

**REPORTABLE (3)**

**AFRITRADE INTERNATIONAL LIMITED  
v  
ZIMBABWE REVENUE AUTHORITY**

**SUPREME COURT OF ZIMBABWE  
PATEL JA, BHUNU JA & BERE JA  
HARARE, JUNE 6 2019 & MARCH 23, 2021**

*T Mpofu*, for the appellant  
*T Magwaliba*, for the respondent

Judgment No. SC 3/2021  
Civil Appeal No. SC 427/18

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**PATEL JA:** This is an appeal against the judgment of the Fiscal Appeal Court dismissing an appeal against the determination of the respondent requiring the appellant to pay value added tax (VAT) on the importation of certain goods into Zimbabwe.

**Background**

The appellant is a foreign company incorporated in the British Virgin Islands and operating from Guernsey in the Channel Islands. The respondent is a body corporate responsible for the collection of VAT and other imposts in Zimbabwe.

The appellant was a supplier of basic commodities to local companies, including the West Group of Companies (West Group). In 1992, it concluded an agency agreement with

Douglas and Tate (Pvt) Ltd (Douglas & Tate), a subsidiary of West Group. By 1999, it was supplying basic commodities to West Group and other local customers under a US\$ 10 million line of credit registered with the Reserve Bank of Zimbabwe (the RBZ).

On 1 October 2007, the RBZ unveiled the Basic Commodities Supply Side Intervention (BACOSI), a facility designed to end the chronic shortages of basic commodities in Zimbabwe. After negotiations between the appellant and the RBZ, the latter purchased certain non-BACOSI goods, valued at US\$ 7,987,207.54, that were in the Douglas & Tate warehouse. The appellant also supplied BACOSI goods, valued at US\$11,698,174.00, to the RBZ in 2008.

After conducting investigations, the respondent raised taxation schedules against the appellant for outstanding VAT, on both BACOSI and non-BACOSI transactions, initially on 17 March 2009 and later on 15 July 2009. The total charge raised was US\$6,302,712.13, inclusive of interest and penalties. This was subsequently corrected, on 13 October 2009, by reducing the charge to US\$ 6,249,496.70.

The appellant lodged an objection to the assessment on 25 September 2009. It also applied for condonation for the late filing of the objection. The respondent dismissed the application for condonation and disallowed the objection. The appellant appealed against both decisions to the Fiscal Appeal Court on 12 October 2009. The respondent filed its reply on 12 November 2009. At a pre-trial hearing on 17 September 2014, the delay by the appellant in filing its notice of objection as well as the failure by the respondent to file its documents timeously were both condoned by consent.

## Judgment of the Fiscal Appeal Court

At the hearing of the matter, the appellant called the evidence of one Kenneth Sharpe, who was the founder and Chairman of West Group and a director of Douglas & Tate. He confirmed the foreign status of the appellant. His evidence was that West Group, Douglas & Tate and the appellant were not related companies. The court *a quo* found that he was not a credible or reliable witness. This was because he contradicted material parts of his evidence-in-chief under cross-examination. Furthermore, his evidence left gaps that could only be filled by the directors, employees, officials or agents of the appellant itself.

On the merits, the court *a quo* relied on the documentary evidence, *i.e.* the unsigned agreement between the appellant and the RBZ and the relevant documents generated in South Africa, to find that it was the appellant that imported the goods in question into Zimbabwe. It was the appellant who beneficially owned and possessed the goods before they entered Zimbabwe and brought or caused them to be brought into the country. It was accordingly held that the appellant was the importer of both the BACOSSI and non-BACOSSI goods.

The court further found that the activities of the appellant in Zimbabwe from 2004 onwards, which were carried on continuously and regularly, constituted trading in the country for the purposes of VAT liability. The appellant was not a registered operator, but every trader is liable to be registered for VAT purposes and is deemed to be a registered operator as the principal for goods supplied or imported on its behalf by its agent. The appellant was carrying on the business of supplying goods through the agency of

Douglas & Tate, which released the goods only on the instructions of the appellant after the latter had received payment in accordance with the relevant waybills and invoices.

The court held that the appellant was the importer of the goods in question and was therefore liable for the payment of VAT in both the pre-BACOSI and BACOSI eras when it supplied goods in furtherance of its business activities. Furthermore, the appellant was required to be registered and had to be treated as a registered operator. Its failure to charge or receive VAT did not exonerate the appellant as VAT is deemed to be included in the purchase price. Additionally, it bore the obligation to remit VAT in foreign currency in accordance with the legislation in force at the relevant time.

As regards the appointment of the Chief Executive Officer (CEO) of West Group as the public officer of the appellant, the court found that this was above board. In terms of the governing provisions, the respondent was allowed to compulsorily appoint the CEO of West Group, the holding company of Douglas & Tate, which was the agent of the appellant in Zimbabwe, as its public officer and representative registered operator for the collection of VAT.

