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FINAL YEAR OBLIGATORY ESSAY

THE STUDY OF THE REDRESS OF TAX GRIEVANCES IN ZAMBIA AND THE ROLE OF THE LAW: THE CASE OF VALUE ADDED TAX

BY

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List of Cases

1. African Supermarkets T/A Shoprite v Zambia Revenue Authority, 2002/RAT/42
2. Celtel Zambia Ltd v Zambia Revenue Authority, 2002/RAT/21
3. Crossland Import and export Ltd v Zambia Revenue Authority, 1999/RAT/45
4. Food Fayre & L.A Fast Foods v Zambia Revenue Authority, 2002/RAT/59
5. Guardian Insurance Brokers & Others v Zambia Revenue Authority, 2002/RAT/63
6. Kajimanga v Zambia Revenue Authority, 2002/RAT/03/VAT
7. Moll v IRC (1955) T. C. 384
8. Stallion Motors Ltd & Africa cargo Services Ltd v Zambia Revenue Authority, 2006/RAT/09/VAT
9. STAR Motors Ltd, Star Commercial Ltd, Commercial Motors Ltd v Zambia Revenue Authority, 1999/RAT/111
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1. The Constitution of Zambia, Chapter 1 of The Laws of Zambia
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Sitwala Mwauluka
Lusaka, Zambia
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Abbreviations and Acronyms

CG - Commissioner-General

DOMT - Domestic Taxes

FIAS - Foreign Investment Advisory Services

MFNP - Ministry of Finance and National Planning

SI - Statutory Instrument

RAT - Revenue Appeals Tribunal

VAT - Value Added Tax

VAT Act – Value Added Tax Act, Chapter 331 of the Laws of Zambia

ZRA - Zambia Revenue Authority

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CHAPTER ONE

1.0 Introduction

In the last fifteen years or so, the issue of domestic resource mobilization has attracted considerable attention in many developing countries. In the face of un-abating debt difficulties, coupled with the domestic and external financial imbalances confronting them, it is not surprising that many developing nations have been forced to adopt stabilization and adjustment policies which demand better and more efficient methods of mobilizing domestic financial resources with the view to achieving financial stability and promoting economic growth.

Taxation has rightly been identified as a major tool in the strengthening of domestic resource mobilization and, consequently, the search for ways and means of expanding the tax base and also strengthening tax administration has been intensified. That taxation is the most important weapon available to governments for marshalling financial resources is indisputable. Taxation involves the transfer of resources from the private sector to government that can be used to finance social overhead projects and provide the necessary infrastructure for economic development.

It is thus, in this respect, needless to emphasize that the existence of well-defined tax laws alone cannot guarantee the success of the tax collection effort. There must also exist an efficient and effective tax administration to implement such laws. It is an accepted fact, therefore, that an efficient and effective tax administration is the cornerstone to successful domestic resource mobilization.[1]

It is increasingly apparent, then, that tax administration must receive far greater attention if the goals of tax policy are to be attained. Much of tax policy is being directed to obtaining increased revenues to enable governments to carry out their economic planning.

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[1] http://unpan1.un.org/intradoc/groups/public/documents/un/unpan006399.pdf (accessed on 16.09.10)

The search is for additional taxes, for new sources of revenue. Yet it is true in many countries that the successful administration of some of the existing taxes would provide a considerable part of the needed additional revenue. The diligent execution of existing taxes may well make unnecessary, or at least reduce, the multiplication of taxes in search of revenue.

It is in this light, of search of revenue, that The Zambia Revenue Authority (ZRA) was established on 1st April 1994 as a corporate body, under the 1993 Act of Parliament.[2] Under this Act, ZRA is charged with the responsibility of collecting revenue on behalf of the Government under the supervision of the Ministry of Finance and National Planning. In its mission statement, the Zambia Revenue Authority intends to maximize and sustain revenue collection through integrated, efficient, cost effective and transparent systems professionally managed to meet expectations of all stakeholders.

The term 'efficiency' according to the Inter-American Centre for Taxes (CIAT) refer to the level of performance of a tax administration's activities in terms of costs and productivity, while the term 'effectiveness' refers to the level of taxpayer compliance with the revenue administration's objectives.[3]

Thus, the test of evaluating the efficiency and effectiveness of a tax administration; tax system; or tax law, lies in determining to what extent the taxpayers and members of the public are aware of its existence and also to what extent they are sensitized about their tax obligations.

Obtaining facts, paint a gloomy picture about the efficiency and effectiveness of the Zambian tax administration as it has continued to witness tax disputes and litigation. According to the Zambia Revenue Authority Annual Report of 2008, it was reported that taxpayers have demonstrated increased awareness of their rights. The report further stated that in 2008, there was a marginal increase in the amount of tax related litigation. The

[2] Chapter 321 of the Laws of Zambia
[3] http://unpan1.un.org/intradoc/groups/public/documents/un/unpan006399.pdf (accessed on 16.09.10)

total number of tax related court cases involving the Authority and its clients increased to ninety-five (95) in 2008 from ninety (90) in 2007. The number of court cases successfully defended by the Authority stood at 53% while 47% were not.[4] Forty-seven percent (47%), is a big number and there is need to establish what causes these disputes in the first place.

1.1 Statement of the problem

The attributes of a good tax administration system or tax law are similar to that of a good legal system. A good legal system or a good law must be accessible; must accord everyone fair and equal treatment; it must have thorough procedures and a rapid adjudication rules. Additionally, a good legal system must be comprehensive, simple and understandable to the people it is supposed to guide; it must be accessible to the people; and above all, it must be certain.[5]

Tax laws are expected to provide stability and certainty in the minds of taxpayers. The way the Government proposes or brings frequent changes in the tax system, has a bearing on its administration; its being understood by those it is meant for; and even its accessibility.[6]

In a paper entitled "Improving resources and organizational structures of the tax administration", Professor John Evans Atta-Mills noted that "tax laws by their very nature are subject to frequent changes. Every year the annual budget statement introduces new measures and procedures, amends, or cancels existing ones. These frequent changes can make the law confusing as well as complicate the tax structure. After a few years these changes and amendments become so many that the taxpayer finds it difficult to know which laws are applicable. There is need therefore for the tax administration to undertake periodic consolidation of the tax laws so that it can have all the amendments

[4] Zambia Revenue Authority, Annual Report 2008, page 23
[5] M M Munalula, Legal Process: Zambian Cases, Legislation and commentaries, UNZA Press, Lusaka, 2004, page 4
[6] http://www.scribd.com/Revised-Direct-Taxes-Code2010-A-Critique-on-Revised-Discussion-Paper (accessed on 16.09.10)

and changes compiled into one statute to which both taxpayers and tax administrators can have easy and ready access."[7]

The same scenario as noted by Professor John Evans Atta-Mills above applies to the Zambian tax system. Every national budget presentation by the Minister of Finance and National Planning has come with changes to the tax laws, and the Value Added Tax (VAT) has not been an exception in this respect. Changes made to any existing system or law is presumed to be for the betterment of the existing status quo.

The Value Added Tax (VAT) is an indirect tax on consumer expenditure, hence borne by the consumer. This Value Added Tax is charged on every taxable goods and services that are supplied by VAT registered businesses. When a registered business supplies goods and services to customers, VAT is charged and collected by the business. The VAT so charged is called output tax. On the other hand, registered businesses claim the VAT that they pay on purchases of taxable goods and services for their businesses. The tax so claimed is referred to as input tax. The net of output and input tax is paid to ZRA or refunded to the taxpayer as the case may be. Thus, VAT registered businesses, are not the ones that bear the expense of paying VAT since they are able to claim their input tax, but pass on the tax to the final consumer.[8]

In the meantime, ZRA has over the years, continued to receive grievances and disputes over its decisions and assessment of tax from taxpayers. The questions that need answers are: why do we continue to have these grievances and disputes of tax assessment? If it is true that the tax is paid by the final consumer (an un-registered business or individual) and that the registered businesses that receive it simply act as agents of ZRA, are these registered businesses aware of this position. And if so, why do they have problems paying the tax that they simply collect from consumers on behalf of ZRA as a tax administration authority? Have the constant changes of our tax laws at every national

[7] http://unpan1.un.org/intradoc/groups/public/documents/un/unpan006399.pdf (accessed on 16.09.10)
[8] Chapter 331 of the laws of Zambia

budget presentation contributed to making our tax laws un-certain and therefore less understood by the taxpayers?
An analysis of the Medium Term Expenditure Framework (MTEF) for 2006 to 2008 summarizes the government's tax policy objectives as aiming to reform the entire system to improve its efficiency, revenue productivity and equity.[9]

In 2004, a number of basic foods and most agricultural products and supplies that were previously zero-rated for VAT were reclassified as exempt resulting in farmers being unable to reclaim the VAT on inputs used in production while a large number were de-registered thereby making their pricing structure less competitive on the market. The impact of the 2004 and 2005 VAT measures therefore, led to increasing the tax burden of agricultural producers and agro-processors. In 2005, cotton, wheat and fresh vegetables were reclassified from exempt to standard- rated outputs and following an outcry from the farming community, the decision was rescinded for products like vegetables and fresh fruits barely a month on. The implication of these various categorization and continuous reclassification of agro-products is that farmers that are multi-cropping or rotating crops that fall in different categories for VAT, that is, a mix of taxable and exempt outputs, face serious problems in apportioning and recovering VAT on inputs. This not only distorts prices within commodity value chains, but also leads to protracted tax administration procedures that invariably impose additional transaction costs.[10]

Herein, lie a tax administrative problem. There is no certainty in the law that will enable the taxpayers to plan for their activities; the changes are too frequent and this is the problem identified in the Zambian tax administration system which this study, aims to establish as a cause of disputes and grievances in our tax system.

