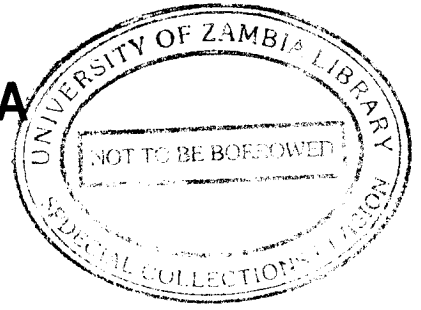


THE UNIVERSITY OF ZAMBIA

SCHOOL OF LAW



**A CRITICAL ANALYSIS OF THE IMPLICATION OF TAXATION STABILITY
UNDER MINING DEVELOPMENT AGREEMENTS ON LEVYING OF RATES ON
MINING PROPERTY IN ZAMBIA**

BY

**CHARLES WALE KABUKA
21101540**

Being a final year Dissertation submitted to the University of Zambia, School of Law, in partial fulfillment to the requirement for the award of the degree of Bachelor of Laws (LLB)

FEBRUARY 2008

THE UNIVERSITY OF ZAMBIA

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CHARLES WALE KABUKA
21101540

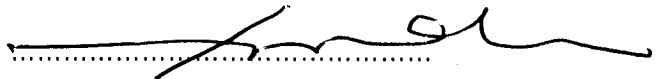
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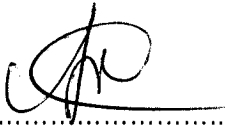
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DEDICATION

To my friends.

DECLARATION

I, **Charles Wale Kabuka**, Comp. No. 21101540, do hereby declare that I am the author of this Directed Research Paper entitled: **A CRITICAL ANALYSIS OF THE IMPLICATION OF TAXATION STABILITY UNDER MINING DEVELOPMENT AGREEMENTS ON LEVYING OF RATES ON MINING PROPERTY IN ZAMBIA**, and confirm that it is my original work. I further declare that due acknowledgement has been given where other people's work has been used. I verily believe that this research has not been presented in the School or indeed in any other learning institution for academic purposes.

Date... 06/02/2008 Student's signature... 

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Many people have contributed to the substance and form of this study through providing constructive criticism and thoughts. I hope they are happy with the outcome.

My special thanks and gratitude are due to Mr. Fredrick Mudenda, Lecturer in the School of Law at the University of Zambia who took time and supervised my work. Despite the School asking him to supervise me at almost half way into the first semester, he understood my problem and accepted this role without any conditions. I will remain indebted forever for this rare gesture.

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Finally, but not the least, I wish to extend my thanks to the School of Law at the University of Zambia particularly those members of staff I had a chance to interact with during my stay at UNZA.

To all, May God richly bless you.

ABSTRACT

The privatization of the mining industry posed a great challenge to the Government of the Republic of Zambia. At the time of privatization, the mines under ZCCM were in bad shape and Government had to entice large-scale mining investors through the creation of a number of incentives. The Mines and Minerals Act of 1995 introduced several incentives for this purpose. The Act as amended by the Mines and Minerals (Amendment) Act (No. 41) of 1996 under section 9 allowed the Government to enter into individual development agreements with individual companies to ensure that further incentives are extended to companies based on their unique requirements.

One of the most important clauses in these mining development agreements is on taxation stability. Under this clause, the Government undertook not to impose new taxes on the mining companies for a period of fifteen years. Arising from this clause is a dispute between the councils and mining companies with the latter refusing to pay property rates. They argue that since the property rates for mining property was reintroduced in 1999, its imposition on companies who signed their agreements before 1999 will be tantamount to introducing new tax contrary to spirit of the development agreements. On the other hand, councils have insisted that the taxation stability under the development agreements does not extend to property rates and that it is requirement that the companies pay rates in accordance with the provisions of the Rating Act.

This study analyzed the implications of the taxation stability clause under the mining Development Agreement on levying of rates on mining property by local authorities. Although the Mines and Minerals Act has been amended to delete the section which allowed stability commitment, the contracts signed before the amendment are still subsisting and binding. However, our findings

revealed that the Rating Act is the enabling Act in matters related to property rates. Exemption of properties from rates can only be done by the Rating Act and not through another Act. It was also learnt that the taxation stability clauses do not apply to all taxes. It was therefore concluded that mining companies regardless of when they signed their agreements are liable to pay property rates to local authorities.

LIST OF STATUTES

1. The Constitution of Zambia, Chapter 1 of the Laws of Zambia.
2. The Local Government Act Chapter 218 of the Laws of Zambia
3. The Rating Act No.12 of 1997
4. The Rating (Amendment) Act No.9 of 1999
5. The Rating Act No.33 of 1976
6. Municipal Corporation Ordinances, Chapter 119 of 1927
7. Township Ordinances, Chapter 120 of 1929
8. Municipal Corporation Act, Chapter 470
9. Township Act, Chapter 471
10. Mines and Minerals Act No. of 1995
11. Mines and Minerals (Amendment) Act No.41 of 1996
12. Mines and Minerals (Amendment) Act No.6 of 2007
13. The Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia.
14. Statutory Instrument No. 37 of 2005
15. Statutory Instrument No. 100 of 1981
16. Statutory Instrument No. 29 of 1982
17. Government Notice No.33 of 1958
18. Government Notice No.31 of 1958
19. Government Notice No.124 of 1959
20. Government Notice No.125 of 1959

LIST OF CASES

1. Thomas Mumba V. The People (1984) ZR 38
2. Christine Mulundika and Seven Others V. The Attorney General SCZ Judgment No. 25 of 1995
3. The Attorney General V. Local Government Election Commission (1990-1992) ZR 182 HC
4. Chunga V. Lusaka City Council (1981) ZLR, 54

CHAPTER ONE

BACKGROUND TO THE STUDY

1.0.0 Introduction

The wheels of government operations, be it at central or local level, can be brought to a halt without the necessary financial support. Most of these finances are raised through the imposition of various taxes. Nothing therefore, goes to the heart of the relationship between government and the citizenry more than taxes. A tax is a financial charge or other levy imposed on an individual or a legal entity by the state or a functional equivalent of a state. Funds provided by taxation have been used by governments throughout history to carry out many functions¹.

Property tax also commonly known as property rate is one of the main sources of local government revenue in many countries. Although its relative importance varies within each country, the tax continues to be popular method of resource mobilization. A property tax is a tax imposed on property by reason of its ownership. This tax is usually levied on the value of the property owned.²

In Zambia, the quest to find a sustainable source of finance for councils has been a pipe dream. The local authorities operations, of late, have deteriorated to extremely low levels mainly due to lack of finance. Historically, local authorities in Zambia relied heavily on central government support through grants. After 1991, the central government withdrew this support to a bare minimum and in some cases to zero. At the same time, local authorities lost many of their revenue earning sources to other organs of government³. In addition, councils lost revenue through rental income after the sale of councils' housing stock country wide in 1996 which was also a major source of finance for these councils. Due to these policy changes and increase in privately owned properties, local property taxation is the major tax that is considered to have potential to

¹ <http://en.wikipedia.org/wiki/tax> Wikipedia, the Free Encyclopedia

² Ibid

³ Banda T (2004) The Role of Property Taxation in the Process of Implementing the Decentralization Policy in Zambia, Case Study Chongwe District Council and Kafue District Council Page 4

provide fiscal autonomy to councils if administered properly. Already, studies on the financial management system in local authorities in Zambia have shown that property tax accounts for the major source of revenue for local authorities⁴.

In an effort to strengthen the property rating system in Zambia, Government amended the Rating Act (No.12) of 1997 through the Rating (Amendment) Act (No. 9) of 1999. The law was amended to make up for the shortfalls identified in the main Act, which provided for too many exemptions from property tax. In line with the liberalization policy, previously exempted properties with potential to be used for income generation purposes are no longer exempted from paying property tax⁵. Among the many properties brought into the property taxation brackets by this amendment is the mining property considering that mines would now be privately owned.

However, this amendment has not been received well by the new mine owners. They argue that they are exempted from paying such taxes through the Mining Development Agreements. They explain that the Mines and Minerals Act of 1995 as amended permits the government to enter into Mining Development Agreement with specific companies under which they may extend incentives⁶. These agreements established the terms under which the mines were sold, and the rights and responsibilities of the Zambian state and the new mining companies⁷. One of the important clauses in these development agreements is on taxation. The Government undertook not to impose any new tax regimes after the agreement was struck for as much as 15 years⁸. These stability periods are important provisions because until they expire the terms of the development agreement are legally binding and said to overrule any existing or future national legislations.

⁴ Banda T (2004) The Role of Property Taxation in the Process of Implementing the Decentralization Policy in Zambia, Case Study Chongwe District Council and Kafue District Council Page 4

⁵ Ibid

⁶ Section 9 of the Mine and Minerals Act of 1995 as amended by Mines and Minerals (Amendment) Act (No.41) of 1996

⁷ Alastair Fraser and John Lungu (2006), For Who the Windfalls? Winners and Losers in the Privatisation of Zambia's Copper Mines Page 6

⁸ Development Agreement between the Zambian Government and Kansanshi Mine Clause 14

The subject of Mining Development Agreement has in the recent past generated a lot of national debates with the call to renegotiate the terms in these agreements. The government acknowledged the need to revisit these agreements. In his 2007 Budget Speech to Parliament, the Minister of Finance and National Planning emphasized on the need to engage the mine owners and renegotiate certain terms in the agreements⁹. Although less has been talked about the implications of the Mining Development Agreement on property rates levied by local authorities in Zambia, this is a very important subject as rates are now a major source of revenue for our councils. This study therefore looks at the implications of the Mining Development Agreements on property taxation of mining properties in Zambia.

1.0.1 Statement of the Problem

Many mining companies have questioned their legal obligation of paying property rates to their respective local authorities. This is on the basis that property rates is regarded as a new tax and mining properties are not subject to it as stipulated in their respective development agreements. They explain that the Government undertook not to impose any new tax regimes after the agreement was struck.

In Kalulushi, for example, Chibuluma Mine objected the inclusion of their mining property to be subjected to rates by the Kalulushi Municipal Council. They argued that the Mining Development Agreement exempts them from paying such taxes especially that rates on mining properties was re-introduced after the Development Agreement had already been signed. In this case, the Rating Valuation Tribunal ruled in favour of the Council¹⁰. Chibuluma Mine appealed to the High Court¹¹. However, this case was not concluded as both parties agreed to settle the matter out of court. The Mine owners however, made it very clear that their contribution to the council is purely out of moral rather than legal obligation. Similarly, the same resistance is being experienced by Solwezi Municipal Council and Ndola City Council from Kansanshi and Bwana Mkubwa mines respectively. In

⁹ Budget Speech by Minister of Finance and National Planning to Parliament on Friday 9th February 2007
¹⁰ Records of Proceedings of the Rating Valuation Tribunal sitting held to consider the Kalulushi Main Valuation Roll of 2004
¹¹ Chibuluma Mines Plc V. Kalulushi Municipal Council Case No. 2001/HK/495

Solwezi, Kansanshi Mine indicated that they would rather put money in Kansanshi Foundation as a vehicle to stir developmental projects in Solwezi rather than giving it the council. They also maintain that councils do not have any legal claim on the levying of property rates in the event that the mine owners refuse to pay property rates¹².

On the other hand, councils (rating authorities) have maintained that they are empowered by the Rating Act to levy rates on all rateable properties within their boundaries. They explain that under the Rating Act (No. 12) of 1997 mining premises were exempt in section 6(2) (l). However, the Rating (Amendment) Act (No. 9) of 1999 in section 6 (b) (v) deleted the exemptions set out in section 6 (2) (l) of the principal Act. The implication of this amendment is that mining premises, together with plant and machinery for mining or mineral processing as of 8th October 1999 are subject to rates under the Act. To them property tax is not a subject of the Mine Development Agreements.

The misunderstanding is not health for the development of our mining towns in Zambia. This study therefore endeavours to analyse this problem with a view to recommend on how this misunderstanding can be addressed for the benefit of both parties.

1.0.2 Research Question

Does the Mining Development Agreement give an automatic exemption to mine owners from paying rates on mining properties to local authorities?

1.0.3 Aim and Objectives

The aim of the study is to examine whether mining properties are exempted from paying property rates as a result of the Mining Development Agreements signed between the government and mine companies. Specific objectives include:

¹² Records of Proceedings of the Rating Valuation Tribunal sitting held on 24th May 2007 to consider the Solwezi Main Valuation Roll of 2004 in the Council Chambers.

- i) To examine the exemptions under the Rating Act of 1997 as amended;
- ii) To review the treatment and policy behind levying of rates on mining property in Zambia
- iii) To examine the legal nature of the mining development agreements;
- iv) To analyse the effect of mining development agreement on levying of property rates; and
- v) To give a legal opinion as to whether mining properties are subject to property rates in Zambia.

1.0.4 Significance of the Study

The development of our cities and towns depends to a great extent on the availability of financial resources to the local authorities. The need will even be more as the Central Government is trying to shed off some of its functions through decentralization process. It is important that councils' financial capacity is enhanced through various financial resource mobilizations. Property tax is one of the main sources of local government revenue in many countries. It is a good tax because it is predictable, stable, and non-distortion with regard to its impact on economic decisions.

In Zambia the importance of property rates cannot be overemphasized as it is currently accounting for more than 60% of the total income in many of our councils. In councils with mining properties, the contribution of the mines in terms of property rates is so enormous that the financial position of the councils will turn for the better. It is therefore important that the law on property rates in Zambia should be clearly appreciated because this will enhance planning to both the rating authorities and the rate payers.

1.0.5 Literature Survey

A literature survey conducted in the University of Zambia main library as well as the School of Law showed that a number of researches have been conducted on the subject of property rates in Zambia. The following literature has been reviewed;

1. John Jumba (2005) “ *A Critical Analysis of the Law and Practice of Rating in Zambia*” being a final year dissertation submitted to the University of Zambia, School of Law, in partial fulfillment to the requirement for the award of a degree of Bachelor of Laws (LLB). This work discusses the importance of property rates as a form of taxation in Zambia especially after councils lost revenues from rental income following the sale of councils' residential and commercial properties. The study also traces the genesis of rating law in Zambia, highlighting its weakness and strength and the institutions tasked with the administration of property rates.
2. Kaunda Mapoma and others (2006) “*Report on the Consultancy Assignment on Property Rates- Valuation Roll/ 'raw model' of by-laws*”. This report arose out of the difficulties that councils seem to have in updating their valuation rolls thereby adversely affecting their resource mobilization capacities by not taking into account an expanding revenue base. The work also emphasized on the importance of rates to councils in Zambia. It explained that the potential benefits from rates is dependent on the number of properties captured in the valuation roll, the rate applied and the collection efficiency of the rating authorities. However, it was concluded that certain changes may be required to be made to the legal framework to achieve the intention of the Rating Act in a more efficient manner.
3. Tamara Banda (2004) “ *The Role of Property Taxation in the Process of Implementing the Decentralisation Policy in Zambia A case Study of Chongwe and Kafue District Councils*”- dissertation submitted to Lund University-Department of Housing Development and Management, in partial fulfillment to the requirement for the award of Masters' Programme in Urban Management and Development. The study argues that the Decentralisation process can be successful if the fiscal autonomy of the councils in Zambia is enhanced. A properly functioning property tax system has the capability to significantly contribute to an increase in revenue levels in local authorities. The study shows that the local authorities are not fully utilizing the property tax revenue potential

and that the system are not functioning properly, but they have the ability to generate a significant percentage of their revenue. Property tax is therefore an important source of revenue which directly affects the level of revenue in the local authorities which in turn affects the funds allocated for the provision of services either negatively or positively.

The works of the above authors together with others shall provide a guide in this directed research writing.

1.0.6 Scope of the Study

This work does not represent an exhaustive study on the effect of Mining Development Agreements on taxation regime in general. The focus is placed on property rates as a form of taxation imposed by the local authorities through the Rating Act.

1.0.6 Sources of Information

The research utilised data obtained from various sources. The major sources of information were statutes, judicial precedents, juristic works, and Government documents. Other sources included research reports, newspaper articles, internet, and other literature that was relevant to the study. Where need arose interviews with persons knowledgeable in the field of property rates were conducted. The institutions earmarked included Ministry of Local Government and Housing, Ministry of Mines and Mineral Resources, Ministry of Justice, The Rating Valuation Tribunal, affected councils and the mining companies.

