
Tax and the Entrepreneur in Africa: A legal case study of the Zambian situation

Maliti, P.N., Polytechnic of Namibia, Windhoek, Namibia

The main purpose of taxation is to raise adequate funds to finance government programs. The other purpose is to redistribute wealth among the citizenry. Government effort in meeting the two objectives is frustrated by limited tax base, exacerbated by tax evasion especially by the self-employed, that is, the informal sector. The businessman views tax as unnecessary burden and tries hard to either reduce or avoid the tax liability. This leads to overzealous tax officers taking drastic measures, such as garnishment and/or issue of warrant of distress, against presumed delinquent taxpayers.

It is also sometimes believed that the Party that is in power will use State machinery, such as the tax authority, to destroy the businesses run by members of the Opposition. This is manifested by the collapse of once flourishing businesses run by politicians who are now in the opposition camp and the sudden success of once fragile businesses which were run by those now in the ruling political party. Furthermore, no member of the ruling party is ever in trouble with the tax authorities, until when that party loses the general elections.

This paper looks at some of the recent court cases in Zambia, brought about by both the taxpayers and the tax authority. It examines whether there is respite for small and big entrepreneurs who may feel that the government of the day is out to destroy their businesses. It disproves some of the accusations of political annihilation by confirming that the aggrieved party, be it the taxpayer or the tax authority, has an opportunity to seek and find redress in the courts of law.

Introduction

In Zambia tax is collected by a corporate body known as the Zambia Revenue Authority (ZRA), which was established on 1 April 1994 by an Act of Parliament. A board oversees ZRA's operations. The chief executive of ZRA is the Commissioner General who is appointed by the President.

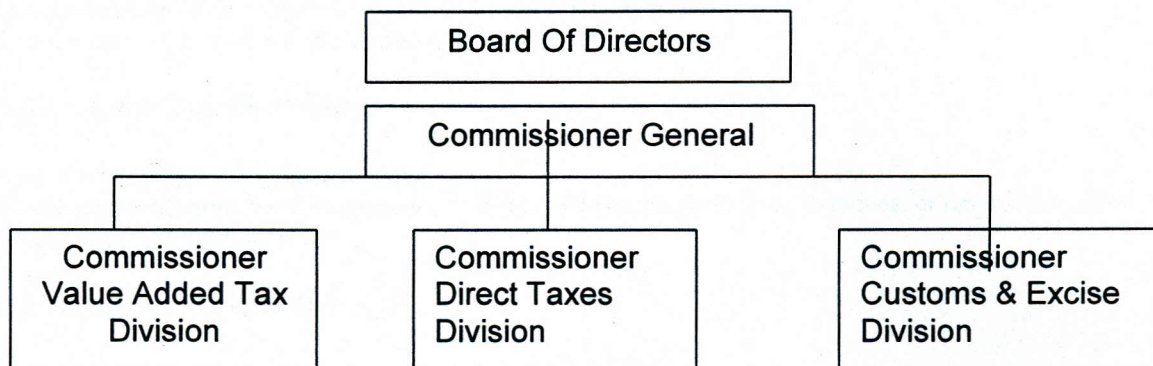
Up to 31 March 1994, the responsibility for collecting tax was under the Department of Taxes in the Ministry of Finance. The purpose of creating a corporate body was to redress the shortcomings in the collection of tax revenue. Hence the main goal of ZRA is to collect as much tax and as early as possible, at reasonable cost. Its mission statement reads: "The mission of ZRA is to maximise and sustain revenue collection through integrated, efficient, cost effective and transparent systems, professionally managed to meet the expectations of all stakeholders."

ZRA summarises its main responsibilities as, among others:

- Proper assessment and collection of taxes and duties at the right time without causing undue burden to the public;
- Encouragement of the public to come forward and pay tax voluntarily;
- Proper enforcement of all relevant statutory provisions;
- Facilitation of international trade.