1.2 Research Objective

The aim of this study is to establish the causes or contributing factors to the problem of tax disputes and grievances in the administration of VAT. In order to establish this

[9] P Langmead, G Baker, A Harding & M Mumbwatasai, Tax Policy Issues in Zambia: Selected Papers, Langmead & Baker Ltd, Lusaka, 2006, page 117
[10] P Langmead, G Baker, A Harding & M Mumbwatasai, Tax Policy Issues in Zambia, page 217

objective, the study will look at the place and role played by the law viz-a-viz, the continuous changes to the tax laws at every national budget presentation.

1.3 Research Hypothesis

The continuous changing of tax laws has contributed to making tax laws uncertain. An uncertain law is not a good law as it will most likely be misunderstood thereby leading to disputes and other forms of grievances. It is hypothesized that the disputes and other forms of grievances we have in the Zambia tax system are as a result of frequent changes in tax legislation that has created problems for both the taxpayers and the tax administrators to comprehend with the law.

1.4 Methodology

1.4.1 Primary data

Primary data was collected through interviews and questionnaires administered to selected stakeholders such as Zambia Revenue Authority (ZRA) Legal department, The ZRA Senior Management staff, The Revenue Appeals Tribunal (RAT), the Ministry of Finance and National Planning – Budget Division, the business community and the taxpayers.

1.4.2 Secondary data

Secondary data was obtained from a review of relevant and modern literature as found in published and unpublished articles, books, journals, law reports, newspapers, annual reports and workshop papers on the performance of the ZRA. The Internet was also a significant source of literature.

1.5 Limitations of the Research

There have been very little publications on the subject. In addition, most of the available literature on tax, focus more on the structures of tax administration systems and how to adjudicate disputes arising thereof.

Also, accessing of information from the government ministry charged with tax issues and from the targeted relevant stakeholders in tax related issues presented quiet some problems given the bureaucracy associated with Government ministries and unwillingness on the part of other relevant individuals and businesses to divulge what they deemed as confidential information.

1.6 Tax Administration

In a Journal entitled, "Tax Reform in India: Achievements and Challenges", Govinda .M. Rao noted that there have been major changes in tax systems in several countries over the last two decades for a variety of reasons and I quote:

> "There have been major changes in tax systems of countries with a wide variety of economic systems and levels of development during the last two decades. The motivation for these reforms has varied from one country to another and the thrust of reforms has differed from time to time depending on the development strategy and philosophy of the times. In many developing countries, the immediate reason for tax reforms has been the need to enhance revenues to meet impending fiscal crises; fiscal crisis has been proven to be the mother of tax reforms. Such reforms, however, are often ad hoc and are done to meet immediate exigencies of revenue. In most cases, such reforms are not in the nature of systemic improvements to enhance the long run productivity of the tax system"[11].

In concluding, he observed that after eight years of tax reform, a number of disquieting features in the tax system still remain, noting that tax reforms should become systemic, a continuous process to keep the economy competitive instead of being sporadic and crisis driven.

[11] G M Rao, Tax Reform in India: Achievements and Challenges, Asia-Pacific Development Journal, Vol.7, No.2, December 2000, page 57

Tax and incentive policies are key parameters in defining a business climate. Taxes are essential for the financing of government activities but, at the same time, they should be set and administered to be as growth-enabling as possible. Thus, the revenue-raising authorities – the Ministry of Finance sets tax policy and the Zambia Revenue Authority administers it – must set a tax policy which meets both needs. Tax policies play a major role in defining the business of any sector; however, while taxes are the major source of government revenue the tax policies and incentives imbedded in them should also encourage growth, if revenues are to be sustained. Tax policies in Zambia are governed by the Zambia Revenue Authority Act 1993, the Income Tax Act 1966, as amended, the Value Added Tax Act 1995, as amended, and the Customs and Excise Act 1995, as amended. Periodically, the government sets policies that guide taxation measures applied under each of these pieces of legislation. The impetus for this study was generated by the debate on VAT on agriculture-related products, introduced in the 2004 National budget, and its impact on food security. The policies introduced reclassified certain agricultural products as exempt while others remained zero-rated or standard-rated. One major administrative drawback this created was that for farmers involved in multi-cropping of crops that fell in different categories for VAT, were required to apportion their business expenses before recovering VAT on inputs. This led to protracted tax administration procedures that imposed additional transaction costs.[12]

This particular research hence is going in the direction of establishing the factors that cause or contribute to causing disputes in the administration of tax. One such factor which the research intends to pursue is the issue of the constant changes in the tax laws.

1.7 Structure of the Work

Chapter one covers the background of the study. It includes the statement of the problem, research objective, research hypothesis, methodology, background information on tax administration, limitations of the research and an outline of the organization of the study. Chapter two deals with the legal framework for the administration of Value Added Tax in

[12] P Langmead, G Baker, A Harding & M Mumbwatasai, Tax Policy Issues in Zambia, 2006, page 212

Zambia. In Chapter three, this study looks at the institutional framework that deals with Value Added Tax administration in Zambia. In chapter four, the study will analyze and evaluate the contribution of continuous tax law changes to the uncertainty of the law thereby resulting in tax compliance failures on the part of the taxpayer manifesting themselves in increasing numbers of tax disputes and grievances. Chapter five gives the findings of the research, concludes on the same and proposes recommendations.

CHAPTER TWO

LEGAL FRAMEWORK OF VAT ADMINISTRATION IN ZAMBIA

2.0 Introduction

The preceding chapter discussed the importance of an effective and efficient tax administration system which most countries strive to attain through various and frequent tax policy reforms and legislative changes. An effective and efficient tax system can only be a product of a good legal framework that establishes the source of its legitimacy and equally a good institutional framework that administers the tax regime. When a tax system continues to record an increasing number of litigations, this calls for an evaluation of the legal and administrative environment in which the tax system operates in order to determine whether there exist defects either in the law, legislative process or institutional structure.

This chapter thus, lays out the legal framework of Value Added Tax (VAT) administration in Zambia. The aim being to highlight the sources of the VAT Laws in Zambia and how and by whom tax policy legislations are introduced in the Zambian tax system. In the subsequent chapter that will evaluate the impact of frequent tax policy changes, an analysis of the legal framework, administrative framework and case law will be undertaken to determine the contributing factors to the ever increasing numbers of tax grievances and litigations that our tax system has recorded over the years, and indeed do continue to record.

Having laid down this introductory part, the research proceeds to outline the legal basis for tax administration in Zambia in general, and for Value Added Tax (VAT) in particular.

2.1 The Sources of the Value Added Tax (VAT) Law in Zambia

The basis for taxation in Zambia is in the Constitution of the Republic of Zambia. The Constitution of Zambia is the Supreme Law of the land and all statutes derive their legitimacy from the Constitution. Article 114(1) of the Constitution provides:

> "subject to the provisions of this Article, taxation shall not be imposed or altered except by or under an Act of Parliament."[13]

Further to that, Article 114(2) provides that:

> " Except as provided by clauses (3) and (4), Parliament shall not confer upon any other person or authority power to improve or to alter, otherwise than by reduction, any taxation"[14].

The tax administration system in Zambia thus derives its legitimacy from the Constitution which Constitution has from time to time been amended to suit the interest of the political leadership and the prevailing social and economic environment of the time. The Legislature of Zambia has in this respect provided or enacted Statutes to directly administer specific taxes viz-a-viz, The Zambia Revenue Authority Act, Chapter 321 of The Laws of Zambia; The Income Tax Act, Chapter 322 of The Laws of Zambia; The Customs and Excise Act, Chapter323 of The Laws of Zambia; and The Value Added Tax Act, Chapter 331 of The Laws of Zambia, among many others.

The governing Statute in the administration of tax is The Zambia Revenue Authority Act. In its preamble, the Act states that this is an:

> "Act to establish the Zambia Revenue Authority; to define the functions and powers of the Governing Board of the Authority; to transfer from the Government to the Authority the functions and powers of the Department of Taxes and the Department of Customs and Excise; to transfer from the Government to the Authority the assets and liabilities used by the said Departments; and to provide for matters connected with or incidental to the foregoing."

