall to the respondent to determine after returns were submitted to it terms of s 251 of the Mines Minerals Act.

Furthermore, it was contended that s 37 A (1) was never meant to provide an alternative basis for computation of royalties due to the fiscus as the method of such was adequately provided in s 244 and 245 of the Mines and Minerals Act as read with the Schedule to Chapter VII (s37) of the Finance Act.

Ms *Banda* submitted that the terms “gross” and “fair market value” are not defined in the Finance Act. The ordinary grammatical meaning of the phrase “fair market value” is said to connote a value based on what a willing buyer and willing seller dealing at arm’s length on an open market would consent to. Reference was made to the case of *Sher No & Ors v Administration of the Transvaal* 1990(4) SA 545 (AD) and an article by James Chen “*Fair Market Value (FMV): Definition and How to Calculate it*” (updated 23 September 2023).

The word “gross” is said to be defined as “total, whole, gross weight, profit etc i.e before deduction of tax etc. It was then concluded that gross fair market value would therefore mean a value based on what a hypothetical willing buyer and hypothetical willing seller dealing at arm’s length on an open market would agree as a whole and without any deductions being made on such value.

Refence is made to the agreement of sale between the applicant and its buyer wherein in clause 3. I it is provided that “For the high carbon ferrochrome the Fastmarkets Ferro – Alloys price shall be used as the benchmark.”

This is said to be the general practice in determining the fair market value of minerals. The Fastmarkets Ferro – Alloys is said to be an international mineral commodity exchange. The price set there as a standard unit is alleged to be recognized as a fair market value and where no deduction or alteration is made to that benchmark that is said to be the gross fair market price.

By reference to the agreement of sale, the fair market value of ferrochrome was US\$ 0.70/1b Cr. This, it is argued is the price at which royalties should be calculated as it represents the open market where the product is sold to a larger buying community dealing at arm’s length and can be considered objective. The Selous market price used by the applicant is said not to be objective as it lacks the competition element.

By reference to a textbook by Tapera and Majachani in” *Unpacking Tax Law and Practice in Zimbabwe*” on p 277 it is asserted that mineral prices are set by reference to the international commodity exchange prices which do not contain a transport and insurance charge. Such charge may then be added to the international charge and there is no good reason why the applicant deducted such charge from the fair market value of the ferro chrome.

It is conceded that indeed the applicant and the buyer were free to play around the price as they wished but they could not do so to affect the calculation of mining royalties whose formula is set out in s 244 and 245 of the Mines and Minerals Act as read with s 37 of the Finance Act. The fact that the applicant characterized its price with an (ex) after price is said to show that the applicant was aware that it was not invoicing the gross fair market value of the mineral as required by the law. The respondent’s agent is said to have no way of establishing the fair market value of the minerals and only deducted royalties on the amounts appearing on the face of the invoice. It is prayed that the application ought to fail therefore as the applicant has failed to establish any right to act as it did as this flies in the face of the provisions of the law.

On this issue I am being called upon to interpret the provisions of s 244 and 245 of the Mines and Mineral Act as read with s 37 of the Finance Act and determine the correct legal framework for calculation of royalties. Section 244(1) of the Mines and Minerals Act provides as follows:

“Subject to this Part, a miner of a registered mining location shall pay royalty on all minerals or mineral bearing products won from such location which have been disposed of by him or on his behalf, whether within or outside Zimbabwe rate per unit of mass as may be fixed in terms of section two hundred and forty- five.”

The parties are agreed on the duty imposed by this section to pay royalties. Section 245 of the Mines and Minerals Act provides for the fixing of the royalty rate. In s 245 (1) it provides that

“The rate of royalty payable in terms of s 244 shall be fixed by the House of Assembly in the Schedule to Chapter VII of the Finance Act.”

This too is accepted by both parties. The point of departure appears to be which particular subsection to rely on in the fixing of the applicable rate. Now to the Finance Act, in s 37 it is provided as follows:

“37 Rates of mining royalties, duty and fees:
For the purposes of the provisions of the principal Act specified in the Schedule the rates of royalties, duty and fees shall be as therein shown.”