With respect to the appellant's argument that the respondent had used an arbitrary exchange rate to convert Rand denominated transactions to United States dollar values, the respondent averred that the relevant invoice values together with the appropriate conversions were supplied by the appellant's own agents. The court found that the onus was on the appellant to establish that the conversions were arbitrary. However, it did not lead any evidence in this regard and the respondent's averments were not denied.

In the event, the court held that the appeal before it was not sustainable in its entirety. However, the appellant's objections raised important legal points and its grounds of appeal were not frivolous. The appeal was accordingly dismissed with no order as to costs.

#### Grounds of appeal and relief sought

There are six grounds of appeal in *casu*. They impugn the judgment of the court *a quo* in the following respects:

- Rejecting the evidence given on behalf of the appellant as being unreliable.
- Holding that the appellant, and not the RBZ, was the importer of the goods in question.
- Holding that the respondent was entitled to go behind the contents of the bills of lading which it had processed and approved to find that the appellant was the importer of the goods into Zimbabwe.
- Finding that the appellant operated a business in Zimbabwe.
- Holding that the appellant was to be treated as a registered operator and finding that the appellant was liable to pay VAT on the imported goods.
- Considering the issue of whether or not any company had been lawfully appointed as an agent to pay any tax due by the appellant, and in finding that such an appointment had in fact been lawfully made.

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The appellant prays that the appeal be allowed with costs and that the judgment of the court *a quo* be set aside and substituted with an order allowing the appeal *a quo* with costs and directing the respondent to withdraw the contested VAT assessments issued by it against the appellant in this matter.

#### Preliminary issues

Mr *Magwaliba*, raised two preliminary objections to the notice of appeal. The first was that paragraph 2 of the order to be substituted *a quo* lacks exactitude as to the specific notices of assessment to be set aside. The second was that the first ground of appeal is too wide and does not identify the specific evidence that was found to be unreliable. This ground does not allow the respondent or the court to identify that evidence.

In response, Mr *Mpofu*, for the appellant, argued that the prayer in the notice of appeal is exact as to the notices of assessment to be set aside. However, if the prayer needed to be amended, he moved that it be so amended.

As regards the prayer, I agree with Mr *Mpofu* that paragraph 2 of the order to be substituted *a quo* does specifically identify the VAT assessments that are to be withdrawn, in relation to both the goods concerned as well as the period covered. Therefore, I do not think that the objection taken is valid or that the draft prayer calls for any corrective amendment.

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As for the first ground of appeal, Mr *Mpofu* was quite correctly prepared to abandon this ground. Consequently, the first ground of appeal was struck out by consent.

Identity of importer: Zimtrade or RBZ

The second and third grounds of appeal pertain to the identity of the importer of the goods in question. Was it the RBZ, as is contended by the appellant, or was it the appellant itself? Also relevant in this context are the contents of the bills of entry that had been submitted for processing and approval by the respondent's Department of Customs and Excise.

Mr *Mpofu* submits that a bill of entry is a document that is filed by the importer. In *casu*, one such bill of entry filed and approved in August 2008 identifies the appellant as the exporter/consignor, based in Guernsey. The importer/consignee is identified as the RBZ. All the other relevant bills of entry in this case contain the same information as to the identities of the exporter and the importer. The bills of entry were issued in terms of the Customs and Excise Act. Mr *Mpofu* relies on the provisions of ss 37(1)(e), 39(1) and 40(1) of the Act in support of his submission that the entries in question were made by the RBZ as the importer. The respondent incorrectly took the position that the appellant was the importer of the goods concerned because it owned the goods before they entered into Zimbabwe from South Africa. The respondent, which bore the evidentiary burden in this respect, did not place any evidence before the court *a quo* to disprove the correctness of the bills of entry.

Mr *Mpofu* also relies on other documentary evidence to buttress the appellant's position. In particular, he refers to an opinion by the RBZ's lawyer dated 17 June 2009, a letter of 1 July 2009 from the RBZ to the appellant's lawyers, and the minutes of a meeting held on 7 October 2009 between the RBZ and representatives of West Group. These documents, so he submits, make it clear that the RBZ was the importer, the only unresolved issue being the currency in which VAT was to be paid.

Turning to the unsigned draft agreement between the parties, Mr *Mpofu* submits that the court *a quo* wrongly relied on this draft to counter the bills of entry. The respondent itself indicated in its reply that it did not know whether or not the agreement was reduced to writing. It further confirmed, through its counsel, that it was not relying on the drafts as conclusive evidence of the agreement between the appellant and the RBZ. Consequently, so it

is submitted, the unsigned agreement had no validity and could not be used as an antidote to the bills of entry, as the court *a quo* purported to do.

Mr *Magwaliba* submits that the provisions of the Customs and Excise Act that are relied upon by the appellant do not address the question at hand. What is more relevant are the definitions that appear in s 2 of the Act relating to the meaning of the terms “import”, “importer” and “entry”. The court *a quo*, so he submits, correctly applied these definitions to find that the appellant was the owner and importer of the goods in question before they crossed the borders of Zimbabwe. Thus, the respondent was entitled to pursue the party that was statutorily liable to pay VAT as the importer, *i.e.* the appellant, and not the RBZ which was not the importer.