This Act established the Zambia Revenue Authority (ZRA) as a body corporate with perpetual succession and a common seal, capable of suing and of being sued in its

[13] Article 114(1), The Constitution of Zambia, Chapter 1 of The Laws of Zambia
[14] Article 114(2), The Constitution of Zambia, Chapter 1 of The Laws of Zambia

corporate name, and with power, subject to the provisions of this Act, to do all such acts and things as a body corporate may by law do or perform.[15]

The Governing Board, whose members are nominated by their respective organizations and formally appointed by the Minister, governs the affairs of the ZRA. The functions of the Governing Board shall be: to assess, charge, levy and collect all revenue due to the Government under such laws as the Minister may, by statutory instrument specify; to ensure that all revenue collected is, as soon as reasonably practicable, credited to the treasury; and, subject only to the laws specified, to perform such other functions as the Minister may determine.[16]

The Governing Board may delegate to the Commissioner-General, who shall be appointed by the President as the chief executive officer of the Authority, to execute its functions and implement its decisions. The Commissioner-General shall be removable by the President.[17]

The Principal Act that directly administers the Value Added Tax (VAT) in Zambia is the Value Added Tax Act of 1995. This Act has seen a number of amendments since its enactment in 1995 all in an attempt to improve the tax administration and also conform taxation to Government's prevailing social and economic policies of a given time. The Act has provided and granted limited powers to relevant stakeholders in the administration of tax viz-a-viz, The Minister of Finance and National Planning and the Commissioner-General of the Zambia Revenue Authority to make Regulations and Rules respectively for the proper administration of tax subject to the provisions of the Principal Act and The Constitution of Zambia.

[15] Section 9 of the Zambia Revenue Act, Chapter 321 of the Laws of Zambia
[16] Section 11 of the Zambia Revenue Act, Chapter 321 of the Laws of Zambia
[17] Section 19 of the Zambia Revenue Act, Chapter 321 of the Laws of Zambia

2.1.1 The VAT General Regulations

The Minister in charge of Finance makes the VAT Regulations by way of issuing Statutory Instruments (SI's). Section 51 of the VAT Act empowers the Minister to formulate regulations with respect to any matter that is permitted to be prescribed or is expedient for carrying out the functions set under the VAT Act for the enhancement of the proper administration of the tax. The section states that the Minister may make regulations for or with respect to any matter that by this Act is required or permitted to be prescribed, or that is necessary or expedient to be prescribed for carrying out or giving effect to that Act.[18]

Additionally, the Minister has powers under the Act to vary the list of goods and services in the first schedule relating to exempt supplies and the second schedule relating to zero-rated supplies. The Act states that the Minister may, by statutory order, vary, add to or replace the First or Second Schedule.[19] The Minister further has powers to regulate and determine cases in which a deduction or credit of input tax shall not be allowed; any such determination being made by reference to the goods or services supplied or the goods imported; or the supplier or importer, or the person supplied; or such other factors as the regulations may prescribe.[20]

It thus goes without saying, that the powers of the Minister in effecting tax policy changes are limited. The relevant sections of the Act that empower the Minister to make Regulations do not confer upon him the power to effect policy changes that will conflict the Principal Act. Tax policy changes that touch on some fundamental provision of the VAT Act should be by way of an amendment in parliament and not through a Statutory Instrument by the Minister. However, this has been done before and was a subject of

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[18] Section 51(1) of The VAT Act, Chapter 331 of The Laws of Zambia
[19] Section 15(3) of The VAT Act, Chapter 331 of The Laws of Zambia
[20] Section 18(5) of The VAT Act, Chapter 331 of The Laws of Zambia

litigation in the case of Celtel (Z) Limited v Zambia Revenue Authority[21] and in African Supermarkets Limited (t/a Shoprite) v Zambia Revenue Authority[22].

In the Year 2000, the Minister of Finance and National Planning in his Budget address of 28th January 2000 announced the introduction of a reverse charge which came into effect on 29th January 2000 by way of Statutory Instrument No.13 of 2000. By this Regulation, the recipient of imported services from a foreign based supplier, who has no place of business in Zambia and is not registered for VAT in Zambia, shall account for Value Added Tax on such services as if he supplied them. The recipient of the service or services will issue himself an own tax invoice for the output Value Added Tax on such services and account for it in the relevant tax period. The output tax corresponding to this reverse charge is non-deductible.[23] This was a measure that was touching directly on the principal Act and could not legally be introduced by way of a Statutory Instrument.

In its ruling in the case involving Celtel (Z) Limited cited above, The Revenue Appeals Tribunal relied on Section 8(1)(a) of the Value Added Tax Act which provides:

> " A tax to be known as Value Added Tax, shall be charged, levied, collected and paid in respect of every taxable supply of goods or services in Zambia other than a zero rated supply" and on Section 7(1) of the Act which reads: " For purposes of this Act, any supply of goods or services made by a taxable supplier, in the course or furtherance of a business that takes place in Zambia on or after the tax commencement day other than an exempt supply is a taxable supply."

Further reliance was placed on Section 28(1) which provides:

> "Every supplier who is carrying on a business in Zambia whose taxable turnover exceeds the turnover prescribed by the Minister, by statutory order, shall make application to be registered".

The respondent in the case, Zambia Revenue Authority had relied on Regulation 12(3) of the Value Added Tax (General)(Amendment) Regulations, 2000[24] which provides that

[21] (2002/RAT/21)
[22] 2002/RAT/42
[23] Value Added Tax, VAT Leaflet No. 29 (Also 2000 Budget Highlights)
[24] SI No. 13 of 2000

where a taxable supplier who does not have business establishment in Zambia does not appoint a tax agent, the services received from abroad shall be treated as if the recipient supplied the services and the recipient shall account for the output tax on the services. The respondent also relied on Rule 24(2) of the Value Added Tax General Rules which provides: " Where services are performed or undertaken (wholly or partially) in Zambia, but where the supplier of services – (a) does not have a place of business in Zambia, or (b) has a place of business in Zambia and elsewhere, but the place of business most closely concerned with the supply of the service in question is not in Zambia, the place of supply shall be regarded as the place where the services are performed or undertaken."[25]

The Revenue Appeals Tribunal thus held that according to Sections 7(1), 8(1) and 28 of the VAT Act, a registered supplier in Zambia or a recipient of services from abroad was prima facie not liable to account for tax on the service he has received. The Tribunal noted on the contrary, that Regulation 12(3) makes the recipient liable if a foreign supplier has not appointed a tax agent. It is clear from the cited relevant Sections that the Principal Act itself did not create or impose the Reverse Tax. The Reverse Tax was imposed by Regulation 12(3), which Regulation has been made pursuant to the principal Act. It was the considered view of the tribunal that a combination of Rule 24(2) of the Value Added Tax General Rules and Regulation 12(3) of the Value Added Tax General Regulations as amended could not impose a tax which was not imposed by the Principal statute itself; the Regulations cannot alter the provisions of the Principal statute.

2.1.2 The VAT General Rules

The VAT General Rules are formulated by the Commissioner-General through publications in the Government Gazette, and any other media as he/she may think fit for purposes of communicating the rules to the public. The Commissioner-General (CG) is empowered by Section 52 of the VAT Act to formulate rules pertaining to the keeping of

[25] Value Added Tax General Rules, Rule 24(2)

accounts, the making of returns, accounting for tax, and any matter he/she is authorized to regulate or prescribe by the Act or Regulations.[26]

The Act also authorizes the Commissioner-General to make administrative rules relating to the crediting or deduction of input tax.[27]The Commissioner-General is empowered to make administrative rules, where there is doubt, to determine the place of supply of a good or service[28]; to determine for taxation purposes the time of supply[29]; rules relating to the accounting for and payment of tax[30]; registration of suppliers[31]; and relating to the manner of registration[32].

The Commissioner-General has specific powers conferred upon him by the VAT Act to make administrative rules. However, like the Minister of Finance, he cannot introduce measures that tend to alter or amend or add to some provision of the VAT Act other than by introducing a Bill of Amendment in Parliament. In 2000, through subsidiary legislation, VAT registered suppliers through Rule 24(2) purported to amend the definition of 'place of supply' in order to impose a reverse Value Added Tax as argued in the Celtel (Z) Limited v Zambia Revenue Authority case cited above in a manner that conflicted provisions of the Principal Act and the Constitution of Zambia. This provision was challenged for legality as stated in the above case necessitating its proper inclusion in the Principal Act through an Amendment.[33]

The courts of law and the Revenue Appeals Tribunal (RAT), through adjudication of tax grievances and appeals have helped and continue helping to enrich the Zambian Tax law Jurisprudence creating another vital source of Value Added Tax Law. Once the court of competent jurisdiction has decided a case, the interpretation of the law as set out in the Ratio Decidendi, becomes binding on all future cases with similar facts. In the court's

[26] Section 52 of The VAT Act, Chapter 331 of The Laws of Zambia
[27] Section 18 of The VAT Act, Chapter 331 of The Laws of Zambia
[28] Section 12 of The VAT Act, Chapter 331 of The Laws of Zambia
[29] Section 13 of The VAT Act, Chapter 331 of The Laws of Zambia
[30] Section 16 of The VAT Act, Chapter 331 of The Laws of Zambia
[31] Section 27 of The VAT Act, Chapter 331 of The Laws of Zambia
[32] Section 28 of The VAT Act, Chapter 331 of The Laws of Zambia
[33] Act No. 2 of 2003

ruling, it is important, therefore, to identify what the law was or reason for the decision (Ratio Decidendi). The job of an authorized officer of ZRA when faced with a similar situation is to compare and contrast the case at hand with the decided case. Precedents set by a lower court of law can be superseded by a higher court's decision, the opposite cannot happen.