The Schedule to Chapter VII (s37) then lays the rates of mining royalties, duty, and fees.

| “1. Section 245 (Royalties) | Percentage of market value of mineral produced. |
|------------------------------------|--|
| (a) Precious Stones | 10 |
| (b) Precious metals | 3.5 |
| (c) Industrial metals | 2...” |

On the other hand, s 37 A provides for collection of mining royalties. In s 37 A (1) it says:

‘With effect from the 1 January 2010 and every subsequent year of assessment, the following persons shall, as agents for and on behalf of commissioner General of he Zimbabwe Revenue Authority deduct royalty on the minerals at source based on the value of the invoice therefore;’”

The golden rule of interpretation of statutes is that where the language used in a statute is plain and unambiguous it should be given its ordinary meaning unless that would lead to some absurdity or inconsistency with the intention of the legislature. This is trite. See *Delta Beverages (Pvt) Ltd v ZIMRA* HH 129/15 & *ZEC and the chairperson ZEC v The Commissioner General ZRP & Ors* CCZ 3/14.

What flows from a literal reading of the words of s 244 and 245 of the Mines and Mineral Act as read with the Finance Act in s 37 is that the Mines and Minerals Act is the parent Act providing that royalties are to be paid. The details on how those are to be calculated are in the Finance Act which is the levying Act. S 245 of the Mines and Minerals Act makes it clear that the rate of royalty payable is to be found in the schedule to Chapter VII of the Finance Act.

In the schedule, it is stated that the rate payable in terms of s 245 on royalties is a percentage of the gross fair market value of the mineral produced. This is as per s 37 of the Finance Act.

It is also very clear that the s 37A which the applicant seeks to rely on is providing for the collection of mining royalties through persons appointed as agents of the Commissioner General of the respondent. Understandably these can only deduct royalty based on the minerals at source based on the value of the invoice thereof. That is the mandate given to the agents. It is not their role to check if the miner has included in the invoice the gross fair market value of the mineral produced. This is then when the respondent steps in as it did *in casu*.

The respondent asserts the gross fair market value of the mineral means a value based on what a hypothetical willing buyer and hypothetical willing seller dealing at arm’s length on an open market would agree as a whole without deductions being made on such value.

On the other hand, the applicant contends that the word market benchmark which is given as US 0.70 c ex Hong Kong should be accepted as US 0.60 c ex Selous Zimbabwe.

In the *ZEC and the Chairperson of the ZEC supra* case, it was held further on interpretation of statutes that:

“However, the object of such Interpretation or construction is to ascertain the intention of the legislature in enacting the provision concerned and even where the words employed in a statute are clear and unambiguous a court may depart from the ordinary effect of the words in order to remove an absurdity and to give effect to the true intention of the legislature.”

The court in doing this can have regard to the context or such other considerations as the court is justified in taking into account. The reason governments levy royalties on miners is to obtain a finite resource that is being taken away from the country by a miner or as a form of compensation for the loss of such finite resource. Different jurisdictions have different ways of calculating the share or compensation to be collected. Some levy royalties on the net revenues obtained whilst others levy on the gross.

Clearly in this case it was the intention of the legislature to levy on a standard benchmark and not ex -works as this would result in different levels for different miners. It cannot be held that such a way of levying royalties is interference with the miner ‘s business decision. What was within the discretion of the miner on the rate 70c ex Hong Kong was to increase the price to include the insurance and freight. The product by being sold at 60c ex Selous was sold at below the gross fair market value.

It is my finding therefore that the applicant erred in declaring royalty on the face value of the invoice based as it was on the ex – works price of 10 cents less than the Fast Markets Ferro Alloys price.

Was the exclusion of the cost of freight from the invoice value a deduction from the gross fair market value and if it is whether it is proscribed by s 37 (9) of the Finance Act.

Mr *Mpofu* submitted that the applicant did not make any deduction on the purchase price of the commodity. The difference between the benchmark and ex works price is said to be arising from the location at which the sale occurred, which is ex- works Selous and not in Hong Kong. The difference is accounted for as the cost of freight which a buyer would have to personally arrange, having bought in Zimbabwe.

The word “gross” is said to mean without a deduction. Applicant avers that the 10c difference for freight does not fall within the deductions prohibited in terms of s 37 (2) of the Finance Act which explains why it provides that levy be levied and collected on the face value of the invoice. Such face value of the invoice is said to equate and represent the “gross market value” of the mineral concerned and that these are therefore synonymous.

The justification is that the applicant never received the cost of freight as part of the purchase price and then deducted the freight charge before paying royalty. It declared royalties on the face value of the invoice.