As regards the bills of entry, Mr *Magwaliba* points to the definition of “entry” in s 2 of the Act which makes it clear that the information contained in a bill of entry must be correct. Most of the declarants on the bills in *casu* were employees of Mitchell Cotts Freight Zimbabwe, a freighting company. Therefore, so he submits, it was not the RBZ but the freighting agent that completed the bills of entry. The evidence indicates that the freighting agent was paid by the subsidiary of West Group, *i.e.* Douglas & Tate, which acted for the appellant. Mr *Magwaliba* further submits that the bills of entry were not prepared by the respondent or the RBZ or by any other official. Consequently, no presumption of regularity could attach to them and their designation of the RBZ as the importer is therefore not reliable or conclusive.

With reference to the alleged admissions of liability by the RBZ, Mr *Magwaliba* argues that the opinion tendered by its lawyer on 17 June 2009 is not binding. Again, the



letter from the RBZ, dated 1 July 2009, was rejected by the Advisor to the RBZ Governor at a meeting held with the respondent's officials on 20 August 2009. Furthermore, the RBZ's expression of its willingness to pay the VAT invoices in Zimbabwe dollars, at its meeting with West Group on 7 October 2009, was conditional on seeking legal opinions on the matter.

Finally, Mr *Magwaliba* submits that the draft agreement between the appellant and the RBZ affords evidence of the negotiations between and intention of the parties at some point. The terms contained in an unsigned agreement can be relied upon unless they are disproved by the party who asserts that the agreement was not intended to be binding. The court *a quo* was therefore correct in relying upon the contents of the draft agreement in *casu*.

In response, Mr *Mpofu* submits that the contents of the bills of entry are crucial because they were officially accepted for the purposes of importation and the liability to pay tax. They show that the RBZ, which had a beneficial interest in the goods at the time when entry was made, was the importer of those goods. There was no evidence to rebut the contents of the bills of entry. In this respect, the fact that the freighting agents signed them as the declarants is irrelevant. In terms of s 12 of the Civil Evidence Act, a bill of entry, being a public document, does not have to be made exclusively by a public officer. The bills of entry in *casu* were made on ZIMRA forms and their contents were accepted by ZIMRA officials. Furthermore, copies of any documents kept by a public official can be used in evidence.

Lastly, Mr *Mpofu* submits that the opinion of the RBZ's lawyer, dated 17 June 2009, were based upon facts given to him by the RBZ itself. The RBZ clearly relied upon that opinion in order to accept liability to pay the VAT claimed in Zimbabwe dollars.

There is a total number of 12 bills of entry on record, covering the period from 20 June 2008 to 26 August 2008. All of these bills identify the appellant as the exporter and the RBZ as the importer. The declarants on the first 7 bills were representatives of Big Star Cargo Services, while the declarants on the next 5 bills were representatives of Mitchell Cotts Freight Zimbabwe. There can be no doubt that, *prima facie*, the entries on these bills of entry support the appellant's contention that it was not the importer of the goods in question.

The draft agreement relied upon by the respondent appears to have been drafted at some stage in 2008. It identifies the appellant as a company duly incorporated in Zimbabwe and whose principal place of business is situated in Harare. The appellant is designated as the seller of specified goods, valued at US\$ 12,759,114.00, while the RBZ is designated as the buyer of those goods. The agreement was not signed by either of the parties. In its reply, the respondent intimated that it had "no knowledge of whether the agreement in respect of the supply of goods was reduced to writing or not". However, the respondent annexed to its reply the minutes of a meeting held on 13 February 2009 between officials of the RBZ and various other named but unidentified persons. The purpose of the meeting was to explain "the operations of BACOSI project". According to the officials of the RBZ, the appellant "was responsible for importation of basic commodities". They further explained that the appellant "is not duly incorporated in Zimbabwe and does not have offices in Zimbabwe as indicated on the contract of agreement in ZIMRA's possession". Furthermore, "only a verbal agreement was reached between the governor and Tania, the Ukrainian representing Afritrade International. There is no written agreement between Afritrade International and RBZ".

The learned judge *a quo* highlighted the principal terms of the agreement and reasoned that “the onus to establish that the terms and conditions in their agreement were different from those captured in the unsigned agreement was on the appellant. The appellant did not lead any evidence on this aspect”. Furthermore, “the unsigned agreement placed the duty to import the goods into Zimbabwe on the appellant. Again, the delivery of the goods cost, insurance and freight Harare strongly suggests that the appellant imported the goods into Zimbabwe. It would not make sense for the RBZ to undertake to expeditiously facilitate the quick clearance of its imports. The obligatory cost, insurance and freight Chitungwiza bonded warehouse delivery clause and the expeditious clearance clause suggests [*sic*] that the appellant was the importer”.