2.1.3 Allied Legislation to the VAT law administration

Side by side with a good tax administration policy, is an efficient mechanism for tax dispute resolution. The Value Added Tax Act, Chapter 331 of The Laws of Zambia provided for this dispute resolution mechanism. It provides in section 30 that for the purpose of hearing and determining appeals, there shall be a Value Added Tax Appeals Tribunal which will regulate its own procedures. There was later established Revenue Appeals Tribunal to deal with all types tax disputes.

Thus arising out of the need to provide for the speedy dispensation of justice in the settlement of tax disputes between the Zambia Revenue Authority (ZRA) and aggrieved taxpayers, the Revenue Appeals Tribunal Act[34] was enacted. This Act provided for the establishment of the Tribunal to hear appeals under the Customs and Excise Act[35]; the Income Tax Act[36]; and the Value Added Tax Act[37] of The Laws of Zambia. In the execution of its functions, the Tribunal is comprised of Tribunal members appointed by the Minister and the administrative staff headed by the Registrar. The administrative staffs are full-time members of the Tribunal. Statutory Instrument No. 143 of 1998 provides the administrative framework of the Tribunal with the Registrar as the Chief Administrative officer. The Registrar is responsible for ensuring that notices, summons, or other documents are served not less than seven (7) days before the date of hearing and for receiving relevant documents on behalf of the Tribunal from appellants. The Revenue

[34] The Revenue Appeals Tribunal Act No. 11 of 1998
[35] Chapter 323 of The Laws of Zambia
[36] Chapter 322 of The Laws of Zambia
[37] Chapter 331 of The Laws of Zambia

Appeals Tribunal, just like Zambia Revenue Authority is a grant-aided institution under the Ministry of Finance and National Planning.

2.2 Conclusion

The legal framework for the administration of Value Added Tax in Zambia is established under the Value Added Tax Act (VAT Act), Chapter 331 of the Laws of Zambia. This framework constitutes the VAT Act as the principal instrument or source of law; the General Regulations; and the General Rules. Changes to the principal Act can only be by way of an Amendment Act. The Act, through certain sections, confer powers to both the Minister and the Commissioner-General to make Regulations (Statutory Instruments) and Rules respectively, with regard to specific issues. It is irregular for either the Minister of the Commissioner-General to introduce into the main Act any provision that alters the framework of the Act in any other way except by way of a Bill of Amendment or to effect a measure before a necessary enabling Act is passed. Irregularities have been noticed in this respect. These irregularities need evaluation to determine their effect, if any, on the overall administration of VAT and on the number of tax disputes that the VAT administration has recorded. This will be a subject of analysis in a subsequent chapter that will evaluate frequent tax policy changes and their effect on the efficient and effective administration of VAT in Zambia.

In the Chapter Three that follows, the study looks at the Administrative Framework for the administration of Value Added Tax in Zambia to evaluate if there are any inconsistences or anomalies that could also impact negatively on the overall administration of the tax.

CHAPTER THREE

INSTITUTIONAL FRAMEWORK RELATING TO THE ADMINISTRATION OF VALUE ADDED TAX (VAT) IN ZAMBIA

3.0 Introduction

In the previous Chapter, the study looked at the Legal Framework for the administration of VAT in Zambia in the context of identifying the most important laws governing taxation in Zambia and the governing of VAT in particular. The focus of the study was to lay out any flaws, irregularities or conflicting provisions in the legal framework that may be contributing to the many tax grievances and litigations in the Zambian tax system. One such sticking point that came to the fore, is the conflict between subsidiary legislations and the spirit and purpose of the law as obtaining in the principal Act, The Value Added Tax Act.

This Chapter, thence, is looking at the institutional framework for the administration of VAT in Zambia again with the view to addressing tax grievances in the Zambian tax system. The study will start by looking at the general background of VAT institutional setup.

3.1 Background

Prior to the introduction of VAT in Zambia in 1995, there was a Sales Tax in its place. VAT was introduced to replace Sales Tax. The principle that is followed in virtually all countries is that actual collection of taxes on imports, including import VAT, is the responsibility of the customs department. The issue that arises then is in establishing who should run the domestic VAT, including accounting for crediting tax paid on imports. The three possibilities are administration by the customs department; by a separate VAT department or Division and; by the department responsible for domestic tax operations or the direct taxes Division. VAT administered by customs services departments where this is obtainable, facilitates exchanges of information on imports and exports. However, one major drawback is that customs and excise procedures and systems are not suitable for VAT administration. Customs staff also may not have the appropriate skills and this impedes coordination of VAT and income tax administration.

VAT can also be administered by a specific department as was the case before the implementation of the modernization project now in place at ZRA. The establishment of a specific department to administer VAT, allowed for a clean break with existing procedures and helped focus on VAT administration. One major negative aspect of establishing a new revenue department in a developing country with weak administrative capacity and scarce skills is that it requires a strong political commitment; and this commitment is never permanently guaranteed. The setting up of a specific VAT department also increases the fragmentation of the tax administration and impedes coordination of the VAT, income tax and custom operations in as much as it increases tax administration costs.[38]

Currently, VAT in Zambia is administered by the Domestic tax administration. The advantages of this framework is that it provides for a more modern, effective, function-based and efficient tax administration; it also facilitates coordination between VAT and Income tax administration and therefore aids better VAT and Income Tax compliance. One drawback however, is that it risks insufficient focus on the specifics of the VAT administration.

The discussion above shows that there is no definitive answer regarding the department where the VAT should be administered for there to be effective and efficient organization of the tax. However, discussions have clearly been sensitive to the existing institutional strengths and weaknesses in specific countries. Indeed as Professor Richard M. Bird noted:

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[38] L Ebrill, M Keen, J P Bodin and V Summers, Value Added Tax: Principles and Practice, Fiscal Affairs Department, International Monetary Fund, November 2000, page 126

> " The best tax policy in the world is worth little if it cannot be implemented effectively....There is a growing conviction among tax policy specialists in developing countries that it is misguided to reform tax structure while largely ignoring tax administration and that it is critical to ensure that changes in tax policy are compatible with administrative capacity"[39].

The study now progresses to analyze the efficacy of the institutional and regulatory framework and procedures involved in VAT in Zambia for their administrative capacity.

3.2 VAT Administration in Zambia

Under the Constitution, tax administration is the responsibility of the Central Government.[40] Two authorities are in charge of taxation issues in Zambia: The Ministry of Finance and National Planning (MFNP) and the Zambia Revenue Authority (ZRA). The Ministry of Finance and National Planning is responsible for developing tax policy for the country, while the Zambia Revenue Authority implements it.

Thus the role of the Central Government in Tax administration in general and VAT in particular is played by the MFNP. The authority of the Minister of Finance and National Planning is conferred by Parliament for in accordance with the Zambian Constitution, tax cannot be imposed or altered except by an Act of Parliament. [41] Apart from administering revenue, the other functions of the MFNP are to supervise the Zambia Revenue Authority in its tax administration responsibilities and also to effect tax policy changes. In interviews conducted with officers of the MFNP, the following came out as functions of the Ministry in tax administration. Legislation is the preserve of the Ministry of Justice, but in terms of tax policy, there is a tax policy/revenue unit in the Budget office of the Ministry of Finance that is responsible for driving tax policy. The structure of this unit is such that it is headed by the Chief Budget Analyst who reports to the Director of Budget. The Director of Budget in turn is supervised by the Permanent Secretary responsible for Budget and Economic Affairs. The Chief Budget Analyst has directly under him various

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[39] R M Bird, Administrative Dimensions of Tax Reform, International Bureau of Fiscal Documentation, March 2004, page 135
[40] Article 114, The Constitution of Zambia, Chapter 1 of The Laws of Zambia
[41] Article 114, The Constitution of Zambia, Chapter 1 of The Laws of Zambia

officers who for administrative expediency are assigned functions divided according to tax types.

Government policy drives or is the catalyst of changes to tax laws, particularly fiscal policy obtaining at a particular time. However, at times circumstances in the business environment necessitate changes. This may be as a result of purely business community lobbying or macroeconomic changes or imbalances that may require correction through fiscal policy. Upon necessity to effect tax law changes, the Minister of Finance and National Planning will cause a Bill approved by the President to be introduced into Parliament. Once the Bill has been passed by Parliament and accented to by the President, the tax laws thereafter take effect. Ideally, tax changes sought are predicted upon the policies the Executive branch of Government wishes to carry out. The role of ZRA as a tax administration institution in the making of tax laws is purely advisory to the tax policy unit of the MFNP. Funding to ZRA for its operations is appropriated by Parliament[42] and MFNP as a supervising institution ensures that ZRA meets its obligations through prompt disbursement of operational funds. On its part, MFNP communicates tax law changes through the National Assembly's National Budget pronouncements.