Organization

ZRA is an autonomous body whose income is derived from monthly Government funding. The organization is divided into three operational divisions, namely: Direct Taxes, Customs and Excise and Value Added Tax (VAT), all assisted by three corporate divisions: Finance, Human Resources and Support Services (Legal Services, Information Technology and Internal Audit).



Tax is not defined in any *Zambian Act*. However, it can be defined as **an amount payable by citizens** (according to income, value of purchases or property, etc) **to the government for public purposes**.

Some of the laws that either affect or effect *Zambian* include:

- (a) *Income Tax Act (ITA)* and its annual amendments;
- (b) *Value Added Tax (VAT) Act*;
- (c) *Customs & Excise Act* as amended from time to time;

Liability to *Zambian* tax is determined by the answers one gives to the following questions:

- (a) Is the person or partnership receiving the income resident in *Zambia*?
- (b) Is the income under consideration derived from *Zambia*?

If the answer to any of the above two questions is "yes" then the income is liable to tax.

BARCLAYS BANK ZAMBIA LTD v ZRA (1999) RAT

This case concerned an appeal against penalties and interest amounting to K416, 935,097 for late payment of Pay-As-You-Earn (PAYE) on expatriate emoluments for 1997/98 and 1998/99, which emoluments were paid offshore by the holding company. The appellant pleaded that they were not sure whether PAYE was payable or not, and that their tax advisers had informed them that there was a possibility that PAYE was not payable. As a result of this uncertainty they sought clarification from ZRA who also took time to revert to them and confirm that tax was payable.

Held, there was no need to seek clarification as the P.A.Y.E. became due immediately the expatriate employees' emoluments were paid offshore. The penalty was thus correctly imposed.

MOHAMMAD HUSSEIN v ZRA (1999) RAT: An Angolan company called Transida, sent US \$200, 000, through its director, a Mr da Siva Sanches, to a *Zambian* company called Madiba Trading Co Ltd in which the appellant was a director. The dollars were confiscated at Lusaka International Airport by Drug Enforcement Commission (DEC) and were later handed over to ZRA who in turn made income tax assessments for four years, 1993 up to 1996, which totalled K259, 160, 000 (being the equivalent of the US \$200, 000 confiscated). Upon raising an objection ZRA issued an amended assessment of K4, 230, 000 in tax liabilities, which the appellant somehow accepted and paid. Question: Why were assessments made on the appellant and not the company?

Held, the US \$200, 000 was not earned income but money brought in the country as an investment.

Secondly, the assessments were arbitrary and unreasonable, arising from confiscation.

It was therefore directed that the dollars be refunded with interest at 5% p.a. from the date they were confiscated until final payment.

Taxation problems

- 1 **Limited tax base** worsened by privatisation of companies.
- 2 The increase in **unemployment**, which has spawned the informal sector.
- 3 **Excessive tax incentives** in order to attract international capital.
- 4 **Tax evasion**.
- 5 **Corruption** of tax officers by taxpayers trying to avoid heavy penalties.

- 6 **High tax rate**, without acceptable government expenditure, leads to non-compliance.
- 7 **Low probability of detection** due to corruption and political pressure.
- 8 **Illegal income**, e.g. from smuggling and drug trafficking.

Tax evasion and tax avoidance

Tax evasion is the wilful and deliberate violation of the law in order to escape payment of tax.

Tax Avoidance, on the other hand, is the active device by which a taxpayer seeks to reduce, or remove altogether, the tax liability without actually breaking the law.

Separate taxation of income

In Zambia husbands are taxed separately from their wives. There are also various tax rates and reliefs (e.g. capital allowances) applicable to different incomes and taxpayers. Each class of income must therefore be identified and matched with relevant expenditure before applying appropriate tax rates and reliefs.