1.0.8 Organisation of the Study

The study is organized in six sections. Chapter one presents the background to this study by stating the statement of the problem and objectives of the study. Chapter two reflects on the concept and the significance of the property rates to local governments in general.

Chapter three examined the law and institutions in the administering of the rating system in Zambia. The chapter traces the historical development of rating and the current legal framework.

Chapter four discusses the treatment of local property taxation of mining properties in Zambia over the years. The periods reviewed include that before independence, between 1968 and 1991 and after 1991, highlighting in each case the public policy behind it

Chapter five presents the analysis of the implication of development agreement particularly taxation stability on the legal requirement to pay property rates by mine owners. Chapter six covers the summary of the salient features, conclusion and legal opinion on the subject.

CHAPTER TWO

PROPERTY RATE AS A FORM OF TAX

2.0.0 Introduction

The property rate (known as tax on property) is a local tax levied on property by local governments¹³ for the purposes of mobilising revenue to finance local projects of public nature.¹⁴ In many countries the administration of property tax is placed in the hands of local authorities. The central governments only regulate how property tax is charged, assessed, and collected.¹⁵ The increased inability of the central governments to adequately fund services of local in nature has placed local property taxation at the centre of this solution. This chapter reflects on property rate as a form of tax and its importance to local governments.

2.0.1 The General Concept of Taxation

Taxation constitutes a major fiscal tool in the development strategy of any nation. Its uses are multi-faceted.¹⁶ A country's economic and social progress largely depends on its government's ability to generate sufficient revenue to finance a host of essential non-revenue yielding public services such as education, health, communications, transport and national security.¹⁷

The first known system of taxation was in ancient Egypt around 3000BC-2800 BC in the first dynasty of the old kingdom.¹⁸ Pharaoh would conduct a biennial tour of the kingdom, collecting tax revenue from people.¹⁹ Early taxation is also described in the Bible. It states that:-

¹³ Slack E. (2003) Property Taxation in South Africa, Paper prepared by Enid Slack Consulting, Toronto, page 1

¹⁴ Simbyakula N.R. (SJD) (1990) Succession and Economic Development in Zambia, PhD Thesis. Submitted in partial fulfillment of a Doctorate Degree in Juridical Science at the University of Wisconsin, Madison, USA, Page 1

¹⁵ Kelly R. (2003) Property Taxation in Indonesia, Challenges from Decentralisation, Lincoln Institute of Land Policy, Working Paper (WP03RK1) Page 20

¹⁶ Supra Note 14

¹⁷ Ibid

¹⁸ <http://en.wikipedia.org/wiki/Tax>. Retrieved on 29/08/2007

¹⁹ <http://en.wikipedia.org/wiki/Tax>. Retrieved on 29/08/2007

“But when the crop comes in, give a fifth of it to Pharaoh. The other four fifth you keep as seed for the fields and as food for yourselves and your household and your children”²⁰

In this passage, Joseph was telling the people of Egypt how to divide their crops, providing a portion to the Pharaoh. A share (20%) of the crop was the tax. While not money, the idea is the same.

Unlike the old taxation system, today in many countries, taxes are levied in money form. According to Wikipedia, the free internet encyclopedia, tax is defined as a financial charge or other levy imposed on an individual or legal entity by the state or a functional equivalent of a state for example a local government. This is a pecuniary burden laid upon individuals or property to support government activities. A tax is not a voluntary payment or donation, but an enforced contribution with legislative authority.²¹

2.0.2 Functions of Taxation

The tax structure plays a number of functions for the economic and social development of any country. Wikipedia²², identifies four main purposes of tax and referred to them as the “FOUR R’s”. The four R’s are revenue, redistribution, repricing, and representation.

Perhaps by far, the most important aspect of taxation is the mobilisation of revenue to finance public expenditure. Taxes enable a government to finance the capital and recurrent expenditures of services of public nature. Taxes raise money to spend on roads, schools, hospitals, enforcement of law, public order, protection of property, e.t.c. Many governments also use taxes to fund welfare and public services.²³

A second function of taxation is redistribution. Normally, this means transferring wealth from the richest sections to the poorer sections. Historically, the nobility was supported by taxes on the poor. Modern social

²⁰ Genesis Chapter 47 verse 24, the New International Version

²¹ ²¹ <http://en.wikipedia.org/wiki/Tax>. Retrieved on 29/08/2007

²² Wikipedia, the free internet encyclopedia, <http://en.wikipedia.org/wiki/Tax>. Retrieved on 29/08/2007

²³ Simbyakula N.R. (SJD) (1990) Succession and Economic Development in Zambia, PhD Thesis. Page 1

security systems are intended to support the poor, the disabled, or the retired by taxes on those who are still working.²⁴

A third purpose of taxation is repricing. Taxes are levied to address externalities. Taxation provides a convenient handle for improving efficiency in resource allocation. It can be used to influence the allocation of resources from less desired use to more useful goals. For example, tobacco is taxed to discourage smoking and many people advocate policies such as implementing a carbon tax as a way of tackling global warming. Tax policy is equally important for purposes of macroeconomic stability.²⁵

A fourth consequential effect of taxation has been representation. Nothing goes to the heart of the relationship between government and the citizenry more than taxes. Rulers tax citizens, and citizens demand accountability from their rulers.²⁶

2.0.3 Classifications of Taxes

Taxes are classified in a number of ways. Taxes are categorised as direct tax or indirect tax. The direct taxes refer to those taxes that are collected from the people or organisations on whom they are ostensibly imposed. For example income taxes are collected from the person who earns the income. By contrast, indirect taxes are collected from someone other than the person ostensibly responsible for paying the taxes.²⁷

The other classification of taxes relates to the percentage of the tax burden as it relates to income or consumption. The terms progressive, regressive and proportional are used to describe the way the rate progresses from low to high, from high to low or proportionally²⁸. The term can be applied to any type of tax. A progressive tax is a tax imposed so that the tax rate increases as the amount to which the rate is applied

²⁴ <http://en.wikipedia.org/wiki/Tax>. Retrieved on 29/08/2007

²⁵ Ibid

²⁶ Ibid

²⁷ Ibid

²⁸ Ibid

increases²⁹. The opposite of a progressive tax is a regressive tax, where the tax rate decreases as the amount to which the rate is applied increases. In between is a proportional tax, where the tax rate is fixed as the amount to which the rate is applied increases.³⁰

Another way of classifying taxes is related to the basis that governments use when they impose taxes.³¹ There are basically three major basis namely income, expenditure (consumption) and wealth or property or Capital. The former two bases apply to funds as they are received (i.e. income) or as they are used (expenditure). The latter on the other hand is based on the possession of wealth which is manifested in the form of property itself.³² Basically the tax levied on both real and personal property constitutes property tax.³³ However, for the purpose of this work, our focus is on property rates levied mainly to finance municipal development projects.

2.0.4 Property Taxation

The term property taxation extends to cover a number of taxes such as rating, property transfer tax, and estate duty. Direct tax of income from property (withholding tax) and value-added tax (VAT) on mainly non-residential property sales and rentals.³⁴ Apart from rating, the other forms of property taxes are based on income generated from the use, acquisition and for alienation of property.³⁵ Rating is the only one which is based on property itself i.e., ownership or occupation and is the main form of property taxation. In this study, reference to property taxation therefore means property rates or rating.

2.0.5 Definition of Property Rate or Tax

Property rate is a tax imposed on real property usually by reference to the value of the property.³⁶ The definition of property rate is diverse normally according to national legislation. A rate is a sum assessed by

²⁹ Ibid

³⁰ Ibid

³¹ Simbyakula N.R. (SJD) (1990) Succession and Economic Development in Zambia, PhD Thesis. Page 168

³² Ibid

³³ Ibid

³⁴ Ibid

³⁵ Franzsen R.C. D. (2002) Property Assessment for Rating Purposes in Southern and East Africa: Present Status and Future Prospects: Paper presented at the 8th Annual Conference of the Pacific Rim Real Estate Society in Christchurch, New Zealand from 21-23 January 2002 Page 2

³⁶ <http://en.wikipedia.org/wiki/Tax>. Retrieved on 29/08/2007

local authority on the owner or occupier of the property by reason of its ownership and is usually levied on the value of the property owned.³⁷ The Rating Act defines the word 'rate' as meaning, "a levy on property".³⁸

There is a common misconception in many countries as to whether property rate is a tax or charge for services, i.e. local authorities levy rates as a charge for the services they provide. This was explained as early as 1963 by the Association of Municipal Corporations in the United Kingdom. The Association stated that the justification for any form of local property tax is that, residents of an area derive benefits from the spending of the money. These benefits need not be direct. They emphasised that a tax does not necessarily have to be justified on the grounds other than that it is revenue producing.³⁹

In the case of **Chunga v. Lusaka City Council**⁴⁰, the rate payer applied to have rates levied on his property nullified because it was situated some miles from the city. Ruling in favour of Lusaka City Council, Sakala E.L.J had this to say:

"My understanding of this definition is that a rate is a sum of money collected by the council for the purposes of services of public nature as opposed to services to an individual. A rate is a tax on all properties with value situated within the boundary of the council, for the purposes of raising revenue for maintenance of facilities offered to all residents..."

The above ruling clearly supports the position that property rate is a tax and not a charge on the services. It is different from money residents pay to the council in exchange for personalised services. As long as the property is rateable, the owner has a legal obligation to pay tax and a direct benefit is not the issue.

2.0.6 Importance of Property Rates to Local Authorities

As already mentioned the main function of property rate is to mobilise revenue for local authorities in order for them to provide for locally determined needs. A very important benefit of a tax on property over a tax on

³⁷ Bone S. (Editor), Osborn's Concise Law Dictionary Page 319

³⁸ Section 2 of the Rating Act of 1997

³⁹ Department of Environment (UK) Report, Cmnd 2582

⁴⁰ (1981) ZR 54

income is that the revenue always equals the tax levy. Unlike income or sales taxes which can result in shortfalls producing deficits, property tax always produces the required revenue.⁴¹

In order for the council to determine how revenue will be raised from property rates, a council will first estimate its total budget for the year. The council will then estimate how much revenue it expects to raise from sources other than rates. The deficits will be realised from property taxation.⁴² The tax provides a fall back and ensures that local authorities raise the required amount. A well administered property tax has the potential to generate significant revenue and enable the local authority to be financially autonomous.

Banda⁴³ outlined four main reasons why the revenue of local authorities should come from local sources;

- a) Local taxes are necessary to enable a local government to vary the quality and quantity of its services in respect of local preferences,
- b) If a local government relies on grants, there is a danger that local politicians can spend the money inefficiently,
- c) There tends to be greater accountability for money raised locally than with fiscal transfer from the centre, and
- d) Grants from government often come with pre-conditions attached and constrain the way the grant is spent.

Emphasizing on the importance of rates, Fisher⁴⁴ pointed out that “there are no taxes capable of financing our current system of local government that can be locally levied and administered, except property tax...” He explains that though unpopular with the electorate, with enlightened and craven politicians alike, and most academic observers-but they endure because they produce reliable, stable, independent revenue for

⁴¹ Simbyakula N.R. (SJD) (1990) Succession and Economic Development in Zambia, PhD Thesis. Page 168
⁴² Jumba J. (2005) A Critical Analysis of the Law and Practice of Rating in Zambia, LLB Thesis University of Zambia Page 36
⁴³ Banda T. (2004) “ *The Role of Property Taxation in the Process of Implementing the Decentralisation Policy in Zambia A case Study of Chongwe and Kafue District Councils*”- dissertation submitted to Lund University-Department of Housing Development and Management, in partial fulfillment to the requirement for the award of Masters' Programme in Urban Management and Development. Page 5
⁴⁴ Fisher G. W. The Worst Tax? A History of the Property Tax in America Page 210

government closest to the people and there is no clearly superior alternative. In his paper, "Current State of Property Taxation in the Global Economy-Will it Survive?" Johnston⁴⁵ also states that, many countries, over many decades have conducted studies, held commissions of enquiry, produced white papers, altered legislations and introduced changes to the process of raising revenue to finance local government. In virtually every study, the conclusion has been the same. The most stable, adequate, fair and acceptable revenue source of local government is a real property tax system based on the market value of the taxable realty. This conclusion has been reached after a detailed analysis of alternatives such as local income tax, local VAT, tax on gasoline, on alcohol, betting tax, poll tax and service fees.

2.0.7 Advantages of Property Rate as a Form of Tax

There are a number of arguments advanced in favour of a property tax. It is generally accepted that the property tax is an excellent local level tax for the following reasons;

- a) Property tax agrees with the public finance "benefit principle" that is to say, it ensures owners of /or property occupants (to some extent) contribute directly to the benefit of public services.⁴⁶ Owners of property receive greater benefit from the provision of the various public services compared to those with less or without property. Equity demands that they pay back more for those services.⁴⁷
- b) Property is a manifestation of wealth and therefore an appropriate indicator of the ability to pay in that wealth is usually found to be more unequally distributed than is income. It is argued that there is more equity in a progressive tax based on wealth than on income. Moreover, such property may have been acquired with funds that initially might not have been taxed. In addition, property tax is a "second line of defence" since many people manage to escape income tax.⁴⁸

⁴⁵ Paper Presented at the International Property Tax Institute-5th Annual Conference in Hong Kong in August 2002 by Tom Johnstone

⁴⁶ Bate T. L. (1993) Government Valuation Department, Rating Position Paper

⁴⁷ Simbyakula N.R. (SJD) (1990) Succession and Economic Development in Zambia, PhD Thesis. Page 169

⁴⁸ Ibid

- c) The other argument in favour of property tax is that it tends to have fewer administrative difficulties than income or other taxes as it is based on land and buildings which are visible and immovable. Possession is difficult to conceal and the property serves as a guarantee against payment.⁴⁹
- d) The property tax if correctly designed can provide a substantial and stable elastic source of revenue. The degree of elasticity depends on the frequency and accuracy of valuations.⁵⁰
- e) Like any other tax, property tax is a fiscal tool which may be utilised to achieve certain social goals such as land reforms. In this respect, the tax assists in the re-allocation of resources.⁵¹
- f) Property has an income effect in the sense that it induces its owner to utilise the property in a productive way in order to generate cash with which to pay the tax. Income tax becomes payable only when an individual earns income and in case of any expenditure tax when income is spent. In property, mere possession of property will attract tax. A property owner must therefore either use the property to generate income or engage in some other activities to raise funds for tax purposes.⁵²
- g) The property tax reduces the local government burden on the central government. Property tax can generate adequate revenue for local authorities with proper administration.⁵³
- h) Property tax is an efficient tax since property is not easily exported which allows a link between those who derive benefits from tax-funded services with those who bear the tax burden.⁵⁴

⁴⁹ Supra Note 46

⁵⁰ Ibid

⁵¹ Simbyakula N.R. (SJD) (1990) Succession and Economic Development in Zambia, PhD Thesis. Page 169

⁵² Ibid

⁵³ Kelly R. (2003) Property Taxation in Indonesia, Challenges from Decentralisation, Lincoln Institute of Land Policy, Working Paper (WP03RK1)

⁵⁴ Ibid

2.0.8 Property Tax Base

There are basically three major property tax bases which a country may adopt for taxation purposes.⁵⁵ The term property tax base explains what part of property should be valued. A country may choose to tax land only or land and improvements or improvements only. The table below shows property tax bases in some countries.

Table 1: Tax Bases Provided for in Legislation

Country	Land Value (Site Value)	Improved Value	Site & Improvements (as separate objects)	Improvements Only	Annual Value
Botswana		X			
Kenya	X				
Lesotho		X			
Malawi		X			
Namibia	X	X	X	X	
South Africa	X	X	X		
Swaziland	X	X	X	X	
Tanzania				X	
Uganda					X
Zambia			X		

Source: Frozen R.C. D. (2002) Property Assessment for Rating Purposes in Southern and East Africa: Present Status and Future Prospects: Paper presented at the 8th Annual Conference of the Pacific Rim Real Estate Society in Christchurch, New Zealand from 21-23 January 2002.