In principle, an unsigned agreement cannot ordinarily be relied upon as creating a valid and binding contract. However, the surrounding circumstances, including prior dealings between the parties concerned, may give rise to the *prima facie* presumption that the terms and conditions embodied in an unsigned agreement represent the true intention of the parties. The burden then shifts to the party disputing the authenticity of the agreement to show that it was not intended to be binding. This position was affirmed by this Court in *Associated Printing and Packaging (Pvt) Ltd & Ors v Lavin & Anor* 1996 (1) ZLR 82 (S), at 87:

“One must mention the fact that the written document, Annexure F, was not signed. The seller apparently declined to sign it. The law on this point is set out in *Christie op cit* at p 122:

‘This principle, that the burden of proof is on the party who asserts that an informal contract was not intended to be binding until reduced to writing and signed, was adopted by the Appellate Division in *Goldblatt v Fremantle* 1920 AD 123 ...’

In *Woods v Walters* 1921 AD 303 at 305 Innes CJ referred to the above passage and added:

‘It follows of course that where the parties are shown to have been *ad idem* as to the material conditions of the contract, the onus of proving an agreement

that legal validity should be postponed until the due execution of a written document lies upon the party who alleges it.’

In this context, it is of significance that Mr Morris, the seller, declined to give evidence on oath, or to call any witnesses.”

It is common cause that there was an agreement between the appellant and the RBZ governing the importation and supply of the BACOSI goods. This agreement was reduced to writing but was not signed by the parties, ostensibly because the appellant was unhappy with the description of its country of incorporation and principal place of business in the preamble to the draft agreement. In any event, the BACOSI goods were imported into Zimbabwe and delivered to the RBZ in Harare as specified in the unsigned agreement. Given this background, it seems to me that the court *a quo* was correct in finding that the contract between the appellant and the RBZ was on the terms and conditions stipulated in the draft unsigned agreement, unless the appellant was able to prove that its contract with the RBZ was on some other terms and conditions. Inasmuch as the appellant did not adduce evidence of any other agreement between the parties, the learned judge *a quo* correctly concluded that the appellant was bound by the terms of the draft agreement. It follows that those terms must be taken as being correct in their designation of the appellant as the seller and importer of the goods in question.

The next issue concerns the legal opinion submitted to the RBZ and its subsequent stance relating to the payment of VAT claimed by the respondent. In their letter to the RBZ, dated 17 June 2009, its lawyers took the following position:

“From the documentation we were shown, the Reserve Bank imported the Bacossi goods. The imported goods are VAT taxable and the tax is charged on the importer (RBZ in this case). ..... . The VAT payable on the importation of goods into Zimbabwe is payable by the importer and not by the supplier of those goods. Accordingly, if ZIMRA were to rely on the provisions dealing with imports the Reserve Bank would have to pay the VAT. .... . We therefore advise the Reserve Bank to urgently pay Zimra in local currency. This should be done before parliament resume [*sic*] and pass the Finance Bill which may have changes on the currency

to be paid on all outstanding taxes. .... . Government departments cannot take each other to court. .... . We do not therefore believe that ZIMRA can go to court against the Reserve Bank.”

Three things emerge from the legal advice contained in this letter. The first, based on the importation documents, presumably the relevant bills of entry, is that the RBZ was the importer of the BACOSSI goods and was therefore liable for any VAT leviable on those goods. The second is that the RBZ should pay that tax in local currency before any legislative change was introduced. And thirdly, even if the RBZ were to be levied for payment of the VAT due, ZIMRA would not be able to pursue its claim against the RBZ through the courts.

Pursuant to this opinion, its addressee (Dr Mombeshora) wrote on behalf of the RBZ to the appellant’s lawyers. The nub of this letter, dated 1 July 2009, was to confirm that the RBZ “imported BACOSSI goods” from the appellant and that the RBZ “accepts liability to ZIMRA for this VAT”. However, this purported admission of liability to pay the VAT was subsequently condemned and rejected at a meeting held on 20 August 2009 between officials of the RBZ and ZIMRA. The lead RBZ representative (Dr Kereke) “opposed the writing of the letter by Dr Mombeshora; in fact it was shocking to him and the governor. .... . It was not proper to write such a letter to take responsibility of payment of tax of a supplier. .... . The letter was not RBZ policy. .... . The bank will revoke point number three of the letter which gave liability of Afritrade International to RBZ.”

Following this *volte-face* by the RBZ, a meeting was held between the RBZ and representatives of West Group. The meeting, held on 7 October 2009, was chaired by the RBZ Governor. It was noted that “a bank employee erred in assuming the liability on behalf of the Bank without the express authority of the Governor”. It was further noted that “there could perhaps be some business transactions held between Dr Mombeshora and Afritrade that

he [the Governor] could not verify or vouch for”. At any rate, “The Governor had no problem paying the VAT invoice as long as it was stated in Zimbabwe Dollars. .... . However, he had asked Dr Mombeshora to seek legal opinion on the matter internally and externally”. At the conclusion of the meeting, “the Governor suggested to West Group to obtain all the invoices and have them assessed by an accounting firm and advise on the correct VAT due. The records should cover pre-bacossi and bacossi importations”.