Section 37(9) is said to relate to impermissible deductions which are specified as beneficiation and production costs. It is argued that freight charges do not relate to production.

In response, Ms *Banda*, for the respondent gave a context for the introduction of s 37(9) which was said to have been introduced to deal with a mischief which had become prevalent among mining entities. They were deducting mineral processing or beneficiation costs from the gross fair market value of the mineral or invoice value and then calculating royalties based on the balance. S 37(9) therefore came in to clarify that such a practice was wrong and was enacted to remove any grey areas or doubt. The law itself is said to have already provided for a “gross fair market value” in the schedule to s 37 of the Finance Act.

The exclusion of explicit mention of the phrase “freight costs” is said to have arisen from this not having become a prevalent practice.

The intention of the Legislature is said to be to recoup as much as possible in the face of extraction of the finite resource and exclusion of freight costs would fly in the face of such intention. It is averred it would be risky to leave it to parties to set the distribution costs as they might connive to inflate these and undercut what government is entitled to.

The approach in *Care International v ZIMRA and Ors* SC 76-17 was commended to the court, wherein it was held that;

“A construction of the body of statutes concerned with matters of revenue assessment, collection and enforcement requires a purposive approach from the courts as a whole. The purpose of the statutes as a whole should be the guiding factor in the determination of the enquiry. The author G Devenish in his book *Interpretation of Statutes* (Juta 1992) at p 33 describes the Purposive Rule of interpretation as:

“The purposive approach requires that interpretation should not depend exclusively on the literal meaning of the words according to the semantic and grammatical analysis..... The interpreter

must endeavor to infer the design or purpose which lies behind the legislation. In order to do this, the interpreter should make use of an unqualified contextual approach, which allows an unconditional examination of all internal and external sources.....words should only be given ordinary grammatical meaning if such meaning is compatible with their complete context.”

The external context commended to the court for consideration is the Minister’s budget statement of 2019. He said:

“In order to ensure uniformity in the assessment of mineral royalty payments and also to promote equal treatment of mining companies, it is affirmed that no beneficiation or processing costs are deductible from the gross mineral proceeds when calculating mineral royalty payments. Such costs will only be deductible when taxpayers are self-assessing for taxable income.”

It is contended that if the self-assessments by the applicant are upheld, then the same distortions caused by production and beneficiation costs would arise. The intention of the legislature to ensure uniformity would fall by the wayside. This is because the miner’s distribution costs may differ. The Minister’s statement is said to give clear recourse in claiming a deduction when claiming income tax liability at the end of the year.

In this case, it was concluded that the applicant had erred by excluding the cost of freight from the invoice value.

Section 37(9) of the Finance Act provides as follows:

“For the avoidance of doubt, it is declared that, in calculating the gross fair market value of a mineral on the basis of which royalty is deducted for the purposes of this chapter, no deduction shall be made of beneficiation, processing or other costs whatsoever incurred in the production of the mineral concerned.”

I am persuaded by the respondent’s argument that I should use a purposive approach in my interpretation of this statute. It is the State’s intention to recoup royalties from the gross fair market value in order to realize the maximum possible and ensure uniformity on royalties levied across different mining institutions for similar products. This was clearly stated by the Minister in his budget statement.

The intention of the Legislature should not be constrained by the particular mischief which was spelt out in s 37 (9) being deductions for beneficiation and processing or production costs. The Legislature was alive to the possibility of other deductions which could be made and would defeat its purpose hence the inclusion of the words, “or other costs whatsoever incurred in the production of the mineral concerned.”

Section 245 of the Mines and Minerals Act provides for payment of royalties on all minerals won by a miner and disposed of by him. In such process of winning and disposing of a mineral, one incurs production, beneficiation and processing costs. Distribution and selling expenses are administrative costs which are deductible for income tax purposes as are the production, beneficiation and processing costs.

It is my finding therefore that the deduction from the gross fair market value of the cost of freight is proscribed by s 37(9) of the Finance Act.

Whether reference to “double the amount of royalties payable “as the primary civil penalty means 200% penalty over and above the royalty payable.

Mr *Mpofu* submitted that the respondent erred by interpreting s 37 (5) of the Finance Act as meaning that the primary civil penalty means 200% penalty over and above the royalty payable. According to him, the primary civil penalty is inclusive of both the amount of royalty due and the penalty. This would just add up to the amount due plus its equivalent thus making it double.