2.0.8.1 Annual rental Value

The annual gross rental value is the amount at which property may be expected to rent on the market at the time of valuation and from year to year under similar conditions.⁵⁶ In other words, the tax may be assessed against the income (rent) that the property produces. The basis may either be the actual rent i.e. net or gross or a presumed rental value. The rental value system places no tax liability for vacant and

⁵⁵ Supra Note 51
⁵⁶Simbyakula N.R. (SJD) (1990) Succession and Economic Development in Zambia, PhD Thesis. Page 174

unoccupied buildings under a strict rental value tax.⁵⁷ Further, the income differs materially. For this reason, some jurisdictions insist upon using the presumption rental figure that takes full account of the potential.⁵⁸

2.0.8.2 Capital Value System

The basis in capital value system is the assumed value which a rateable property would be expected to realise if sold on the open market as at the time of valuation.⁵⁹ The tax may either be restricted to the land only or it may be imposed against both land and improvements, if any thereon⁶⁰. The capital value taxation presents probably the best system of local property taxation. It is argued that one advantage of this system is that for vacant land or unoccupied buildings, it will impose a liability to potential future gains whereas a strict rental value tax, there would be no such liability.⁶¹

2.0.8.3 Site Value System

When the capital value system is restricted to land only, it is known as the site value or pure land value taxation.⁶² As already indicated this is one variant of capital value system where tax is base on the market value of land and improvements are exempt. Simbyakula⁶³ explains that proponents of the site value tax maintain that this tax has the following advantages over both the rental value and capital value (where improvements are considered) systems-:

- a) the site value tax provides for improvements. On the contrary, there is an inherent penalty for holding land idle,
- b) under the improved value tax, there is often a tendency to over-value improvements and under-value land so as to claim higher depreciation allowance on capital improvements for income tax purposes,

⁵⁷ Ibid
⁵⁸ Ibid
⁵⁹ Ibid Page 175
⁶⁰ Ibid
⁶¹ Ibid.
⁶² Ibid Page 179
⁶³ Ibid page 180-182

c) site value is relatively easier to administer than improved valuation. Whereas improvements nearly always must be individually valued, mass valuation technique can be applied more easily to site valuation. There is much more diversity in improvements than in land. According to study carried out by the United Nations, it is estimated that three to four times as much personnel is needed for valuing improvements.

Nonetheless, total exemption from tax of improvements may produce some undesirable effects such as inducing the construction of luxury buildings in urban areas. Furthermore, site valuation per se may not be adequate in terms of revenue production.⁶⁴

2.0.9 Property Tax Enforcement

The measures of tax enforcement are similar in many countries. Local governments may collect interest on arrears. To recover outstanding debts, local authorities are allowed to attach rents and go to court for warrants for seizing goods. The tax liability can also become a charge on properties (e.g. liens) and properties can be sold to recover the taxes.⁶⁵

2.1.0 Conclusion

The significance of property tax lies in its local importance and its ability to allow local communities to provide for locally determined needs. This is even more relevant in developing countries like Zambia, where central governments may find it increasingly difficult to respond to local needs. The importance for property tax will even be more as many countries are now implementing the decentralisation programmes and the success of these programmes are based on sustainable financial stability for local governments.

⁶⁴ Ibid. Page 182
⁶⁵ Kelly R. (2000) Property Taxation in East Africa: The Tale of Three Reforms. Lincoln Institute of Land Policy Working Paper (WP00RK2) Page 4

CHAPTER THREE

THE LAW AND INSTITUTIONS IN THE ADMINISTRATION OF PROPERTY RATES IN ZAMBIA.

3.0.0 Introduction

Like many former British colonies, the sources of many of Zambia's laws are British inclined. Property rating law is no exception. The historical background of rating system in Zambia cannot therefore be complete without making reference to the origin of the British rating system. Property rating was introduced in Northern Rhodesia in the late 1920s after it became a British protectorate in 1911⁶⁶. Zambia has made adjustments to its rating system in order to meet the challenges of property taxation in local authorities.

3.0.1 Brief Historical Development of the Rating System in Britain

The foundation of the rating system as applied to England and Wales was the Poor Relief Act of 1601.⁶⁷ The Act was also referred to as the Statute of Elizabeth. The objective of the Act was to facilitate the raising of money towards the relief of the poor in society. These included those that were disabled, the old and the unemployed. The Act is particularly considered as having given birth to the rating system because unlike all its predecessors in this field, it did for the first time provide for local taxation, in every parish in the country at regular intervals.⁶⁸ The poor rate liability under the Act was extended to every inhabitant, parson, vicar and other...every occupier of land houses, tithes impropriate or appropriations of tithes, coal mines or saleable underwood in the parish. This Act covered many types of taxes apart from the rate. As years went by, the rating system continued to be refined⁶⁹.

In order to address the shortcomings in the Poor Relief Act of 1601, the Rating and Valuation Act of 1925 was enacted⁷⁰. The Act was developed to address the concerns of achieving uniformity of assessment both between one property and another within the same area and secondly between one area and another. On this

⁶⁶ Jumba J. (2005), A Critical Analysis of the Law and Practice of Rating in Zambia, Page 10

⁶⁷ Emery R. and Wilks H.M. Principles and Practice of Rating Valuation Page 3

⁶⁸ Ibid

⁶⁹ Ibid

⁷⁰ Jumba J. (2005), A Critical Analysis of the Law and Practice of Rating in Zambia, Page 9

basis the system tried to equate rating to the equitableness achieved by other forms of taxes, such as income tax, by spreading the tax burden evenly but according to how worthy one property is.⁷¹

3.0.2 Introduction of Rating in Northern Rhodesia

The colonial administration introduced rating in Northern Rhodesia through two pieces of legislation. The Municipal Corporation Ordinance enacted in 1927⁷². The Municipal Corporation Ordinance made Municipal councils rating authorities with power to levy rates on properties within Municipal boundaries.⁷³ In 1929, the Township Ordinance⁷⁴ was enacted to enable township council also to levy rates. Municipal councils were the large local authorities mainly towns along the line of rail i.e. Lusaka, Ndola, Kitwe, Kabwe, e.t.c. On the other hand, Township councils were smaller than Municipal Councils, mostly provincial administrative centres such as Kasama, Mansa, Chipata, e.t.c. Rating was not extended to rural councils (very small administrative centres called Boma) probably because their size did not justify the introduction of rating. There were no major differences between the two Ordinances so far as rating matters were concerned. For example both provided for the rating of all land and buildings except those specifically exempted. Both defined the basis of assessment as “annual value” being a sum equal to one-tenth of the “capital value of such property”.⁷⁵

At independence in 1964, Zambia inherited the two ordinances. No notable changes were made. The Municipal Corporation Ordinances was renamed the Municipal Corporation Act while the Township Ordinances became the Township Act.⁷⁶

Following the introduction of the One-Party state in 1972 and the subsequent fusion of the central and local government administrative bureaucracies, it became necessary to change certain legislation so as to achieve

⁷¹ Ibid
⁷² Chapter 119 of 1927
⁷³Supra Note 70
⁷⁴ Chapter 120 of 1929
⁷⁵ Jumba J. (2005), A Critical Analysis of the Law and Practice of Rating in Zambia, Page 11
⁷⁶ Ibid, Page 12

uniformity of purpose⁷⁷. Because political considerations took precedence over everything else, it took four years to review the two statutes dealing with rating. Eventually both the Municipal Corporation Act and the Township Act were repealed and in their place came the Rating Act (No. 33) of 1976. This became the principal Act regulating rating in Zambia. The Act through Statutory instrument extended exemptions from rates to certain agricultural land and buildings, land and buildings in mine townships and buildings situated in trust land or in reserves.⁷⁸

The change of government in 1991 to plural politics brought with it a number of reforms both politically and economically. The changes included the ejection of socialist oriented government to a capitalist oriented government. This meant that a number of laws needed to be changed to support new developments. In 1993 the Minister of Local Government and Housing proposed to amend the 1976 Rating Act⁷⁹. Because of the importance of rates to local authorities and its sensitivity to the general public a steering committee was formed to conduct public debates in all provincial headquarters.⁸⁰ The Rating Act of 1976 was repealed in 1997 and in its place came the Rating Act (No. 12) of 1997. Within two and half years of existence, the 1997 Rating Act was amended by the Rating (Amendment) Act (No. 9) of 1999.

3.0.3 The Legal Framework

A solid legal framework is a prerequisite to the imposition of all forms of taxation. This is important because it gives Governments and other taxation agencies authority to carry out their taxation duties. The legal framework of property rating in Zambia can be traced from the Constitution of Zambia⁸¹. The Constitution gives the local authorities power to impose various taxes. The local authorities in Zambia exercise the power to impose property rates through the Rating Act.

⁷⁷ Ibid

⁷⁸ Statutory Instrument Numbers 100 of 1981 and 29 of 1982

⁷⁹ Ministry of Local Government and Housing Report by the Steering Committee on Proposed Amendments to the Rating Act of 1976-August 1994

⁸⁰ Jumba J. (2005), A Critical Analysis of the Law and Practice of Rating in Zambia, Page 16

⁸¹ Article 114 Constitution of Zambia, Chapter 1 of the Laws of Zambia

3.0.4 Constitution

The Constitution is the supreme law in Zambia and if any other law is inconsistent with the Constitution that other law shall to the extent of the inconsistent, be void.⁸² The Constitution provides that taxation shall not be imposed or altered except by or under an Act of Parliament.⁸³ Parliament may confer upon any authority established by law for the purposes of local government power to impose taxation within the area for which that authority is established and to alter so imposed.⁸⁴ In terms of Article 109 of the Constitution of Zambia, the system of local government is recognised as may be prescribed by an Act of Parliament.

3.0.5 Local Government Act

Local Authorities, City, Municipal and District councils are established by the Local Government Act, Chapter 281 of the Laws of Zambia. The Act defines the functions and powers of the councils and defines all other conditions aimed at enabling councils undertake their functions.

3.0.6 The Rating Act of 1997 As Amended

In creating the necessary other supporting legal frameworks for the local authorities, other Acts have also created functions and powers for councils to perform their civic duties. Pertinent to this study is the Rating Act of 1997 as amended. This is the law governing property rates in Zambia. The preamble provides for the declaration of rateable areas; to making provision for the assessment of rateable property; to provide for levying of rates; and to provide for matters connected with or incidental to the foregoing.

3.0.7 Salient Provisions of the Rating Act of 1997 As Amended

The Rating Act as amended is divided into six parts. Part I covers preliminaries and definitions of certain terms as used in this Act. Part II provides for the appointment and powers of the Valuation surveyor. Part III and Part

⁸² Article 1(3) Constitution of Zambia Chapter 1 of the Laws of Zambia

⁸³ Article 114 Constitution of Zambia Chapter 1 of the Laws of Zambia

⁸⁴ Article 114 (4) Constitution of Zambia Chapter 1 of the Laws of Zambia

3.0.9 Exemption from Property Rates

3.0.9.1 Exemptions under the Rating Act as Amended

Like other countries, Zambia provides some sort of property tax exemptions. Section 6 (2) of the Rating Act of 1997, as amended, provides a list of properties that are exempted from property rates. According to the Act, the following properties are not rateable;

- i) property in the occupation of the President in the President's capacity as Head of State
- ii) property used wholly for the operational purposes of any public utility undertaking concerned with the storage, processing or distribution of public water supplies, or the collection, treatment or disposal of water-borne sewerage,
- iii) property used primarily for public worship, including property used for residential purposes by ministers of a church and nuns, whether or not that property is in the same curtilage as the church, but excluding property used for social and commercial purposes in connection with places of public worship,
- iv) public libraries and public museums,
- v) public cemeteries and crematoria,
- vi) military aerodromes, including the buildings on them and their cartilage,
- vii) any railway track owned by the Zambia Railways Board or the Tanzania-Zambia Railway authority, including rails and sleepers, together with all earth-work, ballast, fittings, fastenings and devises installed in connection with track or train operation, bridges, culverts, inspection and ash pits, signals and signal installations, centralised train control gear, rolling stock weighbridges, locomotive and train watering installation, cooling and fueling plants, passenger transmission lines, poles, pylons, transformers and switch gear used in connection or without buildings, if they are used for normal working of railway,

- viii) premises of a mission, which are owned by a mission and are the residence of the head of foreign mission or chancery of that mission. Provided that premises other than those specifically mentioned in this paragraph which are owned by a mission in Zambia shall be only be exempt if similar premises owned by a Zambia mission in that country are exempt from rates in such country,
- ix) agricultural land and buildings which are used for agriculture including dwelling houses situated thereon,
- x) public premises which are used for sport or recreational facilities, race course parks and pleasure gardens, and
- xi) such other property as minister may by statutory instrument prescribe.

3.0.9.2 Exemptions under the 2005 Statutory Instrument

In 2005, the Minister in accordance with Section 6(2) (xi) issued the Rating (Exemptions) Regulations.⁸⁶ The regulation exempted from paying rates a number of institutions owned and run by religious organisations.

3.1.0 Preparation of Valuation Roll

3.1.0.1 Maintenance of Valuation Roll

For purposes of levying rates, the rating authority must prepare and maintain a valuation roll prepared in which all rateable properties in the area shall be listed by numbers.⁸⁷The roll contains information on the valuation or revaluation, showing important information such as the name of the property owner, a description of the property, the size of the property, value of land and value of improvements. In Zambia, the Rating Act (as amended) in section 8 (2) requires that the following information is shown in the valuation roll:-

- a) the land parcel number or numbers;
- b) the address of the property;

⁸⁶ The Statutory Instrument No. 37 of 2005

⁸⁷Section 8(1) Rating Act No.12 of 1997 as Amended by the Rating (Amendment) Act No. 9 of 1999

- c) the name of the leaseholder or where an improvement stands on the parcel belonging to more than one leaseholder, the names of those leaseholders;
- d) a brief description of the rateable property and the improvements included in the rateable property;
- e) the area of land comprising the rateable property; and
- f) the rateable value of the rateable property.

3.1.0.2 Main and Supplementary Roll

There are two types of valuation rolls in Zambia namely the main and supplementary valuation rolls⁸⁸. The main valuation roll is a general valuation which must be undertaken at least once in the prescribed statutory valuation cycle⁸⁹. In Zambia, the valuation cycle for the preparation of the main valuation roll is five years.⁹⁰ In an event that the rating authority fails to prepare a new main valuation roll at the expiration of the statutory valuation cycle, the Minister responsible should authorise the use of the old valuation roll.⁹¹

The rating authority may prepare a supplementary valuation roll which is considered to be part of the main valuation roll.⁹² According to section 10 (3) of the Rating Act as amended a supplementary roll may include:-

- a) any rateable property or part of that rateable property which was omitted from the last main roll;
- b) any rateable property whose rateable value has been found to be incorrectly assessed or entered in the last main roll;
- c) any rateable property in, or to which improvements have been erected, completed, altered, or demolished since the effective date of the main roll;

⁸⁸ Section 8, read together with section 10 of Rating Act No.12 of 1997 as Amended by the Rating (Amendment) Act No. 9 of 1999

⁸⁹ Slack E.(2002) Property Taxation in South Africa, Enid Slack Consulting, Toronto, Canada. Page 4

⁹⁰ Section 8(3) Rating Act No.12 of 1997 as Amended by the Rating (Amendment) Act No. 9 of 1999

⁹¹ Section 8(3) Rating Act No.12 of 1997 as Amended by the Rating (Amendment) Act No. 9 of 1999

⁹² Section 10(1) Rating Act No.12 of 1997 as Amended by the Rating (Amendment) Act No. 9 of 1999

- d) any rateable property whose rateable value as at the time of valuation of the main roll has changed since the effective date of the main roll;
- e) any rateable property whose owner notifies the rating authority requiring that the rateable property be included in the next supplementary roll to be prepared; and
- f) any rateable property whose identity as given in the main roll has changed by subdivision, consolidation, or alteration of boundaries by resurveying or renumbering.