What is evident from all of the foregoing is that the RBZ’s acceptance of liability to pay the VAT due on the BACOSI goods, albeit in Zimbabwe dollars, was not unequivocal or unqualified. It was conditional upon the reassessment of the relevant records and the need to seek further legal opinion. Very significantly, this qualified acceptance of liability was largely predicated on the legal advice given to the RBZ on 17 June 2009, not all of which advice was necessarily correct. The basic premise of that advice hinged upon the contents of the importation documents that were shown to the RBZ’s lawyers.

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As I have already stated, *ex facie* the contents of the bills of entry in *casu* the appellant was the exporter and the RBZ was the importer of the goods in question. In light of the factual findings made by the court *a quo*, it becomes necessary to evaluate the legal correctness of those entries in the specific circumstances of this case.

Section 12(1) of the Civil Evidence Act [*Chapter 8:01*] defines a “public document” as a document made by a public officer for public use. In terms of s 12(2) of the Act, a copy of a public document is admissible in evidence as *prima facie* proof of the facts stated therein. By virtue of s 12(3), a copy of a document, other than a public document, the original of which is in the custody of a State official, is also admissible in evidence.

In *casu*, there can be no doubt that the bills of entry produced in evidence are admissible documents within the contemplation of s 12(3) of the Civil Evidence Act. The fact that the entries therein were not made by a public officer or official of the State does not detract from their status as admissible evidence, for the obvious reason that their originals were, or should have been, in the custody of a State official. The court *a quo* was very much alive to the presumption of regularity attaching to the bills of entry. It accepted that those bills were “public documents whose contents are *prima facie* correct” and that, therefore, “the evidentiary onus to disprove the correctness of the contents of the bills of entry shifted to the respondent.”

The court *a quo* then proceeded to examine the definitions of the terms “importer”, “exporter” and “entry” in s 2 of the Customs and Excise Act [*Chapter 23:02*]. The learned judge found that “the business activities of the appellant fell outside the definition of ‘exporter’ but squarely fit the definition of ‘importer’”. It was a misnomer to refer to the appellant in the bill of entry as an exporter”. He then concluded that “notwithstanding the contents of the bills of entry and other documents compiled by or at the instance of the appellant to the contrary, the appellant was the owner or possessor of the goods who also had a beneficiary [*sic*] interest in them before they entered Zimbabwe who brought them or caused them to be brought into Zimbabwe”. He accordingly held that “the appellant was the importer of both the non-Bacossi and the Bacossi goods.”

In terms of s 37(1)(e) of the Customs and Excise Act, where goods are imported by means other than ships, aircraft, trains or pipelines, the time of importation of goods into Zimbabwe is deemed to be the time when the goods cross the borders of Zimbabwe. Section 39(1)(a) of the Act requires every importer of goods to make entry of those goods at the point

of entry at the time of importation. Section 40(1) prescribes the manner in which entry of imported goods is to be made. It requires the person making entry to, *inter alia*, deliver to the proper officer a bill of entry with full particulars as prescribed or required, make and subscribe to a declaration in the prescribed form as to the correctness of those particulars, pay the duty due on the goods, and produce all bills of lading, invoices, or other documents relating to the goods or their value.

Turning to the salient definitions in s 2 of the Act, the term “entry” in relation to clearance of goods for importation means “the presentation in accordance with this Act of a correctly completed and signed declaration on a bill of entry in writing”. The term “export” means “to take goods or cause goods to be taken out of Zimbabwe”. Correspondingly, “exporter” means “any person in Zimbabwe who takes goods or causes goods to be taken out of Zimbabwe, and includes any employee or agent of such person and the owner of such goods as are exported”. Conversely, “import” means “to bring goods or cause goods to be brought into Zimbabwe”. The definition of “importer” is expanded to include “any owner of or other person possessed of or beneficially interested in any goods at any time before entry of the same has been made and the requirements of this Act fulfilled”.

Having regard to the foregoing provisions governing the entry of imported goods and the relevant definitions cited above, as applied within the context of the dealings between the appellant and the RBZ, I am inclined to agree with the conclusion arrived at by the learned judge *a quo*. The critical entries contained in the bills of entry are patently anomalous and misleading for the following reasons.



Firstly, the appellant cannot conceivably be said to be the exporter of the goods in question out of Zimbabwe. It was obviously the consignor of the goods into Zimbabwe, but certainly not their exporter out of Zimbabwe.

Secondly, given the manner of and circumstances surrounding the importation and entry of the goods into Zimbabwe, the RBZ cannot be described as the importer of those goods. It may well have been the ultimate consignee of the goods in Harare, but it was not their owner or possessor at any time before entry of the goods was made or at the time of their importation, *i.e.* when they crossed the borders of Zimbabwe at the port of entry in Beitbridge. There is nothing on record or in the evidence adduced to show that the RBZ had any form of control over the goods at the time of their importation. On the other hand, the appellant was quite evidently the party that brought the goods or caused them to be brought into Zimbabwe. It was also the only party that can accurately be described as the owner or person possessed of or beneficially interested in the goods at any time before their entry was made or at the time of their importation.