Zambia Revenue Authority as a body that administers tax in Zambia, on the other hand, was with the objective of redressing serious shortfall in revenues, established on 1st April 1994 on the basis of the 1993 Act and charged with the responsibility of collecting revenue on behalf of Government. The main responsibilities of the ZRA are currently specified as follows:- to assess, charge, levy and collect all revenue due to the Government under such laws as the Minister may, by statutory instrument, specify; to ensure that all revenue collected is, as soon as reasonably practicable, credited to the Treasury; and subject to specified laws, perform such other functions as the Minister may determine.[43] All revenues collected by ZRA are paid directly into the general budget, and ZRA's own administrative budget is determined by the MFNP and financed from the

[42] Section 22(1)(a), The Zambia Revenue Authority Act, Chapter 321 of The Laws of Zambia
[43] Section 11(1), The Zambia Revenue Authority Act, Chapter 321 of The Laws of Zambia

budget. The Minister of Finance sets every year an overall tax revenue target for ZRA, and individual targets are subsequently set for the tax inspectors.

The ZRA is a corporate autonomous body, reporting to the Ministry of Finance and National Planning and governed by a Board whose members are appointed by the Minister. The current membership of this board, as provided for by the Act includes: the Secretary to the Treasury; the Permanent Secretary, Ministry of Justice; the Governor of the Bank of Zambia; representatives from the Law Association of Zambia (LAZ), the Zambia Association of Chambers of Commerce and Industry, the Bankers' Association of Zambia, the Zambia Institute of Certified Accountants, and two private persons appointed by the Minister of Finance and National Planning. The Board members elect the Chairman of the Board. Representatives of the Law Association of Zambia, Zambia Association of Chambers of Commerce and Industry, the Zambia Institute of Certified Accountants and the Bankers' Association of Zambia are nominated by their respective organizations and formally appointed by the Minister. It is worth noting that the Act does not provide the qualification for the two private persons appointed by the Minister to the ZRA Board, suffice to point out that out of the total eight members of the Governing Board, five are appointed by the Minister.

The Chief Executive Officer of the Zambia Revenue Authority is the Commissioner-General who is appointed by the President to be responsible for executing the functions of the Governing Board and the implementation of the decisions of the Board. The Commissioner-General shall be removable by the President.[44] This is a notable weakness in the institutional and regulatory framework. Firstly, the majority of the members of the ZRA Governing Board are appointed by the Minister, and now the President has the power to appoint and dismiss the Commissioner- General at will.[45]

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[44] Section 19, The Zambia Revenue Authority Act, Chapter 321 of The Laws of Zambia

[45] K. M. Mwenda, Efficacy of the institutional and regulatory framework for the administration of tax law in Zambia, Winter, 2005 (Available on http://litigation-essentials.lexis.com/webcd/app - accessed on 01.03.11)

The Commissioner-General may, subject to the approval of the Governing Board, establish such organizational structures as he may consider necessary for the discharge of the functions of the Board.[46] In this respect, the ZRA has two operational divisions: The Domestic Taxes Division and the Customs Services Division. Officials working for the ZRA are not civil servants and are employed on conditions and scales separate from those obtaining in the civil service. ZRA staff from Assistant Inspector (Grade ZRA 06) to Commissioner-General (Grade ZRA 00) have a three (3) to five (5) year renewable private sector contract contingent upon good performance, whilst lower grades are on permanent and pensionable employment. Information collected from interviews with the tax paying community showed apprehension with this arrangement, holding the belief that some tax assessments meted on them are actually driven by the selfish motives of individual inspectors to meet their revenue targets, a position that will put such an officer in good stead for the renewal of an employment contract.

Discussed above, were general institutional framework issues; emphasis now shifts to the Value Added Tax (VAT) institutional and administrative regulatory guidelines and to establish their potential contribution to tax litigations, if at all. Whereas the VAT Act is the Principal Act setting out the legal structure of VAT, the Act empowers the Commissioner-General to formulate rules and procedures for the proper administration of tax. However, some of these rules and procedures have been at conflict with the provisions and spirit of the Principal Act in their interpretation.

In the case of Stallion Motors Limited and Africa Cargo Services Limited v Zambia Revenue Authority,[47] the respondent levied standard rated Value Added Tax on a zero-rated supply rendered by the first appellant to the second appellant on the misinterpretation and contrary to the provisions of Section 15 of the Value Added Tax Act, Second schedule of Statutory Instrument No. 109 of 1996 and the Value Added Tax General Rules as published in Gazette Notice Number 560 of 1995. While the appellants were of the view that exports and all ancillary services relating to an export are

[46] Section 19(2), The Zambia Revenue Authority Act, Chapter 321 of The Laws of Zambia
[47] 2006/RAT/09/VAT

wholesomely zero-rated, the respondents argued that where a portion of the ancillary services are wholly rendered within Zambia, such portions must be standard rated. The appeal succeeded, the tribunal holding that the words 'ancillary' meant including.

In the case of Kajimanga v Zambia Revenue Authority[48], the appellant failed to register for Value Added Tax when he exceeded the turnover required for statutory registration. The Commissioner-General, through powers conferred upon him to make administrative rules in Section 16 of the VAT Act, sought to make the supplier pay for the tax that was not collected under Section 28(6) of the VAT Act. In passing the ruling, the Tribunal noted that 'it is a principle of legal policy that a person should not be penalized except under clear law. The count, when considering in relation to the facts of the instant cause, which of the opposing construction of the enactment would give effect to the legislative intention, should presume that legislation intends to observe this principle. It should therefore strive to adopt a construction which should not penalize a person where the intention to do so is doubtful'. It was the considered view of the Tribunal that failure to register does not automatically make the supplier liable to pay for tax that was not collected, even if the Commissioner-General determined a different accounting period. The appeal was therefore allowed.

Businesses with a taxable turnover exceeding or likely to exceed K200 million in any twelve (12) months period have the statutory obligation to register with the ZRA for monthly submissions and payment of VAT.[49] Whereas it is easy to establish a business' turnover at the end of any given financial year, the same cannot be projected or determined with certainty at any given period of the year given the volatile and inflationary nature of the economy. The lack of proper guidelines on how to go about establishing the turnover has in some instances led to eligible taxpayers failing to meet this statutory obligation thereby leading to disputes and litigations. The case of Kajimanga v Zambia Revenue Authority[50] cited above is illustrative of this scenario.

[48] 2002/RAT/03/VAT
[49] Section 28, The Value Added Tax Act, Chapter 331 of The Laws of Zambia
[50] 2002/RAT/03/VAT

The role of the ZRA is to ensure that taxable entities are identified, taxable income and taxes are assessed and paid, and tax laws are complied with. Tax authorities are given broad and extensive powers to carry out their functions, and tax officers have discretionary authority in specific legally established areas, such as entering and searching a business premises, or indeed closure of the premises. Discussions with the business community indicated that some of the actions taken and methods employed by tax officers in assessment, audit, entry and search[51] and closures are perceived as based on subjective factors rather than transparent rules and procedures. This according to information collected opens the door for corrupt practices and unofficial arrangements to settle tax payments and issues.

Information collected from the survey conducted by the Foreign Investment Advisory Service (FIAS) on Administrative Barriers to Investment in Zambia, supports the view that the administrative procedures and rules in tax administration do present hindrances to its effectiveness. More than 50% of the respondents identified tax rates as a problem; 44% expressed general dissatisfaction about their treatment by the tax authorities; 54% considered penalties as a problem; 46% were not satisfied with the appeals process; approximately 34% identified inspections and audits as a concern, and 32% were concerned about the ability of ZRA to assess their tax liabilities.[52]

On the issue of frequent policy shifts, the business community expressed concerns about these changes in tax policy; the lack of a clear rationale and justification for many of the changes, and the absence of a process of consultation before the implementation of changes. In principle, changes in the tax laws and tax rates are announced in the Annual Budget speech, but the Minister can also make changes outside the Annual Budget relating to rates applicable to categories of enterprises or eligibility for waivers or relief of taxes by way of Statutory Instruments. These changes can then subsequently by way of

[51] Section 38, The Value Added Tax Act, Chapter 331 of The Laws of Zambia

[52] Republic of Zambia: Adminitrative Barriers to Investment, March 2004 by Foreign Investment Advisory Service, A joint service of the International Finance Corporation and The World Bank.(Also available on http://www.ifc.org/ifcext/fias.nsf - accessed on 01.03.11)

Amendment Bills be presented to Parliament for incorporation in the principal Act. An example of sudden changes to tax laws was the introduction of Medical Levy in 2003.[53]

The results of the survey indicated that the business community complains in particular about decisions that disallow deduction from taxable income of certain business input costs for VAT. For example, cars, petrol and telephone services are not fully claimable. The rationale for these decisions appears to be that it is difficult for ZRA to ensure that businessmen are not claiming a deduction for personal use rather than business-related purposes. Whereas it is true that distinguishing between legitimate business expenses and personal expenses is difficult, and especially so for small businesses, it is also clear that these expenditures do support business use and form part of the cost of doing business; the effect of denying deductibility is to increase the effective rate of business taxation. An alternative approach would be to define clear criteria for separating out personal uses from business-related uses. However, it is difficult to point to any alternative approaches adopted internationally that have solved the problem. Typically, tax authorities in many countries give businesses the benefit of the doubt on most of these issues, choosing to contest the business declaration only if the firm is an extreme case in comparison to similar businesses. This is one issue where dialogue between ZRA and the business community might be able to produce a compromise solution. [54]

To a large extent, the introduction of these changes in tax rates and practices reflects the scarcity of fiscal resources in Zambia and the pressure on the government to collect sufficient tax revenue to finance its programs of expenditures; this pressure is intensified by the fact that the formal sector, the source of most corporate taxes, has been declining or stagnating. However, in most cases, not only have these changes effectively increased the cost of doing business, thereby affecting the cash flows and capital expenditure plans of businesses, but they have also created a climate of uncertainty, insofar as the changes and their duration are not fully understood by the business community.