3.1.0.3 Appointment and Power of the Valuation Surveyor

The role of the valuation surveyor is very important in the administration of property rates in Zambia. The valuation surveyor prepares the valuation roll where all rateable properties are listed for property taxation purposes. Under the Rating Act of 1997, as amended, a valuation surveyor to prepare the valuation roll shall be a person who is registered, under the Valuation Surveyor's Act as a valuation surveyor and shall be an officer of the Government Valuation Department.⁹³ Where the Government Valuation Department is unable to undertake the preparation of the valuation roll, a valuation surveyor engaged in private practice other than full-time officer of a rating authority may be appointed to prepare a valuation roll.⁹⁴ The appointment of the valuation surveyor is initiated by the rating authority through a council resolution, which resolution is subject to ministerial approval.⁹⁵ The valuation surveyor has power to obtain necessary information for the purposes of preparing the valuation roll.⁹⁶

3.1.0.4 Notification of Leaseholder before inspection of the property

After the valuation surveyor has been appointed, and subsequent approval of, the appointment by the Minister, a rating authority shall before the valuation surveyor inspects, any property within the rateable area, publish a

⁹³ Section 3(2) Rating Act No.12 of 1997 as Amended by the Rating (Amendment) Act No. 9 of 1999

⁹⁴ Ibid

⁹⁵ Section 3(1) Rating Act No.12 of 1997 as Amended by the Rating (Amendment) Act No. 9 of 1999

⁹⁶ Section 4 Rating Act No.12 of 1997 as Amended by the Rating (Amendment) Act No. 9 of 1999

notice at least twice in a daily newspaper of general circulation within the area of the rating authority, and take such other reasonable measures to inform leaseholders or occupiers of the intended inspections.⁹⁷

3.1.0.5 Assumption for price of rateable property on open market

The basis of valuation for rating purposes in Zambia is the market value⁹⁸. This is defined as the best price at which the rateable property would be expected to realise if sold on the open market as at the time of valuation and on the following assumption that-

- a) the rateable property is held on leasehold tenure by the vendor;,
- b) the rateable property is sold with vacant possession;
- c) there are no subleases, mortgages, or charges comprising the rateable property;
- d) all repairs and maintenance which would be carried out by a prudent vendor prior to the sale have in fact been carried out;
- e) the rateable property is sold with the benefit of all planning permissions, licenses and other consents, either statutory or personal, as to the actual use of the leasehold; and
- f) the rateable property was offered for sale with the improvements existing as at the time of valuation..

Generally the rateable values are often substantially lower than market values because rateable values are determined as at a certain date which subsists for a period of time (i.e. five years). The rateable values are also based on the broad general features of the buildings and may not take into account additional features that would influence the price of the property.⁹⁹

⁹⁷ Section 9 Rating Act No.12 of 1997 as Amended by the Rating (Amendment) Act No. 9 of 1999

⁹⁸ Section 7 Rating Act No.12 of 1997 as Amended by the Rating (Amendment) Act No. 9 of 1999

⁹⁹ 2007 Agriculture and Commercial Show Brochure prepared by the City of Lusaka Department of Valuation and Real Estate Management

3.1.0.6 **Delivery and attestation of the valuation roll**

Upon completion of the valuation roll, the valuation surveyor shall notify the principal officer of the rating authority of the completion. The valuation surveyor shall deliver to the principal officer and shall sign it in the presence of the principal officer. The principal officer shall also sign and date a declaration.¹⁰⁰ The declaration appended to the valuation roll shall state that the roll has been prepared in accordance with the Rating Act.

3.2.0 **Proposing a Rate**

The rating authority, within thirty days of receipt of a main valuation roll, by a council resolution, proposes a rate to be levied after the main roll become effective.¹⁰¹ The rate is set to make up for the shortfall between expenditure requirements and revenue from other sources. In determining the rate, the rating authority will first estimate its total expenditure (budget) for the year. It will then estimate how much revenue it expects to raise from sources other than rates and how much will come from Central Government in form of grants. The estimated income and grant is deducted from the estimated expenditure. The result is the amount required to be raised from property taxation. To calculate the amount of the rate, the sum to be raised from rates is divided by the total rateable value of the whole area.¹⁰² The example below demonstrates how the rate is determined.

EXPENDITURE (K)		INCOME (K)	
Capital	1,900,000,000	Government Grant	1,600,000,000
Current	3,000,000,000	Adverts (Billboards) and licences	500,000,000
		Commercial Activities	400,000,000
		Deficit (to be raised from property rates)	2,500,000,000
Total	5,000,000,000		5,000,000,000

¹⁰⁰ Section 14 Rating Act No.12 of 1997 as Amended by the Rating (Amendment) Act No. 9 of 1999
¹⁰¹ Section 14(6) Rating Act No.12 of 1997 as Amended by the Rating (Amendment) Act No. 9 of 1999
¹⁰² Jumba J. (2005), A Critical Analysis of the Law and Practice of Rating in Zambia, Page369

Assuming the total rateable value in the local authority area as shown in current valuation roll amounts to K420,000,000,000 then the rate will be determined by the following formula;

$$Rate = \frac{\text{Income Required from Property rates}}{\text{Total Rateable Value}}$$

In our example it will be;
$$= \frac{2,500,000,000}{420,000,000,000}$$
$$= 0.006$$

As the amount of rates payable in any one year is a function of two variables, i.e. the rateable value of the property and the rates. This means that tax liability in respect of a property value at K100,000,000 will be the rateable value of the property multiplied by the rate:

$$\text{Tax} = \text{K}100,000,000 \times 0.006 = \text{K}600,000 \text{ per year}$$

In Zambia, the rating authority may by Gazette Notice determine and levy such different rates on different classes of property. This is subject to the approval of the Rating Valuation Tribunal where the differential rate is in respect of an old roll and the rating authority intends to levy a higher rate, the Minister must approve that differential rate.¹⁰³

The rating authority shall by resolution and with the approval of the Tribunal, determine and levy an ordinary rate on all rateable properties which ordinary rate shall be paid by the owner of that property.¹⁰⁴ Where the rating authority is not adopting a new main roll and proposes an ordinary rate which is the same as or lower than that was last made and levied with the same roll, the approval of the Minister shall not be required.¹⁰⁵

¹⁰³ Section 22 Rating Act No.12 of 1997 as Amended by the Rating (Amendment) Act No. 9 of 1999
¹⁰⁴ Section 20(1) Rating Act No.12 of 1997 as Amended by the Rating (Amendment) Act No. 9 of 1999
¹⁰⁵ Section 20(2) Rating Act No.12 of 1997 as Amended by the Rating (Amendment) Act No. 9 of 1999

Where the rating authority is not adopting a new main roll and proposes to make and levy an ordinary rate to be levied with the same roll, the Tribunal may consider the rate at an ordinary meeting without a formal hearing.¹⁰⁶ An ordinary rate shall not be made or levied in respect of the rateable property reserved for government use. The Minister, however, may make a grant to the revenue of the rating authority in lieu of, and equivalent to, the rate which the Government would have paid.¹⁰⁷ An ordinary rate shall be made in respect of a period not exceeding twelve months. A person shall not be liable to pay rates until the rate levy has been approved by the Rating Valuation Tribunal.¹⁰⁸

3.3.0 Objections Under the Rating Act As Amended

3.3.0.1 Notification of Publication of Valuation Roll

The rating authority shall, within fourteen days of the resolution of the rating authority publish at least once in a newspaper of general circulation in the area of the rating authority and take such other reasonable measures to inform leaseholders or occupiers that the main or supplementary roll is open to the public for inspection at the offices of the rating authority during working hours. The rating authority shall with the publication of the notice, serve by post upon each person whose name appears as a leaseholder for any rateable property listed in the main or supplementary roll a notice of the publication of the valuation roll.¹⁰⁹

3.3.0.2 Inspection and objections to the Valuation Roll

A leaseholder or occupier of any rateable property included in the main or supplementary roll, or the leaseholder's appointed representative may inspect the valuation roll and take extracts from it.¹¹⁰

The rating authority or any leaseholder or occupier of any rateable property included in the main or supplementary roll or the appointed representative of the leaseholder or occupier may lodge an objection within twenty-eight days from the date of advertising the valuation roll.¹¹¹

¹⁰⁶ Section 20(3) Rating Act No.12 of 1997 as Amended by the Rating (Amendment) Act No. 9 of 1999
¹⁰⁷ Section 20(6) and (7) Rating Act No.12 of 1997 as Amended by the Rating (Amendment) Act No. 9 of 1999
¹⁰⁸ Section 20(8) and (12) Rating Act No.12 of 1997 as Amended by the Rating (Amendment) Act No. 9 of 1999
¹⁰⁹ Section 15 Rating Act No.12 of 1997 as Amended by the Rating (Amendment) Act No. 9 of 1999
¹¹⁰ Section 16 Rating Act No.12 of 1997 as Amended by the Rating (Amendment) Act No. 9 of 1999

3.0.3 Validity of the Objections

An objection shall not be valid unless, it is made in form 1 as set out in the second schedule; and the leaseholder serves in duplicate on the Tribunal and on the rating authority. The objection must state the rateable property in respect of which it is made, the ground of the objection contended should replace that against which that person is objecting. The objection must be signed by the leaseholder or the leaseholders authorised agents.¹¹²

3.4.0 The Rating Valuation Tribunal

3.4.0.1 Establishment and composition of the Rating Valuation Tribunal

The Rating Act as amended by Act No. 9 of 1999 provides for the establishment of a Rating Valuation Tribunal to which all objections under Section Seventeen shall be referred to for determination.¹¹³ The Minister of Local Government and Housing appoints the members and the Secretary to the Tribunal.¹¹⁴ The composition of the Rating Valuation Tribunal as provided for in section 28(2) of the Rating Act as amended is as follows:

- i) Chairperson shall be a legal practitioner;
- ii) Vice Chairperson who shall be a representative of the Attorney-General;
- iii) Three other members who shall be Registered Valuation Surveyors;
- iv) A representative from the Ministry of Local Government
- v) A representative from the Ministry responsible for lands; and
- vi) A representative of the Government Valuation Department

¹¹ Section 17 (1) read together with section 15 (1) (b) Rating Act No.12 of 1997 as Amended by the Rating (Amendment) Act No. 9 of 1999

¹² Section 17 (2) Rating Act No.12 of 1997 as Amended by the Rating (Amendment) Act No. 9 of 1999

¹³ Section 28(1) Rating Act No.12 of 1997 as Amended by the Rating (Amendment) Act No. 9 of 1999

¹⁴ Section 28 (4) read together with section 29 Rating Act No.12 of 1997 as Amended by the Rating (Amendment) Act No. 9 of 1999

4.0.2 Jurisdiction of the Rating Valuation Tribunal

The jurisdiction of the Rating Valuation Tribunal as provided for in Section 30 of the Rating Act as amended includes the following:-

- i) to hear and determine any objection made under this Act and make an award giving direction with respect to the manner in which the rateable property in question is to be treated in the main or supplementary valuation roll;
- ii) to examine entries in the main or supplementary valuation roll even if there is no objection;
- iii) to approve or disapprove the main or supplementary valuation roll;
- iv) to approve or disapprove an ordinary rate; and
- v) to order a re-valuation of any property which it considers not to have been properly valued; and review objections which have been resolved by, or agreed between the objector and the valuation surveyor or which have been withdrawn.

4.0.3 Appeal to High Court

The determination of any objection referred to the Tribunal shall be according to majority opinion and the person presiding shall have a casting vote.¹¹⁵ A person aggrieved by an award made by the Tribunal may appeal to the High Court within thirty days from the date of the Tribunal's decision.¹¹⁶

5.0 Remission of Rates

A rate payer may apply to the rating authority for a remission of the whole or part of the rate payable by such rate payer on any rateable property and shall state the reasons for which the remission is sought.¹¹⁷

¹¹⁵ Section 34 Rating Act No.12 of 1997 as Amended by the Rating (Amendment) Act No. 9 of 1999

¹¹⁶ Section 36 Rating Act No.12 of 1997 as Amended by the Rating (Amendment) Act No. 9 of 1999

¹¹⁷ Section 23(1) Rating Act No.12 of 1997 as Amended by the Rating (Amendment) Act No. 9 of 1999

3.6.0 Duty to Pay Rates and Recovery of Rates

It is the duty of any person liable for any rates to pay the amount of the rates to the chief financial officer of the rating authority or such person’s duly authorised representative.¹¹⁸

If any person fails to pay rates due to be paid by that person, the rating authority may cause a demand in writing to be made upon that person, requiring that the person pays the amount due within thirty days of the date of demand. If that person fails to pay the amount due, it shall be lawful for the principal officers, upon a resolution of the rating authority to issue a warrant to the sheriff requiring the sheriff to distrain upon personal goods and chattels found on the rateable property in respect of which the rates are due. The rating authority may recover the amount due from any person by civil action without further notice or demand.¹¹⁹

3.7.0 Institutions in the Administration of Property Rates in Zambia

The design of the property taxation system will influence the number of institutions to participate in the administration of property taxation. In Zambia there are two main institutions in property rates administration namely Ministry of Local Government and Housing and Local Authorities. However, the Rating Act as amended establishes the Rating Valuation Tribunal where disputes between rate payers and rating authorities are referred to for settlement. Each of these institutions obtains its power with respect to property rates from the Rating Act of 1997 as amended.

3.7.0.1 Ministry of Local Government and Housing

The Ministry of Local Government and Housing represents the presence of the Central Government in Property rates administration in Zambia. Like in many other countries, the property tax is assigned to the local government as a local revenue instrument. The central government sets the broad tax policy and administrative framework. It plays at least an oversight role to ensure the uniform application of property rates law. The

¹¹⁸ Section 24 Rating Act No.12 of 1997 as Amended by the Rating (Amendment) Act No. 9 of 1999

¹¹⁹ Section 25 Rating Act No.12 of 1997 as Amended by the Rating (Amendment) Act No. 9 of 1999

Minister makes regulations for the better carrying out of the provisions of the Rating Act as amended.¹²⁰The Minister is also empowered to approve a number of decisions by the rating authorities such as appointment of the valuation surveyor, e.t.c.

The Government Valuation Department is a department within the Ministry of Local Government and Housing. The role of the Department is to advise Government on issues related to real estate in particular the provision of valuation services. One of its priority functions is to assist councils to fully utilise their capacity to levy rates as cost effectively as possible. This is carried out through the implementation of the National Rating Programme. Under the Rating Act as amended the Department is mandated to prepare valuation rolls for councils countrywide¹²¹. In an event that the Government Valuation Department fails to prepare the valuation roll, a private valuation surveyor may be appointed to prepare a valuation roll¹²². Even in this circumstance, Government Valuation Department maintains a supervisory role. The department is responsible for the monitoring of the preparation of valuation rolls by rating authorities and may advise the rating authorities to prepare a new valuation roll.

3.7.0.2 Local Authorities

The local government is the beneficiary of property taxation in Zambia. The law provides that all administrative costs are borne by the local authority. The rating authority pays all the fees and expenses incurred by the surveyor in respect of the surveyors' duties under the Act¹²³. The rating authority in whose area the Tribunal is sitting to hear objections bears all costs of the Tribunal sitting¹²⁴. The collection and enforcement responsibility are vested in favour of the local government which receives the revenue. All the statutory requirements needed to be followed in the preparation of the valuation rolls, are performed by the rating authority. The non-

²⁰ Section 41(1) Rating Act No.12 of 1997 as Amended by the Rating (Amendment) Act No. 9 of 1999

²¹ Supra Note 28

²² Ibid

²³ Section 3(5) Rating Act No.12 of 1997 as Amended by the Rating (Amendment) Act No. 9 of 1999

²⁴ Section 37 Rating Act No.12 of 1997 as Amended by the Rating (Amendment) Act No. 9 of 1999

adherence to the statutory provisions by the rating authority is fatal to the process of approving the valuation roll by the Tribunal.¹²⁵

3.7.0.3 The Rating Valuation Tribunal

The Rating Valuation Tribunal is an administrative mechanism to address disputes between the rate payers and the rating authority. The Tribunal has jurisdiction to hear and determine any objection made under the Rating Act as amended and make an award giving directions with respect to the objection. The Tribunal also ensures that the law as enshrined in the Rating Act is followed in the preparation of the valuation roll. The valuation roll will only be effective after the Tribunal has approved it.

3.8.0 Conclusion

The property rating law has its foundation in the Constitution of Zambia. The Constitution allows the local government to impose tax within their area of jurisdiction. The Rating Act empowers the local government to impose property rates on owners of the property. The law on rating has undergone a lot of changes since the introduction of property rating in Zambia. This is to enable the administration of property rates in local authorities to become effective.