NANGA FARMS Ltd v ZRA (1998) RAT: This was an appeal case in respect of charge years 1991/92 to 1996/97 inclusive. The Revenue Appeals Tribunal was asked to determine whether funds placed in a deposit account were to be treated as part of farming income since the deposits were created with funds from the farming business. The appellant wanted to maximize farming income, which is taxed at 15%, by charging the loan interest against interest earned in order to reduce interest income which attracted tax at 35%. It was held that "the interest expense is incurred to facilitate the operations of the (farming) business and is an allowable expense under the 'wholly and exclusively' basis. The interest expense is not incurred to sustain the deposit account". As an illustration it was argued that the "interest earned by an individual after placing (in a deposit account) excess income from emoluments or salary (could not) be said to be part of emoluments or salary", that is, such interest income is not taxed under PAYE.

Objections and appeals

Notice of objection

The time limit for raising an objection is 30 days from date of notice of assessment. There is further ten days allowed for postage. So, the actual days within which to lodge an objection can be arrived at as follows: -

(1) Statutory objection period	30	days
(2) Statutory allowance for time for delivery	<u>10</u>	
		40
(3) Allowance for day of posting	<u>1</u>	
TOTAL		<u>41</u> days

The objections and appeals system or stages can be summarised as follows: -

	Responsibility	Action
1)	(Inspector of Taxes	Issue Notice of Assessment
2)	(Taxpayer	File an Objection
3)	(Inspector of Taxes	Issue Notice of Determination
4)	(Revenue Appeals Tribunal	Arbitration

5)	(High Court	Decide on Question of Law or Law and Fact
6)	(Supreme Court	Decide on Question of Law Only

It is important therefore to retain the envelope containing the notice of assessment in order to prove items (1) and (2) above.

DERAMS LIMITED v THE COMMISSIONER OF TAXES (RAT)

This was an appeal against assessments for charge years 1993/94 and 1994/95. A Notice of Determination dated 9th February 1996 was received by the appellant (taxpayer) in which the respondent (ZRA) disallowed the objection on the ground that the objection was received by ZRA on 15th January 1996 after the expiry of thirty days as provided by ITA. However, the taxpayer, although dated 30th September 1995, only received ZRA's assessment on 18th December 1995.

Held, from the date of actual receipt of the assessment, the taxpayer was within the thirty days period stipulated, and accordingly the objection should be accepted.

Appeal to the Revenue Appeals Tribunal

Where a taxpayer is not satisfied with the ZRA's decision (notice of determination), an appeal may be lodged with the **Revenue Appeals Tribunal (RAT)** (formerly known as Tax Appeal Court). RAT is made up of three lawyers, two accountants and two businessmen, all appointed by the Minister of Finance.

The time limit for lodging an appeal is 30 days from date of service of the Inspector's notice of determination.

Appeal to the High Court

ZRA or the taxpayer has a right of appeal to the High Court.

Appeal to the Supreme Court

Either the taxpayer or ZRA may further appeal to the Supreme Court if not satisfied with the decision of the High Court

Obligation to pay assessed tax

The right of appeal does not abrogate the taxpayer's responsibility to pay the assessed tax on the due date.

ZRA v BUILDELECT ZAMBIA LIMITED (1997) HC

This was an appeal against a grant of an interim order of injunction by RAT restraining the appellant (ZRA) from levying execution to recover the assessed tax.

Held, the combined operation of the various sections of the ITA clearly shows that once tax is assessed it must be paid whether or not there is an objection or appeal from the person assessed. To hold otherwise, ZRA would be inundated with numerous injunctions to the extent that its capacity to collect tax would be crippled. The purpose of ZRA is to collect revenue for the operations of the Government. If after going through the appeal system up to the Supreme Court it is found that the taxpayer was over-taxed or that he should not have been taxed at all, ZRA will refund him his money. The law in effect prohibits the granting of an injunction in matter of tax collection.