[53] http://www.ifc.org/ifcext/fias.nsf
[54] http://www.ifc.org/ifcext/fias.nsf

In terms of communication, while taxpayers have relatively few complaints about the availability of tax information, ZRA does not have as effective a communication strategy with its clients as it should. Interviews with some businessmen in Zambia indicated that they were not aware of the website at all or the kind of information available on it. It does appear that ZRA needs to re-assess its efforts to communicate with taxpayers and the general public, in order to ensure that its efforts to improve its image and to meet its charter bear fruit.

Conduct of assessments is one administrative procedure of ZRA's business activities that is a source of concern. This is largely linked to attitudes of ZRA officers in their conduct of both field audits and assessments of returns. Business houses perceive ZRA officers as generally suspicious of any claims for tax relief, and feel that they approach assessments from the point of identifying under declarations rather than ensuring the correctness of submissions. The situation is further exacerbated by pressures faced by ZRA from the Government to exceed revenue collection targets. The key issues are that, first ZRA staff earn bonuses and secure contract renewals that are largely driven by how they perform in achieving tax collection targets.

3.3 Conclusion

This preceding chapter has established that there are two institutions involved in tax administration in Zambia; the Central Government through the Ministry of Finance and National Planning (MFNP) and the Zambia Revenue Authority (ZRA). The MFNP is responsible for tax policy formulation. The nature of tax laws that the MFNP come up with are usually dictated by Government fiscal policies. As Government fiscal policies change with changes in its micro and macro-economic environment, this essentially means tax policies do not last long but are usually shifted to address urgent budgetary requirements. This is an ingredient of an un-stable law; and a law that lacks stability, is not a good law.

Zambia Revenue Authority, on the other hand, implements the policies made by Government. To properly administer these policies, the Commissioner-General, through power conferred upon him by the Value Added Tax Act, makes rules and procedures. Some of these rules and procedures have been a source of litigations by aggrieved tax paying businesses as revealed by some Case law.

In the following chapter, the study will proceed to look at the effect of frequent tax policy shifts on tax administration in general. The picture will be established from three sources viz-a-viz information from conducted interviews; reviewed literature and case law that involved Zambia Revenue Authority as either the appellant or respondent to establish the nature of litigations involved.

CHAPTER FOUR

AN OVERVIEW OF TAX LAW CHANGES AND THEIR EFFECT ON THE ADMINISTRATION OF VALUE ADDED TAX IN ZAMBIA

4.0 Introduction

The tax system in Zambia has been through some significant changes since the early 1990s and these changes merit further analysis for which relevant time series datasets are available. This section presents an overview of some recent changes in the Zambian tax system that would merit further incidence analysis to determine the effect of such changes on the efficient and effective administration of tax. Relevant Case Law will be analyzed to establish the root cause of tax disputes that the system continues to record.

4.1 Background

Prior to 1995, Zambia was administering Sales Tax. Sales tax was levied on manufacturers. This tax was considered to be applying double taxation in the sense that importers of raw materials were usually charged duty on imported raw materials which duty they were not drawing back but factored it into the price mechanism of their finished products. Additionally, it was not a broad based tax since only manufacturers and the service industry were paying this sales tax ignoring the massive revenue base comprising the consumers.

Zambia introduced a Value Added Tax (VAT) in 1995 at the rate of 17.5%, to address the concerns of double taxation and also to broaden the tax base in order to meet the country's revenue requirements. There were initially a few numbers of exempted goods and services that included foodstuffs, books, educational materials, healthcare expenditure and rents. There have been numerous subsequent changes over the years to the VAT system, both in terms of coverage of the tax and also the way in which different categories of products are treated. These changes merit a serious analysis using some of the incidence techniques to establish their impact and efficiency to the administration of taxes and the tax system in general.

Tax Incidence analysis concerns the distribution of the economic burden of various tax instruments among different groups of economic agents. This burden can be measured in a number of different ways, but has typically involved an attempt to measure the income gains and losses of various groups resulting from a variety of tax policies, as a proxy for the measurement of changes in their levels of economic welfare.[55] This is important in view of the contentious discussion about the VAT treatment of agricultural products that came with the 2004 (when a number of basic foods and most agricultural products and supplies that were previously zero-rated for VAT were classified as exempt) and 2005 budget changes. The 2005 Budget included a decision to move to standard rating, from exempt, agricultural products like cotton, wheat and fresh vegetables except baby cereals, maize and maize flour. This was criticized by farmers as detrimental to their businesses and their ability to compete in the export market; and to consumers due to the anticipated, but by no means inevitable, pass through of the 17.5% tax on their value added into higher food prices. These changes have effects on administration of tax laws as the study will try to establish below here.

4.2 Tax Policy changes and their impact on effective and efficient administration of tax

The Zambian Tax System has gone through three transformations. The year 1991 is important in Zambia's economic history as there was a shift to private enterprise economic set-up. Included to this transition was a profound reform at the Zambian tax system. It included the replacement of a sales tax by a Value Added Tax in 1995. Zambia's tax system continues to evolve, as exemplified by the 2002 reform.[56] In the year 2006, the Zambia Revenue Authority carried out a diagnostic review of tax policy

[55] P Langmead, G Baker, A Harding & M Mumbwatasai, Tax Policy Issues in Zambia, 2006, page 7
[54] P Langmead, G Baker, A Harding & M Mumbwatasai, Tax Policy Issues in Zambia, 2006, page 83

and administration in collaboration with the International Monetary Fund (IMF). From this study, a number of recommendations were proposed on how ZRA can transform and modernize its tax administration. The objectives of this modernization program are among others, to merge the VAT and Direct Taxes Division and form Domestic Taxes Division (DOMT) which is based on the taxpayer focused approach. DOMT administers both VAT and Direct Taxes. This merger was achieved in 2006. The other objective of this modernization program was to segment the taxpayer population into Large, Medium and Small and also establish dedicated offices to service taxpayers in these categories in line with their peculiar needs; and to establish a separate and dedicated office within the Domestic Taxes Division called Design and Monitoring which will support Operating Units through development, monitoring and evaluation of policies and procedures and the related business processes. These were achieved in 2009.

While the administration part has seen three major transformations or reforms, tax policy changes have been effected every year including the over three years that the modernization program was in transition. Many tax laws or tax policy changes have been introduced over the years; these cannot be itemized suffice to say quite a good number of incentives and exemptions have been introduced in the tax system. Some of these changes have seen some categories of goods and services been moved in terms of classification for VAT purposes from either exempt to zero-rated; zero-rated to standard rated and back to zero-rated and even exempt. This has caused some administrative and compliance difficulties for ZRA and the taxpayers respectively. One such difficult, followed the budget changes to the agricultural sector of 2004 and 2005. Farmers that are multi-cropping or rotating crops that fall in different categories for VAT; those with a mix of taxable and exempt outputs, faced serious problems in apportioning and recovering taxable inputs such as diesel and electricity. This not only distorts prices within value chains but also leads to protracted tax administration procedures, invariably imposing additional transaction costs. The disputes surrounding the use of coefficients to apportion costs for the purposes of determining VAT input claims and duty drawbacks for exporters have also been a major source of concern for the agricultural sector. The process of resolving such disputes between ZRA and eligible taxpayers tends to be protracted thus increasing the administration burden for ZRA and compliance costs for the taxpayer.[57]

Introduction of concessions and exemptions is one other tax policy change that has the potential to create distortion in the tax system. Tax incentives will complicate a tax regime and make it more difficult to administer.[58] In September, 1999, Sun International signed a contract with the Government of the Republic of Zambia to construct two ultra-modern hotels. The agreement included tax concessions for the project which included a waiver of all import duties and VAT during construction. Additionally, tourist accommodation was made zero-rated for VAT in Livingstone from 2001 for an initial period of two years that was further extended. The potential flashpoint of an incentive like this one is that it might allow tax evasion or simply present a possible area for tax litigation. This is so for, a tourist firm with a branch in both Livingstone and Lusaka might try to arrange for business to be accounted for at its Livingstone office, which is zero-rated for VAT, even if the transactions are being done in Lusaka, which is standard rated.[59]

In the Albanian tax Administration, the following was observed,

> " The initial VAT Legislation, usually close to standard International model, as time goes on, tends to become both more complex and to some extent ad hoc in how it is actually applied. The structure of VAT becomes littered with privileges and exemptions that minimize its revenue impact and make it difficult to manage"[60].