¹²⁵ Jumba J. (2005), A Critical Analysis of the Law and Practice of Rating in Zambia, Page 39

CHAPTER FOUR

THE MINING INDUSTRY AND LEVYING OF RATES ON MINING PROPERTY IN ZAMBIA

4.0.0 Introduction

The mining sector plays a significant role in the economy of Zambia. The sector particularly the copper mining continues to be Zambia's economic lifeblood not only at the national level but also in towns where these mines are located. This chapter examines the treatment of mining property with respect to property rates in Zambia since the introduction of the rating system in 1920s. However, in order to appreciate the whole picture, the chapter also discusses the ownership circle of the mines: from private enterprise to nationalization and back to private enterprises again. These changes have influenced on how mining property are treated with regard to property rates.

4.0.1 Importance of Mining in Zambia

Mining is the mainstay of the Zambian economy. The sector is the main contributor to the GDP, export earning, government revenue and economy-wide forward and backward linkage. It remains significant for the economy irrespective of doldrums faced by the country over the years.¹²⁶ The mines are also a major employer in Zambia apart from the Government.¹²⁷ Indications from non-traditional mining explorations chiefly gold, diamond, and nickel underscore the sector's prospects of continuing to be a dominant player in the country's economy.¹²⁸

4.0.2 Ownership Circles of the Mines in Zambia

The mining industry in Zambia has undergone three distinct phases namely the pre-nationalisation, followed by the nationalization stage and finally the privatization era.¹²⁹

¹²⁶ CUTS (2003) Investment Policy in Zambia, Performance and Perceptions Page 48

¹²⁷ Zamabia National Commission for UNESCO Report 2005 Page 130

¹²⁸ Zamabia National Commission for UNESCO Report 2005 Page 130

¹²⁹ Sakala R. L. (2001) Difficulty Decisions: Changing a Nation, Sentor Publishing, Lusaka Page 94

During the pre-nationalisation era, Zambia's economy was completely under the control of foreign investors. The copper mining industry was privately owned by the Anglo American Corporation (AAC) and the Roan Selection Trust (RST) group of companies. During that period Zambia had a vibrant mining sector which ranked second in the World in terms of copper output¹³⁰.

After independence, Zambia followed in the steps of the Soviet Union by adopting a politically inspired nationalization programme. A major switch in the structure of the Zambia's economy came with the Mulungushi Reforms of April 1968 where Government declared its intentions to acquire equity holdings (usually 51% or more) in a number of key foreign-owned firms.¹³¹ By January 1970, Zambia had acquired majority holding in the Zambian operations of the two major foreign mining corporations, the Anglo American Corporation and the Roan Selection Trust. The two became the Nchanga Consolidated Copper Mines and Roan Consolidated Copper Mines.¹³² In 1982 Nchanga Consolidated Copper Mines and Roan Consolidated Copper Mines merged into one giant conglomerate, the Zambia Consolidated Copper Mines (ZCCM).¹³³ The nationalization of the industry inevitably discouraged private investment. Over time ZCCM became progressively under capitalized due to lack of investment capital in exploration and mining development. Under capitalization, poor management, lack of technological innovations coupled with low prices on the world market had a negative impact on the overall performance of the mining industry. This scenario had adverse effects on the performance of other sectors in the economy. There was need to redress the trend and salvage what was left of the mining operation.¹³⁴

In order to restore the viability of the once-prosperous mining sector, ZCCM was placed under the divestiture sequence plan for eventual privatization by the government. Prior to the privatization of ZCCM, the company operated ten integrated copper mines namely; Kansanshi Mine, Konkola Division, Luanshya Division, Nkana

¹³⁰ Ibid

¹³¹ Wikipedia, the Free Encyclopedia-Economy of Zambia. http://en.wikipedia.org/wiki/Economy_of_Zambia. Retrieved on 14/11/2007

¹³² Ibid

¹³³ Ibid

¹³⁴ Sakala R. L. (2001) *Difficulty Decisions: Changing a Nation*, Sentor Publishing, Lusaka Page 95

Division, Mufulira Division, Nchanga Division, Nampundwe Mine, Chambeshi Division, Chibuluma Division and Ndola Lime company. In addition, the company operated three smelters at Luanshya, Nkana and Mufulira, two refineries at Nkana and Mufulira, a tailing leach plant at Nchanga and Power Division.¹³⁵

4.0.3 Investment Incentives in Mining Sector

Since, every country is a potential investment destination, the challenge faced Zambia, like any other developing economies, is the ability to attract credible investors in the mining sector. Zambia needed to set up the requisite 'enabling environment' for investment. Firstly, the government adopted a clear policy for a private sector-driven economy. The Zambian government was further advised by the World Bank and the IMF ahead of privatization that, in order to bring in investment, the country would have to make itself more attractive than its neighbours and competitors by developing an investor-friendly regulatory regime¹³⁶. Laws are always the necessary confidence building pillar that investors want to look at. The government therefore adopted legislations that were supportive of the private sector. In order to attract investors in the mining sector the Mines and Minerals Act of 1972 was repealed.

4.0.4 Mines and Minerals Act of 1995

In line with governments' commitment to attract investors in the mining sector, the Mines and Minerals Act of 1972 which regulated the nationalized mining industry was repealed to give way to the Mines and Minerals Act of 1995. The new Act withdrew many of the controls the government had previously placed in the industry.¹³⁷ The 1995 Act, provides for the particular incentives for investors in mining such as duty free import, non-payment of withholding tax on interest, dividends royalties and management fees paid to shareholders and many others. These incentives are normal incorporated into Development Agreements entered into between

¹³⁵ Ibid Page 96
¹³⁶ Alastair Fraser and John Lungu (2006) For Who the Windfalls? Winners and Losers in the Privatisation of Zambia's Copper Mines Page 4. This is a report published by the Civil Society Trade Network of Zambia (CSNTZ) and the Catholic Commission for Justice, Development and Peace (CCJDP). One of the report's most contributions is that it provides public access for the first time to some of the previously secret contracts signed between the Government of Zambia and various companies that bought the mines.
¹³⁷ Ibid

the Government of the Republic of Zambia and mining Companies. Therefore, the final and most important stage of privatization of the mines in Zambia was the negotiation and signing of Mining Development Agreements with each of the companies. These agreements established the terms under which the mines were sold, and the rights and responsibilities of the Zambian state and the new mining companies¹³⁸.

4.0.5 Legal Basis for Mining Development Agreement

The Mines and Minerals Act of 1995 permits the Government to enter into Development Agreements with mining companies under which they extend more incentives than what the Act grants. The Act as amended provides that for the purpose of encouraging and protecting large-scale investments in the mining sector in Zambia the Minister may on behalf of the Government enter into agreement relating to the grant of a large-scale mining licence.¹³⁹ The agreement shall be known as a development agreement and may contain provisions binding on the Government in relation to;

- a) mining operations under a large-scale mining licence or the financing of any mining operations under such a licence;
- b) the circumstances or the manner in which the Minister or the Director shall exercise any power or discretion conferred on them by the mines and Minerals Act in respect of the licence; and
- c) the settlement of disputes arising out of or relating to the agreement, the administration of the Act, or the terms or conditions of a large-scale mining licence, including provisions relating to the settlement of any such dispute by international arbitration;
- d) matters connected with or incidental to the foregoing. Provided that a development agreement shall not contain provisions relating to fiscal matters.¹⁴⁰

³⁸ Alastair Fraser and John Lungu (2006) For Who the Windfalls? Winners and Losers in the Privatisation of Zambia's Copper Mines Page 4

³⁹ Section 9 (1) Mines and Minerals Act of 1995, Chapter 213 of the Laws of Zambia

⁴⁰ Section 6 (a) Mines and Minerals (Amendment) Act (No.6) of 2007

Section 9 (2) of the Mines and Minerals Act of 1995 has undergone through two amendments. The first amendment was done in 1996 through the Mines and Minerals (Amendment) Act (No.41) of 1996. Section nine of the principal Act was amended in subsection (2), by the insertion, immediately after paragraph (c) of the following new paragraph:

“d) The privatization of the Zambia Consolidated Copper Mines Limited and matters specified in the second schedule in which the Minister of Finance may, after consultation with the Minister responsible for such portfolio make such stability commitments as the Minister may consider necessary”.¹⁴¹

In 2007, section 9(2) of Mines and Minerals of 1995 was amended through the Mines and Minerals (Amendment) Act (No.6) of 2007. This amendment in effect deleted section 9 (2) (d) and in its place came the following paragraph: *“d) matters connected with or incidental to the foregoing”*. The amendment also provides that a development agreement shall not contain provisions relating to fiscal matters.¹⁴²

4.0.6 Taxation Under Mining Development Agreement

The Government of the Republic of Zambia has entered into a number of development agreements with mining companies. There are no major differences between the various development agreements signed by Government and investors in the mining sector.¹⁴³ One of the important clauses of these Development Agreements is on taxation.

4.0.6.1 Obligation to Pay Tax

The Mining companies agreed with the Government that they would pay tax, royalties and duties from time to time in accordance with applicable legislation. However, the Development Agreements emphasized that Government of the Republic of Zambia should ensure that VAT collected on goods and services procured by

¹⁴¹ Section 2 Mines and Minerals (Amendment) Act (No.41) of 1996

¹⁴² Section 6 (b) Mines and Minerals (Amendment) Act (No.6) of 2007

¹⁴³ Supra Note 126

the companies is refunded to the companies within a reasonable time from the date of submission of the companies' monthly return. Further, the Government agreed that from the effective time until commencement of normal operations it would not impose or collect customs duties on the companies' import of goods or material necessary for implementing the programme.¹⁴⁴

4.0.6.2 Taxation Stability under Mining Development Agreement

The Government of the Republic of Zambia undertook that it would not for a period commencing at the effective time and ending fifteen years following the date the company commences normal operations not to do the following;-

- a) increase corporate income tax or withholding tax rates applicable to the company (or decrease allowances available to the company in computing the liability to such taxes) from those prevailing at the time of the agreement, or
- b) otherwise amend the VAT and corporate tax regime applicable to the company including without limitation those pertaining to the carry forward of losses from those prevailing on the day of signing the agreement, or
- c) impose new taxes or fiscal imposts on the conduct of normal operations.

This is to ensure that in each case a material there is no adverse effect on the companies' distributable profits or the dividends received by its shareholders¹⁴⁵.

The Government further undertook that for the same period ending fifteen years following commencement of normal operations, it would not increase the rate of royalty, royalty base, method of calculation, or term of payment from that in effect in accordance with section 66 of the Mines and Minerals Act at the rate not to

¹⁴⁴ Clause 13.2 of the Development Agreement between GRZ and Chibuluma Mines Plc and Clause 14 of the Development Agreement between GRZ and Kansanshi Mines Plc

¹⁴⁵ Clause 15.1 of the Development Agreement between GRZ and Chibuluma Mines Plc and Clause 14.1 of the Development Agreement between GRZ and Kansanshi Mines Plc

exceed three percent (3%) of the net back value¹⁴⁶. The Government would also not increase import duty rates (including the IDF) applicable to the company which would be exempt from customs and excise duties under section 97(i) of the Mines and Minerals Act above a level of five percent (5%) and other import duty above a level of twenty percent (20%)¹⁴⁷. The mining companies and the Government also agreed that Government should not increase the rural electrification levy applicable to the company's purchase of power from the level applicable at the effective date. Government would also not impose other royalties or duties on normal operations, so as to have a material adverse effect on the company's distributable profit or dividends received by its shareholders¹⁴⁸.

Upon expiry of the fifteen year period, the Government shall in any event, ensure that no law, statute, regulation or enactment shall be passed or made which would discriminate against the company in respect of matters agreed under taxation stability when compared to other mining companies. However, Government will be at liberty to pass or make any such law, structure, regulation or enactment to enable the performance or amendment of the Development Agreement¹⁴⁹.

In case of a breach, Government covenanted to reimburse the company (or at its option make offsetting changes in any law, statute, regulation or enactment applicable to the company) to ensure the company is fully and fairly compensated for any loss, damages, or costs incurred by it by reason of failure by Government of the Republic of Zambia to comply with the provisions on taxation stability¹⁵⁰.

4.0.7 Current Debate on Mining Development Agreement

The subject of development agreement has in the recent past generated a lot of national debates with the call to renegotiate the terms in these agreements. Many people have complained the manner in which these

¹⁴⁶ Clause 14.1 (d) (i) Kansanshi Development Agreement.

¹⁴⁷ Clause 14.1 (d) (ii) Kansanshi Development Agreement.

¹⁴⁸ Clause 14.1 (d) (iv) Kansanshi Development Agreement.

¹⁴⁹ Clause 15.2 of the Development Agreement between GRZ and Chibuluma Mines Plc and Clause 14.2 of the Development Agreement between GRZ and Kansanshi Mines Plc

¹⁵⁰ Clause 15.3 of the Development Agreement between GRZ and Chibuluma Mines Plc and Clause 14.3 of the Development Agreement between GRZ and Kansanshi Mines Plc. See also Clause 15.3 of Chambishi mine Development Agreement.

contracts have always been guarded as secrets by the mining companies and the Government of the Republic of Zambia.¹⁵¹ This has caused significant problems in ensuring the accountability of the mining companies. It is explained that the best way to secure maximum benefit for the Zambian citizen from the mining industry is to subject the terms of the sale of the mines for public discussion. This is the only way the mining companies themselves and the Zambian authority will win the trust of the public.¹⁵²

The taxation regime under the mining development agreement is top on the agenda of the current debate. The Government explained that the state and conditions of the mining assets and the investment climate prevailing in the country prior to privatization, made it difficult to attract the much needed Foreign Direct Investment (FDI).¹⁵³ In these circumstances the investors requested special conditions to allow them to obtain good returns on their investments. They also required stability periods during which taxes would remain unchanged. However, the fact that these contracts were negotiated when Zambia was in a desperate situation and now things have changed it is only plausible that Zambia similarly enjoy the benefits.¹⁵⁴ The Zambia Daily Mail quoted the Minister of Finance and National Planning Ng'undu Magande saying that it is our understanding that when there was a case for these concessions to be given, we agreed to give them. Now that there is no case for them, the mining companies should also agree to review them.¹⁵⁵

In his 2007 Budget Speech to Parliament, the Minister of Finance and National Planning raised mineral royalties from 0.6% to 3%, company income tax from 25% to 30% and introduced a 3% import duty and a 15% withholding tax on dividends interests, royalties and other mining sector transactions¹⁵⁶. However, these tax changes only affect future investors not those already holding contracts. Nonetheless, Magande said that the Government would now seek negotiations with those companies so that there is mutual consent by contracting

¹⁵¹ Alastair Fraser and John Lungu (2006) For Who the Windfalls? Winners and Losers in the Privatisation of Zambia's Copper Mines Page 6

¹⁵² Alastair Fraser and John Lungu (2006) For Who the Windfalls? Winners and Losers in the Privatisation of Zambia's Copper Mines Page 4

¹⁵³ Zambia Daily Mail, Thursday October, 25 2007, Volume II No. 255 quoting Finance Minister Ng'undu Magande

¹⁵⁴ Ibid

¹⁵⁵ Ibid

¹⁵⁶ <http://www.minewatchzambia.com> Retrieved on 10/11/2007

parties to review the regime to the new rates.¹⁵⁷ However, the Minister emphasized that Government would not propose taxes that might stifle mining operations.¹⁵⁸

On the other hand, Government have been warned not to renegotiate the mining development agreements as doing so would erode investors' confidence in Zambia.¹⁵⁹ The Chamber of Mines of Zambia (CMZ) observed that if authorities come up with harsh fiscal regime, the impact may come later than now when investors decide not to invest. They explained that under the mining development agreement investors have undertaken to rehabilitate production plants, equipment and environment, investing in exploration drilling, in research and development and in new technologies, encourage promote and support local businesses. All these will make significant contribution to the Zambian economy.¹⁶⁰

4.0.8 Levying of Rates and Mining Development Agreement

The mining development agreements have stimulated a lot of debates particularly in the area of taxation. Not only have the agreements affected the national taxation regime but also local taxation such as property rates. Mine owners argue that companies that signed their agreements before 8th October 1999 are not liable to pay property rates.¹⁶¹ This is because the mining premises, together with plant and machinery for mining or mineral processing became rateable only on 8th October 1999. They explain that they levying of rates introduced pursuant to the Rating (Amendment) Act (No.9) of 1999 is inconsistent with taxation stability clause of the development agreement because such rates amount to an imposition of a new tax.¹⁶² The mine owners are only liable to pay rates to the extent only and insofar as the same are not inconsistent with the Development Agreement.