Onus of proof

Normally, any accused person is presumed innocent until proved guilty. In tax law, however, a taxpayer, whether suing or being sued, is presumed guilty until he has proved himself innocent. The taxpayer is therefore the one to prove that the assessment is wrong or frivolous (see *ZRA v Buildelect*).

TRANS ZAMBEZI INDUSTRIES Ltd v ZRA (1998) RAT

This was an appeal against an assessment whereby initial licence fees in the sum of K42, 258,742 in respect of the 1994/95-charge year were disallowed. There was a submission by the defendant that "as there was no sufficient evidence to support the claim that the expenses were of revenue nature, the only inference was that the expenses were of a capital nature". The chairman of the Revenue Appeals Tribunal agreed with the defendant and ruled: "The appellant has not discharged the onus of proof to discharge the assessment. If the appellant fails to lead evidence before the commissioners, he cannot have the assessment reduced or replaced or displaced".

Nature of tax collection

Tax is collected either directly from the taxpayer or through appointed taxpaying agents.

Mitigating Factors

The following reasons are not acceptable as an excuse for late or non-payment of tax:

- Shortage of cash;
- Ignorance of due date;
- Pressure of work;
- Failure by tax agent [*Barclays Bank (Z) Ltd v ZRA*].

PHILIPS ELECTRICAL (Z) LTD v ZRA (1999)

This concerned non-submission of 1995/96 tax returns due to mistaken belief that the agent had submitted one within the statutory time limit. Furthermore, the taxpayer had no outstanding tax liability. Nevertheless a fine of K107 million was charged for late submission of returns. This fine was subsequently reduced to K10 million. The company appealed against the K10 million fine, contending that the maximum payable under the circumstances was K60, 000 per month for five months, which added to K300, 000, since the company's tax position, having nil outstanding, was equivalent to a nil return.

Held, it was the obligation of each taxpayer to furnish a return to the Commissioner-General no later than 30 September following the end of the charge year. "It is trite law that the principal liability to submit returns falls upon the taxpayer. The maximum penalty for late submission of returns is not K60, 000 per month from 30 September until the date of actual submission of the late and correct return, but the greater of this sum, or 5% per month of the tax payable in the charge year."

Tax recovery from delinquent taxpayers

There are four main methods of collecting tax and enforcing tax compliance:

- (1) Withholding tax (WHT) deducted from interest, dividends and other payments;
- (2) Appointment of tax paying agents, e.g. employers under PAYE;
- (3) Tax clearance certificate for disposal of properties and on importation of motor vehicles; and
- (4) Provisional payment of tax at the end of each quarter.

Tax due from delinquent taxpayers is collected using one or more of the following methods:

Firstly, an "immediate demand letter" is issued.

Secondly, if there is no payment forthcoming then ZRA will issue:

- (i) Garnish order,
- (ii) Warrant of distress, and
- (iii) Charge on land, in that order, until payment is received.

Garnishment

Garnishment is a recovery of tax through an agent.

PHINDA AUTO SPARES LTD v ZRA (1998)

The appellant was in possession of a sum of K76, 562,411 being money belonging to a Mr. Allen Fakeye who had been deported by the Immigration Department. It was admitted that the company sold Fakeye's goods and kept the money, awaiting his return to Zambia. ZRA subsequently served on the appellant a notice under S.84 in respect of Fakeye's 1995/96 assessment.

Held, as conceded by the directors the sum of money belongs to Fakeye and is not the appellant's money. The assessment therefore stands as per S.84.

S.84 states:“(1) Any person or partnership may be declared by the Commissioner General to be an agent for the payment of tax due by another person or partnership.

(2) Any person or partnership declared to be an agent in pursuance of subsection (1) shall apply to the payment of the tax due so much of any kind of property whatsoever held by him or coming into his hands on behalf of the person or partnership from whom the tax is due as is sufficient to pay such tax, and any such agent is hereby indemnified against any person or partnership whatsoever in respect of all payments so made by him.”