In support of such an interpretation, the applicant relies on s 37(7) of the Finance Act which says that a debt in respect of outstanding royalty is the primary and secondary penalties only. It is argued that the only logical conclusion which would not result in an absurdity by reading s 37 (5) together with s 37 (7) is to include the outstanding amount plus a 100% penalty making it double. I was urged not to take a literal interpretation of s 37(5) of the Finance Act as proposed by the respondent.

On the country, Ms *Banda* relies on s 37 (4) and (5) to argue that the law provides for a primary civil penalty and a secondary civil penalty. The primary civil penalty is said to be calculated using the principal debt which is the amount due at 200% of such amount. Such primary civil penalty is said to be a debt due in terms of s 37 (6) the Finance Act. This provision is said to also provide for a secondary civil penalty calculated on a daily basis at a prescribed debt. It is essentially argued that the applicant is liable to pay the principal debt and in addition the primary penalty which is 200% of the principal debt.

Examples were pointed to in the Income Tax Act [Chapter 23:06] and the Value Added Tax Act [Chapter 23:12] where penalties are provided for differently so as to result in the penalty being only 100% of the principal debt.

The court was urged not to be influenced by the economic hardships which may befall the applicant and simply focus on whether the applicant falls within the provisions of the taxing law. See the case of *Delta Beverages v ZIMRA SC 3/22*.

Additional references were made to the following cases: *Endeavour Foundation & Anor v Commissioner of Taxes 1995 (1) ZLR 339(s)* & *ZIMRA v FC Platinum SC 44/22* urging the court on how to interpret the provisions in issue. Section 37(5) of the Finance Act provides as follows:

“As soon as it comes to the notice of the Commissioner that any person responsible for remitting royalties timeously in terms of Subsection (3) has failed to do so, the Commissioner shall serve upon that person notice to pay double the amount of the royalties payable (hereinafter called the “primary civil penalty”)

Section 37 (6) provides for payment of a secondary civil penalty which is calculated per day of default after the Commissioner has served notice to pay the primary civil penalty and remains in debt. Section 37(7) then provides as follows:

“A primary and secondary civil penalty that becomes payable by the infringer shall constitute a debt due by the infringer to the Zimbabwe Revenue Authority and shall, at any time after it becomes due, be recoverable in a court of competent jurisdiction by proceedings in the name of the Authority.

The word “penalty” in ordinary language as per Oxford Dictionary means “a punishment imposed for breaking a law, rule or contract.” *In casu* the law sets out in the Schedule to s 37 that royalties are payable as a percentage of the gross fair market value of the mineral produced. Whatever amount is payable is the principal debt which stands due and payable. Through s 37 (5) of the Finance Act a punishment is imposed for failure to pay the royalty due as the principal debt. The principal debt is only important in calculating the quantum of the primary civil penalty at double the amount due. In the very literal sense, there is no way the principal amount can be subsumed into the primary civil penalty because it is not a punishment imposed for breaking the law. This gives credence to the respondent’s argument on this issue.

Additionally, the provisions providing for a penalty to be levied at 100% in both the Income Tax Act and the Value Added Tax Act explicitly say so. *In casu* it is clear that by using the different language of double the amount due as a primary civil penalty the legislature meant that the primary civil penalty on its own would be 200% of the principal debt. In this case the ordinary, plain literal meaning of this expression as popularly understood accords with the

expressed intention of the legislature which is to set the primary civil penalty at 200% of the principal debt.

It is my finding therefore that reference to “double the amount of royalties payable” as the primary civil penalty means 200% penalty over and above the royalty due.

Disposition

I have found that the applicant erred in declaring royalty on the face value of the invoice based as it was on the ex-works price of 10 cents less than the Fast Markets Ferro Alloys price.

I further found that the exclusion of the cost of freight from the invoice value is a deduction from the gross fair market value and that it is proscribed by s 37 (9) of the Finance Act.

The reference to double the amount of royalties payable as the primary civil penalty has been found to mean 200% penalty over and above the royalty due.

Costs generally follow the cause.

Accordingly, the urgent court application is dismissed with costs.

Mushoriwa Pasi Corporate Attorneys, applicant’s legal practitioner
Zimbabwe Revenue Authority, respondent ‘s legal practitioner