¹⁵⁷ <http://www.minewatchzambia.com> Retrieved on 10/11/2007

¹⁵⁸ Zambia Daily Mail, Thursday October, 25 2007, Volume II No. 255

¹⁵⁹ Business Post, Tuesday, October, 23 2007 Volume VIII

¹⁶⁰ Ibid

¹⁶¹ Records of Proceedings of the Rating Valuation Tribunal sitting held to consider the Kalulushi Main Valuation Roll of 2004. The same argument in the Records of Proceedings of the Rating Valuation Tribunal sitting held on 24th May 2007 to consider the Solwezi Main Valuation Roll of 2004 in the Council Chambers.

¹⁶² Ibid

On the other hand affected councils have insisted that the Rating (Amendment) Act (No.9) of 1999 removed the exemption which was given to the mining property¹⁶³. The effect of this amendment is that mining premises, together with plant and machinery for mining or mineral processing as of 8th October 1999 are subject to rates under the Act. They explain that it is only the Rating Act through which a property can be exempted or qualify for remission from paying rates.¹⁶⁴ They argue that since the Mining Development Agreements are creations of the Mines and Minerals Act, their ambit should be restricted to the taxes under this Act and those taxes specifically mentioned in the Agreements.

This position has culminated into a number of disputes between mine companies and local authorities. In Kalulushi, for example, Chibuluma Mine objected the inclusion of their mining property to be subjected to rates by the Kalulushi Municipal Council. They argued that the Mine Development Agreement exempts them from paying such taxes especially that rates on mining properties was introduced after the Development Agreement had already been signed. In this case, the Rating Valuation Tribunal ruled in favour of the Council¹⁶⁵. Chibuluma Mine appealed to the High Court.¹⁶⁶ However, this case was not concluded as both parties agreed to settle the matter out of court. The Mine owners however, made it very clear that their contribution to the council is purely out of moral rather than legal obligation. Similarly, the same resistance was being experienced by Solwezi Municipal Council from Kansanshi mines. In Solwezi, Kansanshi Mines indicated that they would rather put money in Kansanshi Foundation as a vehicle to stir developmental projects in Solwezi rather than giving it the council. They also maintain that councils do not have any legal claim on the levying of property rates in the event that the mine owners refuse to pay property rates¹⁶⁷

¹⁶³ Argument submitted by the Appointed Valuation Surveyor, Mr. Denis Kasonde during Rating Valuation Tribunal Sitting held on 24th May 2007 to consider the Solwezi Main Valuation Roll of 2004 in the Council Chambers in opposition to Kansanshi Mines objection.

¹⁶⁴ Ibid

¹⁶⁵ Records of Proceedings of the Rating Valuation Tribunal sitting held to consider the Kalulushi Main Valuation Roll of 2004

¹⁶⁶ Chibuluma Mines Plc V. Kalulushi Municipal Council, Case No. 2001/HK/495

¹⁶⁷ Records of Proceedings of the Rating Valuation Tribunal sitting held on 24th May 2007 to consider the Solwezi Main Valuation Roll of 2004 in the Council Chambers.

The continued misunderstanding between mine companies and councils is not health for the development of our cities and towns particularly where the mines are situated. Councils with mining properties get enormous contributions from the mines in terms of property rates such that their financial position councils will turn for the better. As we are aware that property tax is one of the main sources of local government revenue in many countries including Zambia.

4.0.9 Brief History of Rating on Mining Property in Zambia

Property rates in Zambia were introduced in the late 1920s through the enactment of two ordinances i.e. the Municipal Corporation and the Township Ordinances. There were no major differences between the two ordinances in so far as rating matters were concerned.¹⁶⁸ Both ordinances provided that;-

*"All land within the Municipality/Township, together with improvements situated thereon, shall be assessable property within the meaning of the ordinances, save such property as the Governor in Council may prescribe."*¹⁶⁹

The two pieces of legislations exempted exactly the same properties from paying rates.¹⁷⁰ The following were not assessable property under the ordinances;-

- a) land and buildings of every description situated thereon in the personal occupation of the Governor.
- b) Land and buildings used primarily for public worship together with their necessary cartilage but excluding land and buildings used for residential purposes in connexion with places of public worship,
- c) Public libraries and museums.
- d) Cemeteries and crematoria,
- e) African housing areas as defined under section two of the urban Africa Housing Ordinance and accommodation provided in terms of section three of the said ordinance being accommodation of a

¹⁶⁸ Jumba J. (2005) A Critical Analysis of the Law and Practice of Rating in Zambia, submitted to the University of Zambia, School of Law in partial fulfillment to the requirement for the award of the Degree of Laws (LLB) Page 11

¹⁶⁹ Sections 97 (1) Municipal Corporation Ordinance, Chapter 119, and section 23 (1) Township Ordinances, Chapter 120 of the 1960 Edition of Laws of Northern Rhodesia

¹⁷⁰ Government Notices No.33 of 1958 and No.124 of 1959 and Government Notices No.31 of 1958 and No. 125 of 1959.

type and in such places approved by the Commissioner for Local Government pursuant to paragraph (c) of section four of the said ordinance,

- f) Civil aerodromes excluding airport buildings,
- g) Land laid out and used for sporting purposes other than that used and maintained for profit or for private use of the owner or occupier,
- h) The railway track owned by the Rhodesian Railway together with other facilities provided the same are for the normal working of the railway.

The declarations in each case emphasized that neither land nor buildings other than those specified in the declaration by the Governor in Council were exempted.¹⁷¹

At independence in 1964, the two ordinances were renamed Acts. As already indicated no notable changes were made to the two Acts. The Minister in both Acts exempted exactly the properties which the Governor in Council prescribed under the two ordinances.¹⁷² The mining properties were not exempted from paying property rates either under the Municipal or Township Ordinances/Acts.

In 1976 the Municipal and Township Acts were repealed and in their place came the Rating Act No. 33 of 1976. The principal Act did not exempt the mining property from paying rates.¹⁷³ There was a major shift in the treatment of mining property as far property rates were concerned in the early 1980s. The Rating Act of 1976 through statutory instruments extended exemptions to certain agricultural land and buildings land and buildings used for mining purposes.¹⁷⁴ The order issued by the Minister provided the following;

*“Lands and buildings as well as machinery or plant (together with the shafting, pipes, cables, wires, and other appliances and structures accessory thereto) used for mining or mineral processing purposes belonging to Zambia Consolidated Copper Mines Limited shall not be rateable property for the purpose of the Act”.*¹⁷⁵

¹⁷¹ Ibid

¹⁷² Sections 97 (1) Municipal Corporation Act, Chapter 119, and section 23 (1) Township Act, Chapter 120 of the 1960 Edition of Laws of Northern Rhodesia

¹⁷³ Section 6 of the Rating Act No. 33 of 1976

¹⁷⁴ Statutory Instrument Numbers 100 of 1981 and 29 of 1982

¹⁷⁵ Section 2(1) of Statutory Instrument Number 29 of 1982

In 1997 when the Rating Act was repealed, the exemption of the mining property was retained in the new Act. The Act provided as follows;

*For the purpose of this Act and subject to subsection (1) the following property within the rateable area shall not be rateable... premises on which buildings, plant and machinery used for mining or mineral processing purposes are located.*¹⁷⁶

However, in an effort to strengthen the property rating system in Zambia, Government amended the Rating Act (No.12) of 1997 through the Rating (Amendment) Act (No. 9) of 1999.¹⁷⁷ Under the Rating Act (No. 12) of 1997 mining premises were exempt in section 6(2) (l). However, the Rating (Amendment) Act (No. 9) of 1999 in section 6 (b) (v) deleted the exemptions set out in section 6 (2) (l) of the principal Act. The implication of this amendment is that mining premises, together with plant and machinery for mining or mineral processing as of 8th October 1999 are subject to rates under the Act.

4.1.0 Conclusion

The mining industry plays a significant role in the economy of Zambia. Ownership of the mines in Zambia has come full circles: from private enterprise to nationalization and back to private enterprise again. These ownership circles influenced on how mining property were treated as far as property rates are concerned. At the time of privatization of the mines, the state and conditions of the mining assets and the investment climate made it difficult to attract investors in the mining sector. The investors requested for special conditions to allow them obtain good return for their investment. Today, these incentives, in particular Mining Development Agreements are subject to national debate with a general call to renegotiate these agreements.

¹⁷⁶ Section 6(2)(1) of the Rating Act No. 12 of 1997

¹⁷⁷ Banda T. (2004) " *The Role of Property Taxation in the Process of Implementing the Decentralisation Policy in Zambia A case Study of Chongwe and Kafue District Councils*"- dissertation submitted to Lund University-Department of Housing Development and Management, in partial fulfillment to the requirement for the award of Masters' Programme in Urban Management and Development.

CHAPTER FIVE

ANALYSIS OF THE IMPLICATION OF MINING DEVELOPMENT AGREEMENTS ON LEVYING OF RATES ON MINING PROPERTY

5.0.0 Introduction

The Mining Development Agreements signed by the Republic of Zambia and mining companies as the package for the sale of mines have a number of consequences. Many Zambians feel that Government should renegotiate these agreements as the country is not benefiting from the mining industry. Apart from environmental concerns raised by people, the taxation regime being enjoyed by mining companies is a great source of debate in Zambia. This study has been stimulated by the fact that although premises used for mining purposes are now rateable under the Rating Act, mining companies are refusing to pay rates to local authorities. They claim that the tax is inconsistent with the provision of Mining Development Agreements entered into between Government and themselves. This chapter is an attempt to analyse the implications of these agreements as they relate to levying of rates on mining properties. The analysis has been presented under four headings namely; examining exemptions under the Rating Act, historical perspective of levying rates on mining property, examining legal nature of development agreement and the effect of taxation stability on rating of mining property. These are now discussed in detail below.

5.0.1 Examining Exemptions Under the Rating Act of 1997 as Amended

The study examined the kind of exemptions provided for under the Rating Act and analyse the rationale of giving such exemptions. All countries provide some sort of property tax exemptions. However, countries differ as to how they apply property tax exemptions. The exemptions are mainly based on two factors- what kind of rate payer qualifies and the kind of property that may be exempt. In order to answer the above question, typical determining factors include; who is the owner of the property? Who uses the property? For what purpose is the property used? How much property is being used?

government of the many educational and healthy burdens which are traditional functions of government in exchange for tax exemption. The cost of exemption is less than the cost of government providing the services itself.

As Janne Gallagher explains,

*"In many British colonies, property tax exemption is firmly rooted in the special treatment that British law afforded exemptions for charitable purposes in order for them to carry on religious, healthy and educational works..."*¹⁸²

c) Property used for primarily Agriculture

The Act provides that agricultural land and buildings which are used primarily for agriculture are exempted from rates¹⁸³. Agriculture has been defined as the use of land or buildings for, or in connection with, animal husbandry, fish farming, breeding and keeping of livestock, hatcheries, irrigation, tillage, floriculture, flower growing, horticulture, gardening, vegetable growing, fruit or seed growing, mushroom growing, vine-growing, silviculture, afforestation, forestry or plantation, but does not include tourism, green grocership and meat-processing¹⁸⁴. This exemption is purely to support the economical diversification from mining sector to agricultural industry. Interestingly to note is that the only property exempted from paying rates based on economic reasons is agricultural property. Property tax like any other taxes is an economic tool which can influence and encourage economic activities in a given sector.

d) Property owned by a Foreign Mission

The other category of properties exempted from paying rates is the ones owned by the foreign missions. These include the residence of the head of foreign mission or Chancery of that mission¹⁸⁵. The exemption is based purely on diplomatic relations considerations. Other properties owned by foreign missions in Zambia can only

¹⁸² Janne Gallagher, "The Legal Structure of Property-Tax Exemption," Property-Tax Exemption for Charities: Mapping the Battleground, ed. Evelyn Brody (Washington, D. C.: The Urban Institute Press, 2002) page 3

¹⁸³ Section 6 (2) (i) of the Rating Act of 1997 as amendment by the Rating (Amendment) Act of 1999

¹⁸⁴ Section 6 (4) of the Rating Act of 1997 as amendment by the Rating (Amendment) Act of 1999

¹⁸⁵ Section 6 (2) (c) of the Rating Act of 1997 as amendment by the Rating (Amendment) Act of 1999

be exempted if similar premises owned by a Zambian mission in that country are exempt from rates in such country¹⁸⁶. The second exemption is based in the reciprocity rationale, i.e. do unto others as you want them to do for you.

Having examined the exemptions provided for in the Rating Act and Statutory Instrument No. 37 of 2005, it is important to ask ourselves this question- Do other legislations provide for exemption of properties from paying rates? Mr. Denis Kasonde¹⁸⁷ in his submission¹⁸⁸ to the Rating Valuation Tribunal explained this point as follows-;

“My current knowledge is that it is by the Rating Act through which a property in a District can be exempt or qualify for remission from paying rates. I am not aware of any other legislation which has the same rates exempting authority. The Development Agreement does not state the provisions of the Rating Act by which the agreement derives authority to exempt Kansanshi Mining Plc from paying owners rates. Mention of such a provision would have guided me.

My understanding is that Kansanshi Mining Plc was a rateable property under the Rating Act as at the time of valuation for preparation of valuation roll in 2004 and that to the best of my knowledge, Kansanshi Mining Plc is still a rateable property as I am not aware of any amendments that have been done to the Rating Act which have henceforth made Kansanshi Mining Plc exempt from paying rates.

As Valuation Surveyor appointed under section 4 of the Rating Act, my burden is to prove that Kansanshi Mining Plc was not exempted under section 6 of the Rating Act as at the time of valuation...”

¹⁸⁶ Ibid

¹⁸⁷ Mr. Denis Kasonde is a Senior Valuation Officer with Government Valuation Department, Ministry of Local Government and Housing based in Kitwe. He was the Appointed Valuation Surveyor who prepared the 2004 Solwezi Main Valuation Roll and 2005 Kalulushi main Valuation Roll. He has a lot of experience in rating.

¹⁸⁸ Submission to the Rating Valuation Tribunal Sitting held on 24th May 2007 to Consider the Solwezi Main valuation Roll of 2004 in the Council Chambers

We agree with Mr. Denis Kasonde's observations that it is only the Rating Act which governs the rating system in Zambia. Its provisions cannot be derogated by other legislations save the Constitution. The authority to exempt premises used for mining purposes can only be derived from the Rating Act and not from the Mines and Minerals Act or any Act. In 1982, when Zambia Consolidated Copper Mines Limited was exempted from paying rates on mines, a Statutory Instrument¹⁸⁹ was issued in line with the provisions of the Rating Act and not through the legislation dealing with mines. Therefore properties exempted are those in section 6 (2) of the Rating Act and those declared in the Statutory Instrument issued by the Minister of Local Government and Housing in accordance with section 6 (2) (xi) of the Rating Act.

5.0.2 Review of the treatment and policy on levying of rates on mining property

A brief review of the treatment of mining properties with regard to rates is important to help us understand the background and policy behind the Governments' position at different times.

At the time, property rates were introduced in the late 1920s, the law governing the rating system was the Municipal Corporation and Township ordinances¹⁹⁰. All land within the municipality/township together with improvements thereon were rateable properties. The exemptions were given through the declarations by the Governor in Council.¹⁹¹ Through Government notices¹⁹² the Governor in Council prescribed a list of eight types of properties to be exempted which were the same for both ordinances. The declarations in each case emphasized that neither land nor buildings other than those specified in the declaration by the Governor in Council were exempted.¹⁹³

It is interesting to note that mining property was not exempted from paying rates through the declarations. Both land and buildings comprising a mine were therefore assessable properties for rating purposes.

¹⁸⁹ Statutory Instrument Number 29 of 1982

¹⁹⁰ Jumba J (2005) A Critical Analysis of the Law and Practice of Rating in Zambia, Page 10

¹⁹¹ Sections 97 and 68 of the Municipal Corporation and Township Ordinances respectively

¹⁹² Government Notices No.33 of 1958 and No.124 of 1959 and Government Notices No.31 of 1958 and No. 125 of 1959..