Thirdly, there is no evidence of any direct linkage between the RBZ and the freighting agents involved, *i.e.* Big Star Cargo Services and Mitchell Cotts. They were clearly not the agents of the RBZ or acting on its behalf at the time when they declared themselves on the bills of entry as the importer's agents. There is no evidence on record to show that the RBZ itself was privy to the particulars contained in the bills of entry or that it could vouch for their correctness. Indeed, this is abundantly clear from the meeting that was held between the RBZ and the representatives of West Group on 7 October 2009, when it was decided that West Group was to obtain all the relevant invoices and records, for assessment by an accounting firm, so as to advise the RBZ on the correct amount of VAT due. On the other

hand, there can be no doubt that it was the appellant that generated or caused to be generated the accompanying bills of lading, invoices and other documents relating to the imported goods and their value. Moreover, when subscribing to the particulars contained in the bills of entry, the freighting agents, as declarants, were evidently acting on the instructions and as the agents of the true “importer” of the goods in question, to wit, the appellant.

In the final analysis, I am amply satisfied that the court *a quo* was perfectly correct in holding that it was the appellant that was the importer of both the BACOSI and the non-BACOSI goods. In the premises, the second and third grounds of appeal cannot be sustained and must accordingly be dismissed.

Conduct of business or trade: Registration as operator

The fourth and fifth grounds of appeal attack the judgment *a quo* in the finding of the court that the appellant operated a business in Zimbabwe and consequently holding that the appellant was to be treated as a registered operator liable to pay VAT on the imported goods.

The evidence-in-chief of the Chairman of West Group (Kenneth Sharpe) was that there was no cross-holding of shares between West Group and the appellant. He further testified that none of the officers of the appellant was on any of the boards in West Group and that the appellant did not have and never had any personnel in Zimbabwe. He also confirmed the details in his earlier written statement pertaining to the type of business that was being conducted by the appellant with Douglas & Tate, a subsidiary of West Group. This was to the effect that Douglas & Tate was holding various items which had been put in its warehouse on

behalf of the appellant. The arrangement between Douglas & Tate and the appellant was that the former would act as an agent of the latter.

On the basis of this testimony, Mr *Mpofu* submits that there was nothing to contradict the appellant's position that it did not operate any business in Zimbabwe. The appellant is a foreign company that conducted business in South Africa to acquire goods for the RBZ. It did not undertake any gainful occupation or activity within Zimbabwe itself and it had no employees in Zimbabwe. Consequently, so it is submitted, the learned judge erred in holding that the appellant was required to be registered for VAT purposes.

Mr *Magwaliba* counters that, in terms of the governing legislation, VAT is payable by any person, local or foreign, who is an importer. Whether or not that person carries on any trade in Zimbabwe is irrelevant. The appellant, so he submits, is obliged to pay VAT as an importer. Furthermore, it is common cause that the appellant operated in Zimbabwe through its agent, *i.e.* Douglas & Tate. The appellant therefore carried on business partly in Zimbabwe. As regards registration as an operator, the law permits the respondent to deem a person to be registered from the date he becomes liable to pay VAT. Accordingly, it is argued that the respondent competently deemed the appellant to be a registered operator for VAT purposes.

In terms of s 6(1)(a) of the Value Added Tax Act [*Chapter 23:12*], VAT is to be charged, levied and collected on the value of the supply by any registered operator of goods or services supplied by him in the course or furtherance of any trade carried on by him. Additionally, by virtue of s 6(1)(b) of the Act, VAT is also leviable on the value of the importation of any goods into Zimbabwe by any person.

My reading of these provisions is that they afford two separate and distinct taxing bases for the levying and payment of VAT. Under s 6(1)(a), it is the supply of goods and services in the course or furtherance of any trade that attracts liability to pay VAT, while s 6(1)(b) pertains to the payment of VAT on the importation of any goods into Zimbabwe. By virtue of s 6(2)(a) and s 6(2)(b), the tax payable under s 6(1)(a) is to be paid by the registered operator, and the tax payable under s 6(1)(b) is to be paid by the importer of the goods in question. In the latter instance, it is not necessary that the importer should also be carrying on any trade in Zimbabwe for VAT to be levied.

The registration of persons making supplies in the course of any trade is governed by s 23 of the Act. Section 23(1) stipulates that every person who, on or after 1 January 2004, carries on any trade and is not registered becomes liable to be registered. Subsections (2) and (3) of s 23 prescribe the procedural requirements for registration for VAT purposes. In terms of s 23(4)(b), where any person who is liable to be registered has not applied for registration, that person is deemed to be a registered operator for the purposes of the Act from the date on which he first became liable to be registered in terms of the Act.