The Governments, hard-pressed for revenue are driven sometimes to discretionary and un-predictable enforcement efforts to raise revenue oblivious of the need to maintain long-term sustainable stability.

[57] P Langmead, G Baker, A Harding & M Mumbwatasai, Tax Policy Issues in Zambia, 2006, page 222
[58] P Langmead, G Baker, A Harding & M Mumbwatasai, Tax Policy Issues in Zambia, 2006, page 261
[59] P Langmead, G Baker, A Harding & M Mumbwatasai, Tax Policy Issues in Zambia, 2006, page 261
[60] E Gjokutai, Albanian Tax Administration – Growing with a Good VAT [accessed on: http://ezinearticles.com/?Albania-Tax-Administration---Growing-With-A-Good-VAT on 01.03.11]

Tax policy decisions are not made in a vacuum nor are they made by benevolent Governments. They are outcomes of complex social and political interactions between different groups in society in an institutional context established by history and State administrative capacity. Taxation is not simply a means of financing Government; it is also a very visible component of the social contract underlying the State. Citizens are more likely to comply with tax laws if they accept the State as legitimate and credible and are to some extent both willing to support it and afraid of what will happen to them if they do not. Thus to do a better job of tax reform, countries need to pay adequate attention to developing adequate capacity to draft tax legislation and analyze data relevant to tax reforms as well as developing the procedural systems and administrative capacity to implement them. Above all, to sell reforms not only to politicians, but also to those who must administer them, to those who will discuss them in public and most importantly, to those who must endure them, that is , the taxpayers.[61] When it comes to tax reforms, "ownership" matters.[62]

To what extent, if any have the frequent tax policy changes affected the administration of tax or caused tax disputes? To address this question, the study analyzes information gathered from taxpayers and other relevant stakeholder that included MFNP and ZRA employees and the Revenue Appeals Tribunal. Cases that were subject of litigations are also analyzed to extract what are among the major causes of tax disputes. On the question of the effect of frequent tax policy changes to the administration of VAT, the information gathered suggested that tax policy changes are a normal occurrence the world over and are essential in order to direct government fiscal policy in an intended direction. However, there is belief in certain sections of the respondents that some of these frequent changes are usually not thought of properly leading to incidences of policy reversals, which according to one respondent, is injurious to the credibility of the tax system. Reference was made to Statutory Instrument Number 7 of 2006 which classified as standard rated all agricultural products and services, except maize, maize meal and infant cereals. This VAT (Exemptions)(Amendment) Order was soon revoked by Statutory

[61] Richard M. Bird, "Tax Challenges Facing Developing Countries" [accessed on 11.3.11 at http://www.fiscalreform.net/]
[62] R M Bird, "Tax Challenges facing Developing Countries"

Instrument Number 22 of 2006, that is, VAT (Exemptions)(Amendment)(No.2) Order which reversed the earlier standard rating of all agricultural products and services. Apart from the negative effect of eroding the credibility of the tax system, it was also expressed that these frequent tax changes create a lot of work and administrative costs to ZRA in that it will have to put in place strategies to implement and educate the taxpayers for them to comply with the changes in order for ZRA to collect the additional revenue.

As to the possible causes of tax disputes and litigations that have littered our tax system, evaluated information from the field gave diverse views but all point to the fact that all is not well in our tax administration. One view expressed was that the insufficiently researched and thought-through changes are a contributing factor. Coupled with this, it is viewed that the insufficient time allowed for both ZRA, as tax administrators and the taxpayers to adjust and incorporate new changes, especially in the old system of presenting the National Budget and tax changes in January, was also a major contributing factor to the tax laws being less understood before implementation. While it was generally viewed that the legal and organizational framework within which the Value Added Tax is being administered in Zambia is adequate, it seem generally agreed too, that some legal provisions and administrative rules and procedures are unclear and ambiguous. Also ignorance of the applicable tax provisions and over-zealousness on the part of ZRA; and lack of taxpayer information following tax policy changes have been observed as contributory to tax disputes. Other respondents were of the view that culture of not just wanting to pay tax is inherent in some people thereby manifesting itself in clear unwillingness to pay and tax evasion. Failure of Government policy to broaden the tax base is over-burdening a few, especially those in the formal sector leading some of them into tax avoidance. It is clear to see that the possible causes of tax litigation are quiet diverse and difficult to establish as the reasons for non-payment of tax or tax evasion may be embedded in the person's mind. To un-lock this scenario, evaluation of Case law may be of assistance.

In the case of Crossland Import and Export Limited and Zambia Revenue Authority[63], the appellant was challenging the fine imposed by ZRA for an offence of evasion of tax under Section 44 of the VAT Act. Reading Section 45(1) of the VAT Act under which the fine was imposed it states:

> "If a person alleged to be an offender under this Act (hereinafter called the alleged offender) agrees to pay a specified fine proposed by the Commissioner-General, which does not exceed the maximum penalty provided by this Act for the offence in question, the Commissioner-General may impose that fine on the alleged offender",

The Tribunal held that a fine may only be imposed with the consent of the alleged offender. If the alleged offender does not agree, the fine cannot be imposed by the respondent stating that this was in line with Article 16(1) as read with Sub Article (2)(b) of the Constitution to the effect that a penalty for breach of any kind, whether under civil process or after conviction of an offence can only be meted out under the authority of an Act of Parliament. Clearly, this was a misunderstanding or misinterpretation of the Law as obtaining in Section 45(1) of the VAT Act on the part of ZRA.

There have also been cases of misunderstanding or misinterpretations of the law on the part of the taxpayers on account of certain legal provisions. On the basis of Statutory Instrument No. 12 of 2001, Insurance Brokers, in the case of Guardian Insurance Brokers and 29 Others v Zambia Revenue Authority[64], believed that they were exempted from paying value Added Tax or filing in VAT returns by virtue of that Value Added tax (Exemption) (Amendment) Order. It was interpreted then that, the functions by a Broker fall short of providing insurance and as such, was taxable at standard rate.

Other cases that have come before the Tribunal are to do with the conduct or procedures to undertake during an audit. If in the course of a tax audit, the taxpayer has got no records or insufficient records, can ZRA adopt usage of averages or estimates? In the cases of Food Fayre and L.A. Fast Foods v Zambia Revenue Authority[65]; Trans-Zambezi

[63] 1999/RAT/45
[64] 2002/RAT/63
[65] 2002/RAT/59

Limited v Zambia Revenue Authority[66]; and in Star Motors Limited, Star Commercial Limited, Commercial Motors Limited v Zambia Revenue Authority[67], the Tribunal in all cases held that the burden to discharge an assessment lies on the taxpayer citing the English case of Moll v I R C[68] in which it was stated that if the appellant fails to lead evidence before the Commissioners, he cannot have the assessment reduced or displaced.

4.3 Conclusion

Tax administration system cannot guarantee stability of tax laws. Tax laws always keep changing in line with the government fiscal policies. Frequent tax policy changes then, looked at from a general principle of law, is capable of causing distortion in the administration of tax. A good law is one that is simple; easy to understand; equitable; is fair and less costly. It is doubtful whether these attributes can be imputed to our tax system given the instability of the tax laws due to the frequent changes.

The tax administration system has recorded a number of litigations over the years. As seen from case law that has been referred to in this chapter, most disputes are emanating from misinterpretations and misunderstandings of the law. Others are as a result of audit procedures employed during such tax audit. It cannot be disputed that the misinterpretation of the tax laws implies misunderstanding or lack knowledge of the same. It is possible that the continuous changes in the law does not give both taxpayers and ZRA enough time to entrench themselves and understand the laws fully, when they are confronted with yet other changes as another national Budget is presented and the process goes on.

The next chapter, summarizes the findings of this research paper, concludes on the findings and offers recommendations to the problems identified.

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[66] 1998/RAT/02
[67] 1999/RAT/111
[68] [1955] T.C. 384

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

5.0 Introduction

The real tax system people and businesses face reflects not just tax laws, but also how that law is actually implemented in practice. How the law is actually implemented depends on how those who administer it understand it and on how efficient the procedures of its implementation are. How a tax system is administered affects its yield, its incidence and its efficiency. Thus the tax laws; their implementation and how they are perceived have a bearing on the overall system.