¹⁹³ Ibid

At independence in 1964, the two legislations were renamed as the Municipal Corporation and Township Acts. There were no changes to the law regarding property rates. The Minister in both Acts exempted exactly the same properties which the Governor in Council prescribed under the previous two ordinances. Again the law did not exempt the mining property from rates.¹⁹⁴

The law on rating was consolidated in 1976 following the enactment of the Rating Act (No.33) of 1976.¹⁹⁵ Similarly the new Rating Act did not extend the exemption to mining property. However, in 1982 the statutory instrument was issued in which land and buildings as well as machinery or plant used for mining or mineral processing belonging to Zambia Consolidated Copper Mine Limited (ZCCM) were exempted from paying rates¹⁹⁶. This statutory instrument confirmed that until 1982 the mining property were rateable. However, the strict construction of this statutory instrument implied that mine owners other than ZCCM Limited were liable to pay property rates. It was right to say that mining property was not exempted from rates but rather ZCCM as an institution. It is important to note that the change in law coincided with the nationalization of the mining industry and ZCCM became the holding company.

In 1997 when the Rating Act was repealed, the treatment of mining property got a new dimension. In terms of section 6(2) (l) the premises on which buildings, plant and machinery used for mining or mineral processing were not rateable. The Act now gave a blanket exemption by deleting Zambia Consolidated Copper Mines Limited. Therefore, mining property was exempted regardless of who owned the mines. This, however, did not happen by accident because at this time all large-scale mining operations were in the hands of the Zambian Government.

In 1999, the Government amended the Rating Act (No. 12) of 1997 through the Rating (Amendment) Act (No.9) of 1999. This amendment removed the exemption accorded to the mining property. Section 6(b) (v) of the

¹⁹⁴ Jumba J (2005) A Critical Analysis of the Law and Practice of Rating in Zambia, Page 11 and 12

¹⁹⁵ Ibid Page 13

¹⁹⁶ Section 2 of the Statutory Instrument No 29 of 1982

Rating (Amendment) Act deleted the exemption set out in section 6(2) (l) of the principal Act. This entails that mining premises together with plant and machinery for mining or mineral processing are subject to rates under the Act. The change in law here again reflected the change in government policy. The mining industry was taken back to private ownership.

It is not in dispute now that the exemption accorded to mining property is no longer there. However, mining companies argue that even if mines have to be rateable, the mining plant and machinery are not rateable within the meaning of the Rating Act¹⁹⁷. The Act in section 2 defines rateable machinery or plant to mean –

- a) machinery and plant, together with the shafting, pipes, cables, wires and other appliances and structures accessory to the machinery and plant which are used mainly or exclusively in connection with either of the following purposes:
 - i) the generation, storage, primary transformation or main transmission, of power in, or on, any rateable property; or
 - ii) the heating, cooling, ventilation, lighting, drainage or supply of water to rateable property or the protection of the rateable property from fire.
- b) lifts or elevators in a building;
- c) structures or parts of the structures used for storage purposes and not being an integral part of a manufacturing operation or trade process.

This definition casts a doubt as to whether mining plant and machinery is rateable within the meaning of rateable plant and machinery under the Rating Act. It is well established practice that when a statute is plain and unambiguous, the words of the statute bind everyone to apply them with nothing added or taken away¹⁹⁸. The words used in their strict construction have definitely excluded the mining plant and machinery.

¹⁹⁷ Records of Proceedings of the Rating Valuation Tribunal Sitting held on 24th May 2007 to Consider the Solwezi Main valuation Roll of 2004 in the Council Chambers.

¹⁹⁸ Munalula M. M.(2004) Legal Process: Zambian Cases, Legislation and Commentaries, page 168

5.0.3 Examining the Legal Nature of the Development Agreements

Mining companies argue that development agreements have the force of the law which overrides all other laws and regulations.¹⁹⁹ The same sentiments were also expressed by Justice Minister, George Kunda, who told the National Assembly that Government could not successfully alter the Development Agreements because they are above the 'law'²⁰⁰. In order to examine this argument we now reflect on how laws in Zambia are ranked in the hierarchy of superiority.

5.0.3.1 Constitution

The supreme law in Zambia is the Constitution, Chapter One of the Laws of Zambia. The Constitution is supposed to be the enactment of the people's desires and expectations; thus all other laws must be in compliance with it in order to be valid²⁰¹. The Constitution sets out the structures and powers of Government and indicates people's rights and duties visa vis the state²⁰². Article 1(4) of the Constitution provides that it shall bind all persons in the Republic of Zambia and all legislative, Executive and Judicial organs of the state at all levels.

5.0.3.2 Act of Parliament

The Constitution has given the Parliament of Zambia power to enact laws. Article 62 of the Constitution provides that the legislative power of the Republic of Zambia shall vest in Parliament which consists of the President and the National Assembly. All laws made by Parliament shall be styled "Act" of Parliament.²⁰³

The relationship between the Constitution and Acts of Parliament is very important to understand. Article 1(3) of the Constitution establishes this relationship. It provides as follows:-

¹⁹⁹ Records of Proceedings of the Rating Valuation Tribunal Sitting held on 24th May 2007 to Consider the Solwezi Main valuation Roll of 2004 in the Council Chambers.

²⁰⁰ Mining Agreement under scrutiny, <http://www.mineweb.net/mineweb/view/mineweb/en/page36?oid=197548&sn=Details>. Retrieved on 20/10/2007

²⁰¹ Munalula M. M. (2004) Legal Process: Zambian Cases, Legislation and Commentaries, page 73

²⁰² Ibid

²⁰³ Article 79 (8) Constitution of Zambia

"This Constitution is the supreme law of Zambia and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void".

The courts in Zambia have evoked this provision in the number of decisions. In the case of **Thomas Mumba v. The People**²⁰⁴, section 53(1) of the Corrupt Practices Act was declared unconstitutional null and void as the provisions of section were in contravention of Article 20 (7) of the Constitution. Chirwa J had this to say:-

'In countries like Zambia where there is a written Constitution, the Constitution is the supreme law, any other laws are made because the Constitution provides for their being made; and are therefore subject to it. It follows therefore that unless the Constitution is specifically amended, any Act that is in contravention of the Constitution is null and void.

Similarly, in the case of **Christine Mulundika and Seven Others v. The Attorney General**²⁰⁵, the sacrosanct of the Constitution was upheld. The Supreme Court held that it is not justifiable that citizens can only assemble and speak in public with prior permission which permission is not consistent with the guaranteed freedoms of assembly and speech. Therefore applying the constitutional principles to the case, the Supreme Court found section 5(4) of the Public Order Act inconsistent with the Constitutional provisions.

5.0.3.3 Statutory Instrument

Article 80 (1) of the Constitution provides the following-;

"Nothing in Article 62 shall prevent Parliament from conferring on any person or authority power to make statutory instruments".

²⁰⁴ (1984) ZR 38

²⁰⁵ SCZ Judgment No. 25 of 1995.

Statutory instrument means any proclamation, regulation, order, rule, notice or other instrument (not being an Act of Parliament) of a legislative, as distinct from an executive, character²⁰⁶. If any provision of a statutory instrument is inconsistent with any provision of the Constitution, the President may, by order annul that statutory instrument and it shall thereupon be void from the date on which it was made²⁰⁷. Similarly any provision of a statutory instrument which is inconsistent with any provision of an Act shall be void to the extent of the inconsistency²⁰⁸. In the case of the **Attorney-General v. Local Government Election Commission**²⁰⁹,

Bweupe J stated the following-;

“It is in my view that where a statute confers a power,...the court will confine those exercising the power to the strict letter and spirit of the statute. In this view I am reinforced by s. 2(4) of the Interpretation and General Provision Act Cap 2 which states that any provision of a Statutory Instrument which is inconsistent with a provision of an Act, Applied Act or Ordinance shall be void to the extent of the inconsistency.”

Applying this principle, the Court held that regulation 10 (3) of the local government election regulations statutory instrument no. 111 of 1992 to be inconsistent with the provisions of sections 16 and 17 of local government elections Act (No.21) of 1991 in so far as the regulation purports to widen and extend the criteria to qualify as a candidate.

5.0.3.4 By-Laws

Other than statutory instrument, there are other instruments, which have the force of law such as by-laws. By-laws have been defined as rules made by some authority subordinate to the legislature for the regulation, administration or management of a certain district, property, undertaking e.t.c., and binding on all persons who come within their scope²¹⁰. For example section 76 of the Local Government Act confers powers on councils to make by-laws.

²⁰⁶ Section 3 of the Interpretation and General Provisions Act Chapter 2 of the Laws of Zambia
²⁰⁷ Article 80 (3) of Constitution of Zambia
²⁰⁸ Section 20 (4) of the Interpretation and General Provisions Act Chapter 2 of the Laws of Zambia
²⁰⁹ (1990-1992) ZR 182 HC
²¹⁰ Material prepared by John. P. Sangwa and was initially part of a larger study undertaken by the author and now meant for students studying Administrative Law, page 27. Mr. Sangwa is a lecturer of Administrative Law at the University of Zambia.

5.0.3.5 Development Agreement as a Contract

It is not in dispute that the Development Agreement derives its authority from section 9 of the Mines and Minerals Act of 1995. Section 9 (1) provides the following-‘

“For the purpose of encouraging and protecting large-scale investments in the mining sector in Zambia, the minister may, on behalf of the Government, enter into an agreement relating to the grant of a large-scale mining licence.”

The question is what powers is given to the Minister? Is it legislative powers or other forms of power? The answer lies in words used to confer this power to the Minister by the Act. The words in the section clearly show that the minister has only been empowered to contract on behalf of the Government of Zambia. The Mines and Mineral Act actually defines Mining Development Agreement as an agreement entered into under section 9 in relation to a large-scale licence.²¹¹ A contract is a legally binding exchange of promises or agreements between parties that the law will enforce²¹². The purpose of section 9 (2) is to give legal capacity to the Minister to contract on behalf of the Government. Therefore, Development Agreements are contracts between the Government of the Republic of Zambia and mine companies and the terms and conditions in these agreements are regulated by the law of contract. Contract law is based on the Latin phrase *pacta sunt servanda* (pacts must be kept). Breach of contract is failure to perform as stated in the contract and remedy for breach of contract is an award of money damages. When dealing with unique subject matter specific performance may be ordered²¹³.

Therefore, it is not true that the Development Agreements override all other laws and regulation as such position could be inconsistent with the Constitution and other Acts of Parliament.

²¹¹ Section 2 of the Mines and Minerals Act of 1995

²¹² <http://en.wikipedia.org/wiki/Contract>. Retrieved on 20/10/2007

²¹³ Ibid

5.0.4 The Effect of Taxation Stability on Rating of Mining Property

Mining companies have argued that notwithstanding the provision of the Rating Act, they are only liable to pay rates to the extent only and insofar as the same are not inconsistent with development agreements²¹⁴. The implication of this statement is that by virtue of the taxation stability clause in the development agreements, mining properties are exempt from paying rates²¹⁵. This has been the source of dispute between Mining companies and local authorities where mines are located.

The convenient starting point to analyse the above argument is section 9 (2) of the Mines and Minerals Act of 1995 as amended. The section defines the scope or areas where the Minister is authorized to contract. The Mines and Minerals (Amendment) Act (No.6) of 2007 deleted subsection (2) and substituted it with the following:-

- a) Mining operations under a large-scale mining licence, or the financing of any operations under such licence²¹⁶. This entails that if the Minister for example contracts in relation to small-scale mining, such contract will not be binding on the Republic because it is done out of the authority.
- b) The circumstance or the manner in which the Minister or Director of Mines shall exercise any power or discretion conferred on them by the Mines and Minerals Act in respect of the licence²¹⁷.
- c) The settlement of disputes arising out of or relating to the agreement, the administration of the Act or terms and conditions of the licence, including provisions relating to the settlement of any such dispute by international arbitration²¹⁸.

²¹⁴ Records of Proceedings of the Rating Valuation Tribunal Sitting held on 24th May 2007 to Consider the Solwezi Main valuation Roll of 2004 in the Council Chambers

²¹⁵ Ibid

²¹⁶ Section 6 (b) (a) of Mines and Minerals (Amendment) Act (No.6) of 2007

²¹⁷ Section 6 (b) (b) of Mines and Minerals (Amendment) Act (No.6) of 2007

²¹⁸ Section 6 (b) (c) of Mines and Minerals (Amendment) Act (No.6) of 2007

d) matters connected with or incidental to the foregoing, provided that a development agreement shall not contain provision relating to fiscal matters²¹⁹

The only change introduced by this amendment is section 9 (2) (d). Before this amendment section 9 (2) (d) read as follows;

d) The privatization of the Zambia Consolidated Copper Mines Limited and matters specified in the second schedule in which the Minister of Finance may, after consultation with the Minister responsible for such portfolio make such stability commitments as the Minister may consider necessary²²⁰

The above paragraph gave authority to the Minister responsible for finance to make stability commitments in development agreements where taxation stability failed. This paragraph was introduced by the Mines and Minerals (Amendment) Act (No.41) of 1996 and removed by the Mines and Minerals (Amendment) Act (No.6) of 2007. By virtue of the presumption that enactments relating to matters of substance are not intended to operate retrospectively a statute declaring void, or prohibiting, a particular type of contract will be taken, in the absence of clear indication to the contrary, as applicable only to contracts entered into after commencement of such statutes. Therefore, despite the change in the provision of the law, development agreements concluded between 12th December 1996 and 13th April 2007 are still binding contracts. It is only future agreements which will not contain provisions relating to fiscal matters as provided for in the Mines and Minerals (Amendment) Act (No.6) of 2007.

Section 9 (2) (d) of the Mines and Minerals Act of 1995 as amended by the Mines and Minerals (Amendment) Act (No.41) of 1996 is a very important provision because it creates the extent of authority which the Minister had in as far as entering into development agreements was concerned. The Minister could not for example, for the purpose of encouraging and protecting large-scale investment in mining sector in Zambia contract to give

²¹⁹ Section 6 (b) (d) of Mines and Minerals (Amendment) Act (No.6) of 2007

²²⁰ Section 9 (2) (d) of the Mines and Minerals Act

freehold land tenure to the mining companies for mining purposes. The importance of defining the scope of authority is that where the clauses of the development agreements are in conflict with the provision of the enabling (empowering) legislation then, such a clause is to the extent of the inconsistency *ultra-vires* the relevant provision of the empowering Act.

Having examined section 9 (2) (d) of the Mines and Minerals Act of 1995 as amended by the Mines and Minerals (Amendment) Act (No.41) of 1996 which was the empowering provision for including stability commitments into development agreements between the Government and mining companies, we can now look at the taxation stability clauses and examine how it affects levying of property rates. Taxation stability clause relied on by the mining companies provides as follows-;

“GRZ undertakes that it will not for a period of commencing at the effective time and ending fifteen (15) years following the date the company commences normal operation:

...(c) impose new taxes or fiscal imposts on the conduct of normal operation,

*so as to have in each case, a material adverse effect on the company's distributable profits or the dividends received by its shareholders”*²²¹

The mine owners contend that levying rates on mining properties was re-introduced by the 1999 Rating (Amendment) Act. Therefore levying of rates on mining companies who had already entered into development agreements before 1999 constitute an introduction of new taxes contrary to the provisions contained in the development agreements. These companies enjoy an exemption from the imposition of rates which exemption could not be removed until after 15 years in accordance with the development agreements.²²²

²²¹ Clause 14.1 (c) Amended and Restated Kansanshi Development Agreement (Incorporating the Amendments made by the Deed of Amendment dated 20 December 2001). Note that this taxation stability clause is the same as in other development agreements. See clause 15.1 Chibuluma Mines Plc development agreement and clause 15.1 of Chambishi Mine Development Agreement

²²² Records of Proceedings of the Rating Valuation Tribunal Sitting held on 24th May 2007 to Consider the Solwezi Main valuation Roll of 2004 in the Council Chambers.

In order to determine the full extent of the tax obligations of mine companies under development agreement, it is important to look at the whole picture of taxation regime in the mining development agreements. Firstly, all mining companies are under general obligation to pay tax, royalties, and duties from time to time in accordance with applicable legislation²²³. This clause does not indicate that mining companies would only be liable to perform these obligations if they were existing at the time of entering into agreements. It is important because this also confirms that development agreements do not apply to all taxes but have limitations.