The word “supply” is defined in s 2 of the Act to include “all forms of supply, irrespective of where the supply is effected”. The term “trade” is equally broadly defined to mean “in the case of a 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 cause or furtherance of which goods or services are supplied to any other person for a consideration, whether or not for profit, ..... “. In similar vein, a

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

In *casu*, it is common cause that, at all material times, it was the appellant, acting through Douglas & Tate as its agent, that supplied both the non-BACOSI and BACOSI goods to the RBZ. Having regard to the definitions of “trade”, “supply” and “supplier” in s 2 of the Act, the appellant was unquestionably the supplier of those goods, who supplied them in the course and furtherance of a trade carried on by it, within the contemplation of s 6(1)(a) of the Act. The fact that such supply might have been effected before, at the time when or after the goods in question arrived at the Beitbridge border post is quite immaterial, as is the fact that the appellant conducted its trade only partly in Zimbabwe. Again, it is equally irrelevant that the appellant was an entity incorporated in Guernsey, but not in Zimbabwe, or that its principal place of business might have been situated outside Zimbabwe.

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It follows from the foregoing that the appellant was liable to be registered in terms of s 6(1)(a) of the Act, as an entity subject to VAT, and that it was quite properly and lawfully registered for VAT purposes in terms of s 23(4)(b) of the Act. It also follows that the court *a quo* cannot be faulted for holding that the appellant was to be treated as a registered operator in terms of the Act and that it was therefore liable to pay VAT on the goods that it supplied, as required by s 6(2)(b) of the Act. Alternatively and in any event, in light of my earlier conclusion that the appellant was the true importer of the goods in question, it would also be liable to pay VAT on their importation, in terms of s 6(1)(b) as read with s 6(2)(b) of the Act.

Appointment of agent to pay tax

The sixth and final ground of appeal takes issue with the findings of the court *a quo* in connection with the appointment of an agent to pay tax and that such an appointment had in fact been lawfully made. As was correctly observed in argument by Mr *Mpofu*, this ground is only relevant if the other grounds of appeal are unsuccessful.

On 12 March 2009, the respondent appointed the Chief Executive Officer (CEO) of West Group as the public officer and representative of the appellant on the ground that West Group was the holding company of Douglas & Tate, the appellant's agent in Zimbabwe. The CEO objected to this appointment but his objection was dismissed by the respondent on 31 March 2009. The court *a quo*, relying on various provisions of the Income Tax Act and the Value Added Tax Act, held that "the appointment of the CEO of the holding company of D & T, the agent of the appellant, as a public officer and representative registered operator was above board because D & T acted as an agent of the appellant in Zimbabwe".

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Mr *Mpofu* submits that the appointment of the CEO of West Group was invalid, particularly as the respondent initially conceded this point by cancelling the appointment and dealing instead with the appellant's legal practitioners, but then later overrode its own concession. Mr *Mpofu* points to s 61(4) of the Income Tax Act to submit that this provision completely excludes the propriety of the appointment and that it was clearly misconceived. Section 61(4) makes it clear that the appointed person must be an official of the importing company and not an official of an agent company. Mr *Magwaliba* submits that s 61(4) is not the only relevant provision. Section 61(8) of the Act is equally relevant as it allows the respondent to penalise the agent of any defaulting company.

Subsections (1), (2) and (3) of s 61 of the Income Tax Act [*Chapter 23:06*] provide for the appointment of a public officer, being an individual residing in Zimbabwe, to represent every company which carries on a trade or has an office or other established place of business in Zimbabwe. Such individual, who must be a person approved by the Commissioner of Taxes, must be appointed within one month of the company commencing its operations in the country. Section 61(4) of the Act stipulates that “in default of any such appointment, the public officer of any company shall be such managing director, director, secretary or other officer of the company as the Commissioner may designate for that purpose” (my emphasis). By dint of s 61(8), any company which fails to comply with s 61 “and every person who acts within Zimbabwe as agent or manager or representative of such company” incurs a monetary penalty for every day during which the default continues. Additionally, s 61(9) enables any notice, process or proceeding under the Act to be given to, served upon or taken against the public officer of the company and, in his or her absence, “any officer or person acting or appearing to act in the management of the business or affairs of such company or as agent of such company”. The word “agent” is defined in s 2 of the Act to include “any partnership or company ..... when acting as an agent” and “any person declared by the Commissioner to be the agent of some other person for the purposes of this Act”.

Section 53 of the Income Tax Act sets out the persons who are representative taxpayers for the purposes of the Act. In terms of s 53(1)(a), a “representative taxpayer ..... in relation to the income of a company, means the public officer of the company”. Section 54(1) of the Act subjects every representative taxpayer to the same duties, responsibilities and liabilities as if such income were received by or accruing to him or her beneficially as well as liability to assessment in his or her own name in respect of such

income. However, s 54(5) makes it clear that any tax payable in respect of an assessment made upon a public officer is recoverable from the company itself.