However, a garnish order is not effective unless served after an assessment has been raised.

WILHEIM ROMAN BUCHMAN v THE COMMISSIONER OF TAXES (RAT)

On or about 19th July 1995 officers from the Drug Enforcement Commission (DEC) seized US \$67, 352 from the appellant. The appellant had brought into the country various currencies equivalent to US \$140, 000 as per Customs declaration dated 7th October 1991 which was produced in evidence. ZRA invoked S.84 and applied the amount to payment of tax alleged to be due. To this effect ZRA issued notices of assessment on 28th March 1996 covering three charge years 1992, 1993 and 1994. It was apparent that S.84 was invoked after the seizure of the currency by DEC and at that time the appellant had not yet been assessed for tax. Question: Was S.84 properly invoked when no notices of assessment had been raised by ZRA?

Held, S.84 was not properly invoked because no tax was proved to be due at that time. Furthermore, ZRA had not proved that the appellant had earned income in the concerned charge years. To assume that the seized funds were proof of income earned was an ingenious scheme to over extend the application of ITA.

Loans to effective shareholders

Assumed Tax Charge

As an anti – avoidance measure, loans to effective shareholders attract tax. Any such loan is grossed up at the maximum rate and the difference is the assumed tax charge arising without assessment.

PHINDA AUTO SPARES LTD v ZRA (1998)

This concerned assessment for the charge year 1995/96 where two directors Messrs Simon Phiri and Edward Banda were granted house loans totalling K100 million. The actual amounts drawn by the two directors were K26, 293, 040. But ZRA valued the two houses at K55 million to arrive at “regrossed loans” amount of K92, 307, 692. *Held* that the amount to be treated as loans for grossing up was the actual amount drawn by each director and not the market value of each house. However, the tax was to be paid within 30 days from date of judgment.

Tax investigations and inspections

The following are some of the objectives of carrying out an investigation into or inspection of a taxpayer's activities:

- To maximize tax compliance among taxpayers
- To widen tax base through measures like surveillance of other taxpayers' returns (e.g. rent, dividends, interest, royalties, management & consultancy fees etc).

ZRA v INDO-ZAMBIA BANK Ltd (1997) HC

ZRA was seeking a declaration that Indo Zambia be obliged under the provisions of ITA to supply the following information:

- (1) Names and addresses of companies and individuals awarded tender of capital expenditure by the bank.
- (2) Details of payments made by Indo Zambia in respect of goods and services procured by the company in excess of K2.0 million.

S.48 of ITA states: “Every person shall furnish to the Commissioner General such information whether relating to the affairs of himself or another person, as the Commissioner General determines is necessary for the purposes of this Act...”

Held, the request should be specific because it should not be to the whole world, turning the bank into an intelligence unit of ZRA. Furthermore, Zambian laws specify that unless with the express consent of the customer or order of the Court, there shall be no divulgence of information by a bank.

Tax amnesty

In an effort to encourage tax compliance by the public, the Zambian government introduced in 1998 an amnesty with the following specific objectives:

- (a) Capture unregistered taxpayers, to increase tax base;
- (b) Capture un-declared income/sales;
- (c) Collect unremitted taxes.

The success or failure of this exercise is yet to be determined, especially that tax matters require secret treatment as provided for by the law.

Conclusion

I have shown in this paper that the RAT and the High Court have so far ensured that ZRA complies with both the spirit and the letter of the law and that of its mission statement. It is evident that all the cases that have gone before RAT or the High Court have had no political insinuations. The task confronting ZRA is enormous but it should execute its duties and obligations within the ambit of the law, that is, no arbitrariness, vindictiveness, political agendas (retribution) nor over-zealousness. So far both the taxpayer and ZRA have shown their confidence in the legal process. However, the small entrepreneurs have not been able to utilize the legal process due to a combination of factors e.g. non-existent culture of litigation, timidity and/or lack of funds to pay for legal fees.

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