There is no single set of prescriptions that, once introduced, will ensure improved tax administration in any country. Developing and transitional countries exhibit a wide variety of tax compliance levels, reflecting not only the effectiveness of their tax administration but also taxpayer attitudes towards taxation and towards government in general. Attitudes affect intentions and intentions affect behavior. Attitudes are formed in a social context by such factors as the perceived level of evasion, the perceived fairness of the tax structure, its complexity and stability, how it is administered, the value attached to government activities, and the legitimacy of government. Government policies affecting any of these factors may influence tax-payer attitudes and hence the observed level of taxpayer compliance.[69]

The life of the tax administrator is made even more complicated by the propensity of many governments, reflecting in part the often unstable political and economic environment, to alter tax legislation annually or even more frequently. Both the complexity of the tax structure and its stability are thus important factors to be weighed in assessing tax administration. One of the most important lessons emerging from experience in various countries is that an essential precondition for the reform of tax

[69] R M Bird, Administrative Dimensions of Tax Reform, page 136

administration is to simplify the tax system in order to ensure that it can be applied effectively in the generally low-compliance contexts of developing and transitional countries.

The subject of tax administration is wide and varied depending on circumstances obtaining in a particular political, social and economic environment. As such, a paper like this one cannot claim to be comprehensive and conclusive on the subject. Thus what this paper has endeavored to do is to evaluate and highlight the weaknesses in the legal, institutional and procedural framework in the context of the frequent changing nature of tax laws and hoping the suggested remedial measures will make a modest contribution to the improvement of our tax administration and in reducing incidences of tax litigations.

5.1 Findings and Conclusions

The aim of this study is to redress the tax grievances in Zambia. Proceeding on the basis of a research hypothesis that the frequent changes in the tax laws have contributed to making the laws un-certain, it endeavors to establish the causes or contributing factors to the problem of tax litigation in our tax administration. Three research questions guided this study and these are as follows. Why do we continue to have grievances and disputes of tax assessments? If it is true that business houses registered for Value Added Tax do not bear the brunt of the tax and that this tax is bore by the final consumer in the chain of consumption, why do they have problems remitting the tax they simply collect from consumers on behalf of the tax authorities? Have the frequent changes of our laws at every National Budget presentation contributed to making our tax laws un-certain and therefore less understood by the taxpayers.

Accordingly, the paper has discussed the legal framework for the administration of this tax, the institutional framework and the effect of frequent tax policy changes on the overall administration of tax. The legal framework for the administration of Value Added Tax law in Zambia revolve around the Value Added Tax Act, which is the Principal Act; and the General Regulation and General Rules that constitute the subsidiary legislation.

The study established, with the help of case law that some litigations have been recorded in our tax system on account of conflict between the provisions of the subsidiary legislation and the spirit and intention of the law as obtaining in the Principal Act. Reference here is made to the case of Celtel Zambia Limited and Zambia Revenue Authority[70].

From the Institutional framework point of view, again weaknesses have been identified that could be contributing to tax disputes. The majority of the members of the Zambia Revenue Authority's Governing Board, are appointed by the Minister of Finance and National Planning; and the Commissioner-General, who is the Chief Executive Officer of the ZRA is an appointee of the President of the Republic who can hire and fire him or her at any time. This scenario has contributed to eroding the confidence that taxpayers and general members of the public have in ZRA as a tax administrator especially when handling high profile taxpayers. Findings of the research from interviews conducted suggest that most people perceive ZRA as a tool that people in Government use to settle scores with their political opponents. It is no wonder that results from such high profile tax audits may end up being disputed on account of them being view as conducted from a vindictive motive. Additionally, ZRA as the body that enforces the tax laws does come up with house-keeping measures and other form of procedures and practices to help them in their day to day functions. Unfortunately, in some instances, these administrative procedures and interpretations have come at variance with the VAT Act. The Kajimanga and Zambia Revenue Authority[71] case is one such situation when ZRA sought to administratively enter into an arrangement to impose a fine on a taxpayer when the Act provided otherwise.

It has not been easy to point out exactly at any dispute that could have been caused by frequent changes in tax policy suffice to say quite a good number of incentives and exemptions have been introduced in the tax system. Some of these changes have seen some categories of goods and services been moved in terms of classification for VAT

[70] 2002/RAT/21
[71] 2002/RAT/03/VAT

purposes from either exempt to zero-rated; zero-rated to standard rated and back to zero-rated and even exempt. This has caused some administrative and compliance difficulties for ZRA and the taxpayers respectively. The findings of the research are that a majority of disputes and litigations are as a result of misinterpretation of the law both on the side of ZRA and the taxpayers. Whether these misinterpretations and misunderstanding of the law have their roots in the frequency of tax policy changes, is not very clear. The problems that come with frequent tax policy changes were stated by Professor John Evans Atta-Mills in his presentation to the Third Regional Workshop on Taxation in Brazil on the theme: "Improving Resources and Organizational Structures of the Tax Administrations", when he noted:

> "...the laws themselves may be extremely difficult to locate. Very often there is a tangled mass of laws, regulations, decrees and the like reaching far into the past, jumbled together with amendments and modifications. When the statutory picture is so confused, it is extremely difficult for the government to know what it must administer and for the taxpayers with what they must comply."[72]

In summary, and to answer the research questions, the major causes of tax litigation in our tax administration system in general and Value Added Tax in particular, is the conflict between provision of the Principal Act and those of the subsidiary legislation. Also equally contributory to tax disputes is the lack of understanding of the law leading to flaws in its interpretation and implementation.

5.2 Recommendations

Tax policy cannot be separated from tax administration. As tax policies or laws keep changing, time and energy need to be devoted to changing tax designs and administration to cope with changing circumstances and enhance capacity. There must be close corroboration and in-depth analysis of all subsidiary legislation to bring them in conformity with the Principal Act. Before any decision based on subsidiary legislation is imposed, it must be mandatory to verify its efficacy with relevant provisions of the principal Act.

[72] http://unpan1.un.org/intradoc/groups/public/documents/un/unpan006399.pdf (accessed on 16.09.10)

To instill confidence in the activities of ZRA in the eyes of members of the public in general and the taxpayers in particular, there must be transparency in the appointment of its Chief Executive; this will eliminate the perception that it is a tool used by Government to harass its political opponents. In this respect, the appointment of the Chief Executive can be ratified by an independent body like Parliament.

Continued efforts should be made towards integration to introduce a single taxpayer number and streamlined documentation requirements as soon as possible. An important element in any successful administrative reform is simplicity and enforceable laws to administer. In addition, it is equally important to simplify procedures for taxpayers, for example, by eliminating demands for unnecessary information in tax returns and payment invoices.

Tax policies should, as much as possible, be consistent and predictable. The situation where categories of taxpayers are awarded relief selectively should be avoided as it creates classes of taxpayers that are not recognized in the legislation but the subject of discretionary treatment by MFNP. It also creates belief in certain taxpayers that the tax system is unfair and un-equitable thereby affecting tax compliance levels. Also compliance provisions should be clearly stated together with accompanying guidelines for the use of taxpayers so that they are made fully aware of requirements and the role of ZRA.

ZRA should continue its efforts to publicize relevant laws, amendments, policies and practices and to explain them to the business community. Both MFNP, as tax policy makers, and ZRA as tax system administrator, should also increase their efforts to obtain information and feedback from the public and business community through feedback forms, hotlines, and meetings with business associations. Regular dialogue should be an essential part of the Government's strategy to reduce the belief widespread in the business community that tax policy administration is unfair, corrupt and not transparent. Talking about dialogue and public participation in matters that affect them, it is recommended that government introduces a system whereby it publishes the tax measures that are likely to be introduced in Parliament prior to National Budget presentation to promote openness in tax matters; this way, taxpayers will accept a law that has been enacted with their input as theirs. It will have legitimacy and that may reduce the number of litigations. After all, when it comes to tax reforms, "ownership" matters.

It was earlier noted in this paper that tax laws by their very nature are subject to frequent changes. Every year the annual Budget presentation introduces new measures and procedures, amends, or cancels existing ones. These frequent changes can make the law confusing as well as complicate the tax structure. After a few years these changes and amendments become so many that the taxpayer finds it difficult to know which laws are applicable. One recommended solution to this problem is to have the various laws codified, based on an orderly statutory rearrangement of the entire tax system in accordance with a definite outline. There is need therefore for the tax administration to undertake periodic consolidation of the tax laws so that it can have all the amendments and changes compiled into one statute to which both taxpayers and tax administration can have easy and ready access. It must be noted that the Zambia Revenue Authority (ZRA) is in the process of consolidating the various amendments; however, consolidating is one thing and getting the information to the various stake holders is another. This must however be done to ensure that the applicable laws at any given time is fully comprehended by both the administrators and the taxpayers.

Another institutional arrangement that seems to impede the efficiency and effectiveness of tax administration is the linkage of the revenue administration with the Civil Service or the Central Government. The revenue administration, therefore, reflects the weaknesses and structural defects existing with the Civil Service organization such as excessive bureaucracy, low morale and the inadequacy of resources. The issue of VAT refunds is a topic of great concern to the business community and indeed disputes have arisen in cases where the taxpayers have attempted to offset the refunds due to them, with their tax liabilities, with ZRA claiming it is unable to refund due to lack of funding from

Government. It is recommended in this respect that ZRA be empowered to maintain a Revenue retention Fund that will be funded from part of revenues collected at source to cover taxpayer claims promptly.

It is hoped that with these measures and recommendations, confidence and credibility is going to be enhanced in our tax administration system and contribute towards alleviating the problem of tax grievances in our system.

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