Turning to the Value Added Tax Act [*Chapter 23:12*], the provisions relied upon by the court *a quo* are to be found in ss 47, 48 and 49 of Part VIII of the Act, pertaining to representative registered operators. In terms of s 47(a), the person responsible for performing the duties imposed by the Act upon any company is the public officer contemplated in s 53 of the Income Tax Act. Section 48(2) empowers the Commissioner to declare any person to be the agent of any other person for the purposes of the Act, including the payment of any amount of tax, additional tax, penalty or interest due from any moneys held or received by him or her as an agent or intermediary of the other person. In similar vein, s 49(2) stipulates that every representative registered operator shall be liable for the payment of any tax, additional tax, penalty or interest chargeable under the Act in relation to any moneys controlled or transaction concluded by him or her in a representative capacity, as though such liability had been incurred personally.

The key provisions for consideration in the present context are s 61(4) of the Income Tax Act and s 47(a) of the Value Added Tax Act. The former enables the Commissioner to designate the public officer of a company in the absence of an appointment of such officer by the company itself. The latter, as read with s 53 of the Income Tax Act, identifies the public officer as the person responsible for performing the duties imposed by the Value Added Tax Act on any company. Apart from identifying the public officer of a company as its principal representative for all tax-related purposes, the other provisions in both Acts that I have alluded to earlier also impose various responsibilities and obligations upon other specified individuals. These include any person who acts as an agent, manager or



representative of the company and anyone declared by the Commissioner to be the agent of the company.

It is trite that the provisions of a statute must be construed holistically, within the context of the statute in which they appear as well as any statute *in pari materia*. In this respect, the learned judge *a quo* quite properly took into account “the architectural design” of both the Income Tax Act and the Value Added Tax Act which allow the Commissioner to compulsorily appoint public officers and agents for the collection of VAT and other taxes. On this basis, he found that the appointment of the CEO of West Group as a public officer and representative registered operator of the appellant was perfectly lawful.

With great respect, the learned judge appears to have misconstrued and misapplied the provisions that he relied upon to arrive at that conclusion. First and foremost, it is common cause that there was no corporate nexus between West Group and the appellant. The fact that Douglas & Tate, a subsidiary of West Group acted as an agent of the appellant in Zimbabwe, did not justify the imposition of corporate responsibility upon the CEO of West Group simply because the latter was the holding company of Douglas & Tate. Secondly and more significantly, the learned judge seems to have stretched the concept of contextual construction well beyond the permissible limits. In terms of s 47(a) of the Value Added Tax Act, it is the public officer of a company that is responsible for performing the duties imposed by that Act. Such public officer is ordinarily appointed by the company itself or by an agent or legal practitioner vested with the authority to do so. And in default of such appointment, s 61(4) of the Income Tax Act enables the Commissioner to designate a “managing director, director, secretary or other officer of the company” as its public officer. Without doing critical violence to the clear and unambiguous language of this provision, it is

difficult to imagine how the CEO of West Group, an entity that had no managerial, directorial or shareholding connection with the appellant, could possibly be regarded as an officer of the appellant company.

I am fortified in this position by having regard to the extremely onerous obligations imposed upon the public officer or registered representative operator of a company as well as the highly punitive consequences and liabilities attaching to the failure to fulfil those obligations. Amongst other things, there is the possibility of being subjected to monetary penalties, legal process and tax assessments as well as the liability to pay, albeit in a representative capacity, taxation debts incurred by the company. I do not think that the lawmaker would have intended the visitation of such punitive measures upon the officers of an entirely separate corporate entity.

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Both at common law and by virtue of s 3 of the Administrative Justice Act [Chapter 10:28], the Commissioner of Taxes, as an administrative authority, is enjoined to act fairly, reasonably and lawfully in the performance of his or her statutory functions and duties. In the instant case, I am of the considered view that the compulsory appointment of the CEO of West Group as the public officer and representative registered operator of the appellant was patently unfair, unreasonable and unlawful. In this respect, the court *a quo* clearly erred in upholding this appointment.

### Disposition

To conclude, the first ground of appeal is struck out by consent. The second, third, fourth and fifth grounds of appeal are dismissed. Only the sixth ground of appeal succeeds and is therefore upheld.

As regards costs, the court *a quo* quite properly declined to award costs against the appellant on the basis that its objection raised important legal points on the status of a bill of entry and that its grounds of appeal were not frivolous. I am inclined to agree and adopt the same approach on appeal.

It is accordingly ordered that:

1. The appeal partially succeeds in respect of the sixth ground of appeal.
2. Each party shall bear its own costs.
3. The judgment of the court *a quo* is set aside and substituted as follows:
  - “(i) Subject to paragraph (ii) below, the appeal be and is hereby dismissed.
  - (ii) The respondent’s appointment of the Chief Executive Officer of the West Group of Companies Limited as the public officer and representative registered operator of the appellant be and is hereby set aside.
  - (iii) There shall be no order as to costs.”

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**BHUNU JA** : I agree

**BERE JA** : (No longer in office)

*Gill, Godlonton & Gerrans*, appellant’s legal practitioners

*ZIMRA Legal & Corporate Services Division*, respondent’s legal practitioners