The big question is which taxes are enjoyed under the taxation stability of development agreement? Are property rates subject of taxation stability? The starting point should be to examine the words used in the agreements. Not to impose new taxes or fiscal imposts on the conduct of normal operation means the taxes in question are those related or will affect normal operations of the mining business²²⁴. According the Development Agreement between the Government of the Republic of Zambia and Kansanshi Mining Plc, 'normal operation' means the commercial operation of the project following the commencement of normal operations carried on in accordance with the approved programme of mining operations approved by GRZ...Property rates is not a tax on profit or business but a tax rather based on ownership of property.

The tax extent can be determined in two ways. In cases where the tax schedule accompanies the development agreement it is easy to determine the tax extent under the agreement. For example in the Chibuluma Mines Plc Development Agreement, the provisions of clause 15 read together with schedule 8²²⁵ are very instructive. While clause 15 of the agreement assures the company of tax stability for a period of fifteen years, schedule 8 specifies the applicable taxes to company in the conduct of normal operations from the date of the agreement.

Specifically, paragraph 3 (iv) of schedule 8 provides as follows-;

“(iv) *Other Taxes, Charges and Fees*

²²³ Clause 13.1 Amended and Restated Kansanshi Development Agreement (Incorporating the Amendments made by the Deed of Amendment dated 20 December 2001). See also clauses 13.2 of Chibuluma and Chabishi Mine Development Agreements.

²²⁴ Supra Note 40

²²⁵ Clause 13.1 Chibuluma Mine Development Agreement

For the avoidance of doubt, Chibco shall be liable to pay (and these provisions will be without prejudice to such liability) all other taxes, charges and fees payable to GRZ or to any governmental authority in Zambia as of the date of this Agreement in relation to its mining, concentration, smelting or refining and other operations carried out in Zambia, including but not limited to:

- (aa) any annual fees, company fees, land rents or other payments due to GRZ in accordance with applicable legislation and the provisions of this Agreement; and*
- (bb) taxes, charges and fees for services rendered by governmental authorities on request or to public or commercial enterprises generally."*

This paragraph is instructive as it clearly obligates the company to pay all other taxes, charges and fees payable to GRZ or to any other governmental authority in Zambia as of the Agreement notwithstanding the provisions of clause 15. Evidently, this is the category of taxes, charges and fees into which rates fall. Local Authority is a governmental authority within the meaning of paragraph 3 (iv) of schedule 8.

In terms of section 6 (2) (I) of the Rating Act of 1997 the property consisting of premises on which buildings, plant and machinery used for mining or mineral processing purposes are located was not rateable at the time the agreement was signed. However, an amendment of section 6(2) of the Rating Act repealed section 6 (2) (I) through the Rating (Amendment) Act (No. 9 of 1999).

The Rating Valuation Tribunal stated that-;

"The Tribunal is of the view that paragraph 3 (iv) does not state that Chibuluma Mines Plc will only be liable to pay the other taxes, charges and fees if those other taxes, charges and fees were payable as at 30th September, 1997. Rather the provision states that Chibuluma Mines Plc will be liable to pay all other taxes, charges and fees payable to GRZ or to any governmental authority in Zambia as of the date of the agreement.

Given its ordinary meaning the phrase “as of” means from a particular date or time. Thus with effect from 30th September, 1997 Chibuluma Mines Plc is obliged to pay all other taxes, charges and fees”.²²⁶

In an event that the development Agreement does not contain a schedule of applicable taxes, section 9 (2) (d) provides us with a good guidance. Taxation stability will only be applicable to items specified in the first schedule of the Mines and Minerals Act of 1995 as amended. The matters where stability commitments were applicable included employment, energy and supply, exchange control, taxation, royalty, and taxes and environmental protection and pollution control. This schedule does not define taxes where stability commitments could be contracted. However, section 9 (2) (d) stated how the Minister of Finance could make such commitments particularly areas which fall outside his jurisdiction. The Minister responsible for finance should consult with the Minister responsible for such portfolio before making stability commitments in relation to matters outlined in the first schedule.

Property rates fall within the Ministry of Local Government and Housing. Therefore, before property rates can be subjected to stability commitments the Minister responsible for finance should consult the Minister responsible for Ministry of Local Government and Housing. The essence of this requirement is to ensure that the Minister of Local Government and Housing issues the necessary legal instruments to facilitate the inclusion of property rates as matters in the first schedule. It is only the Minister of Local Government and Housing who is empowered by law to exempt property from paying rates. In the absence of this important requirement, property rates cannot be said to be subject of taxation stability under the mining development agreements.

5.0.5 Conclusion

The Rating Act is law governing the administration of property rates in Zambia. It defines which properties are rateable and which ones are exempted. Further the Act empower the Minister of Local Government and Housing to extend exemptions through the issuance of a Statutory Instrument under section 6 (2) (s) of the

²²⁶ Rating Valuation Tribunal Award in the case of Kalulushi Municipal Council and Chibuluma Mines Plc

Rating Act. The Mining Development Agreements entered into between the GRZ and mining companies drew their authority from section 9 of the Mines and Minerals Act. Their applications were therefore restricted to the scope provided for in section 9 (2) of the Mines and Minerals Act as amended. Taxation stability commitments made by GRZ should be restricted to the scope defined in the Act. Property rate did not fall directly within the scope of Mining Development Agreements and therefore taxation stability clauses in these agreements could not apply without putting in place necessary legal instruments as provided for in the Rating Act.

CHAPTER SIX

SUMMARY, CONCLUSION AND RECOMMENDATIONS

6.0.0 Introduction

The study examined whether the mining properties are exempted from paying rates as a result of the mining development agreements entered into between the Government of Republic of Zambia and mining companies. The proceeding chapters discussed the principal and administration of rating system in Zambia. Chapter four outlined the brief history of the treatment of mining property as far as rating is concerned. The fifth chapter looked at the effect of the Mining development Agreement on levying of rates on mining properties. This chapter reflects on the major issues raised in this study before presenting the conclusion and recommendations of the study.

6.0.1 Summary of the Study

Property rate (known as tax on property) is a local tax levied on property owners by local government for the purposes of mobilizing revenue to finance local projects. In Zambia the administration of property rates is in the hands of local authorities while the central government, through the Ministry of Local Government and Housing, gives the general policy guidelines. This is to ensure that there is uniformity in the manner rating system is administered by the local authorities.

The law governing the administration of property rates in Zambia is the Rating Act. The Act provides for the declaration of rateable areas; to make provision for the assessment of rateable property; to provide for levying of rates; and to provide for matters connected with or incidental to the foregoing²²⁷. This also Act defines which property is rateable and which ones are exempted from paying rates²²⁸. In order to meet the challenges of the changing times, the law on rating has undergone a number of changes. The latest being the Rating (Amendment) Act (No.9) of 1999. The principal Act was amended to make up for the shortfalls identified in this

²²⁷ Preamble of the Rating Act (No.12) of 1997

²²⁸ Section 6 of the Rating Act (No.12) of 1997

Act, which provided for too many exemptions from paying rates²²⁹. In line with the liberalization policy, previously exempted properties with potential to be used for income generation purposes are no longer exempted from paying rates.

The rating of mining property in Zambia has been to a great extent influenced by the pattern of ownership of the mines. Before the nationalization policy, the mining industry was in private hands and during this time mining properties were subject to property rates²³⁰. In 1982, when the mining industry was nationalized and the subsequent formation of the Zambia Consolidated Copper Mines Limited, a statutory instrument No.100 of 1982 was issued to exempt ZCCM from paying rates. In 1997, the exemption was extended even to other mine owners. The exemption continued until 8th October 1999 when the Rating (Amendment) Act (No.9) of 1999 deleted the exemption set out in section 6 (2) (l) of the principal Act²³¹. This means that as from 8th October 1999, mining property became rating within the meaning of Rating Act. However, there is a doubt as to whether mining plant and machinery are rateable as the definition of rateable plant and machinery within the meaning of the Rating Act does not seem to favour this position.

In line with the liberalization policy, Government embarked on the privatization of the mining industry. The Government opted to unbundle Zambia Consolidated Copper Mines Limited and sell the assets in separate business packages²³². The unbundling and selling of ZCCM assets in business packages was aimed at promoting diversity of ownership of the mining assets, minimizing delays in exploitation of mineral reserves and minimizing political and economic risks²³³. The challenge faced by the Zambian Government was how to make itself more attractive than its neighbours and competitors. Zambia needed to set up the requisite 'enabling environment' for large scale mining investment²³⁴. Consequently, the Government adopted legislations that were supportive of the private sector. In 1995, the Mines and Minerals Act of 1972 which regulated the

²²⁹ Banda T (2005) The Role of Property Taxation in the Process of Implementing the Decentralization Policy in Zambia, page 4

²³⁰ Statutory Instrument Nos. 28 and 29 of 1965

²³¹ Section 6 (v) of the Rating (Amendment) Act (No.9) of 1999

²³² Sakala R. L. (2001) Difficult Decisions, Changing the Nation, page 96

²³³ Ibid page 97

²³⁴ Fraser A. and Lungu J. (2006) For Who the Wind Falls? Winners and Losers in Privatisation of Zambia's Copper Mines, page 4

nationalized mining industry was repealed to give way to the Mines and Minerals Act of 1995. The new Act withdrew many of the controls the Government had previously placed in the industry and introduced incentives for investors in large-scale mining²³⁵. The other innovation of the Act is the provision to empower the Minister to provide incentives to individual investors through the Mining Development Agreements²³⁶. This is to ensure that investors' unique needs are addressed.

Based on the above authority the Government of the Republic of Zambia entered into a number of Development Agreements with large-scale mining companies. However, despite entering into individual agreements, there are no major differences between these agreements. In all the agreements, taxation stability clause is one of the most important terms of the contracts. Here Government made commitment that it would not adjust or impose new tax regime for the period of fifteen years²³⁷. It is this stability commitment that has been the subject of national debate with the majority of Zambians calling the Government to re-negotiate the terms in the development Agreements.

It is the same stability commitment which has raised misunderstanding between the mining companies and councils over payment of property rates. Mining companies argue that since rates on mining property was re-introduced in 1999 after some of the mining companies had signed their development Agreement, its imposition will be contrary to the provisions of the taxation stability clause as this amounts to imposition of new tax²³⁸. On the other hand, councils have maintained that development agreements do not extend to taxes outside the mining sector or those not specifically specified in the tax schedule.

Having analysed the relationship between the taxation stability clauses under the Development Agreement and property rates we established the following-;

²³⁵ Ibid
²³⁶ Section 9 of the Mines and Minerals Act of 1995 as amended
²³⁷ Clause 15 of Chibuluma Mines Plc Development Agreement
²³⁸ Records of Proceedings of the Rating Valuation Tribunal Sitting held to consider the Kalulushi Municipal Council main Valuation Roll of 2004

The administration of property rates in Zambia is governed by the Rating Act (No.12) of 1997 as amended by the Rating (Amendment) Act (No.9) of 1999. This Act provides for exemptions of properties from paying rates. The exemptions can either be embodied in the main Act or those prescribed by the Minister of Local Government and Housing from time to time through the issuance of the Statutory instrument in line with section 6 (2) (s) of the Rating Act²³⁹.

The treatment of mining property as far as property rates are concerned has been greatly influenced by the pattern of ownership of the mines. Before nationalization and after privatization, the mining property is subject to property rates. At the time the mines were in the hands of the Government, they were exempted from paying property rates. The other reason to learn is that the Government introduced and removed the exemption on mining property through the issuance of statutory instruments²⁴⁰ in accordance with the provisions of the Rating Act as the enabling Act in matters related to property rates.

The mining Development Agreements are contractual in nature and the relationship between the Government of the Republic of Zambia and mining companies is governed by the law of contract. In Zambia, the Constitution is the supreme law followed by the Acts of Parliament, Statutory Instruments and by-laws. Contracts are subordinate to statutes and not the other way round. It is therefore not correct to place development agreements above the law. The powers bestowed on the Minister under section 9 (1) of the Mines and Minerals Act are not legislative in nature but create contractual capacity for the Minister to enter into contracts on behalf of the Government of the Republic of Zambia.

The minister is not given absolute powers but the scope of authority is outlined in section 9 (2) of Mines and Minerals Act. Before the amendment of the Mine and Minerals (Amendment) Act (No.6) of 2007, this section, in particular, addresses the issue of stability commitment. Here only matters specified in the first schedule of the Mines and Minerals Act of 1995 as amended are subjects to stability commitments. There was actually a

²³⁹ Supra Note 227

²⁴⁰ Statutory Instrument No. 100 of 1982

requirement that before making such commitments, the Minister of Finance might consult the Minister of responsible for matters under considerations.

The development agreements place a general obligation on all the mining companies to pay tax, royalties and duties in accordance with the applicable legislations²⁴¹. This obligation does not only applicable to taxes in existence at the time of entering into these agreements but even new taxes which do not fall within the scope of the stability clause.

Some mining development agreements such as that of Chibuluma Mines Plc have tax schedule which determines the tax extent under the agreement. This also confirms that these agreements do not have general applications in all taxation matters.

6.0.2 Conclusion

It is clear from our findings that land and buildings used for mining and mineral processing are subject to property rates as at 8th October 1999. This was after the passing of the Rating (Amendment) Act (No. 9) of 1999 which deleted the exemption set out in section 6 (2) (I) of the principal Act. However, we hold the view that the mining plant and machinery are not rateable within the meaning of the Rating Act.

The question as to whether mining companies enjoying taxation stability under the Development Agreement need to pay rates can be looked at in two ways. Companies who entered Development Agreements after 1999 have no claim as the tax was in existence then and therefore does not amount to imposition of the new tax. On the other hand, the claim by companies who concluded their agreements before 8th October 1999 cannot also be sustained. This is because exemptions from paying rates can only be done in accordance with the enabling legislation which is the Rating Act. The provision of the Development Agreement, a contract, deriving its authority from another Act of Parliament (the Mines and Minerals Act) cannot derogate the provision of the Rating Act. Further, the scope in which the Minister is allowed to make stability commitments does not apply to

⁴¹ Supra Note 236

the property rates. The taxation stability clause has limitations and its application does not extend to all the taxes in Zambia. It is confirmed by the fact that in the same Development Agreements there is an obligation placed on the companies to pay tax, royalties, charges and fees to Government and governmental institutions. The extent of application is simpler to determine in agreements which have tax schedules such as the one with Chibuluma Mines Plc. In making an award between Chibuluma Mines Plc and Kalulushi Municipal Council, the Rating Valuation Tribunal clearly explained the tax liability of the company. The Tribunal observed the following:-

*"Paragraphy 3 (iv) of schedule 8 obligates Chibuluma Mines Plc to pay all other taxes, charges and fees payable to the Government of the Republic of Zambia or to any governmental authority in Zambia as of the agreement notwithstanding the provisions of clause 15 (stability clause). This is the category of taxes, charges and fees into which property rates fall..."*²⁴²

The position is the same even where the development agreement does not have the tax schedule to limit the tax extent under the stability commitment clauses. In this case the second schedule under section 9 (2) (d) of the Mines and Minerals Act of 1995 as amended by the Mines and Minerals (Amendment) Act (No.41) of 1996 is instructive. The Minister responsible for finance needed to consult the Minister of Local Government and Housing so that the later could issue necessary instruments to subject the property rates to the stability commitments under the Mining Development Agreements. Since this requirement is missing, the argument by mining companies who signed their agreement before 8th October, 1999 that imposition of property rates is inconsistent with the development agreement is also broken down. Currently, land and buildings used for mining and mineral processing are rateable regardless of whether the Mining Development Agreements exist or not.

²⁴² Kalulushi Municipal Council Award for the 2005 Main Valuation Roll, page 16

6.0.3 Recommendation

There is great need for the councils and the mining companies to work together to foster development in their respective areas. Property rates are important to the councils and its imposition is backed by law. However, if the mining companies find the demands from the councils to be excessive, the law provides for mechanisms to address such concerns. The rate payer can apply for remission under section 23 of the Rating Act. If total exemption is required, then the government through the Ministry of Local Government and Housing must issue a statutory instrument to exempt the mining property.

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