

LFC ZIMBABWE LTD
versus
ZIMBABWE REVENUE AUTHORITY

SPECIAL COURT FOR INCOME TAX APPEALS
KUDYA J
HARARE, 7 and 11 June 2018 and 13 March 2020

Income Tax Appeal

AP de Bourbon, for the appellant
S Bhebe, for the respondent

KUDYA J: This appeal relates to the tax years ending 31 December 2009, 2010, 2011, 2012 and 2013. At the commencement of the appeal hearing, the appellant abandoned three of the eight issues that had been referred for determination at the pre-trial hearing of 23 February 2018. The remaining issues concerned the deductibility of “master branding fees”, consumable spare parts that were unutilised at the tax year end, quarry overburden expenses and computer software from the income of the appellant and the propriety of levying any measure of penalty against the appellant.

The appellant called the evidence of an expert witness, with 50 years experience in the local, regional and international advertising, marketing and branding industry, on the issue of master branding and produced fairly bulky documentary exhibits, which were marked as exhibit 1 and 2, respectively. The facts pertaining to the other four issues were common ground. The respondent did not call any evidence but relied on the common cause facts contained in the pleadings and the r 11 documents.

The background

The appellant is a local public company, which owns a limestone mine and manufactures cement and allied products under licence from limestone extracted at that mine. It also manufactures adhesives and adhesive paints and decorative paints, construction chemicals and agricultural lime. It is a wholly owned subsidiary of a European company, which describes itself as “one of the world’s foremost manufacturers of building and construction materials established all over the world”.

The respondent commenced various tax head investigations on the appellant in May 2013, which culminated in the issuance on 22 March 2016, of further amended manual notices of assessment for income tax, number 6458 for the tax year ended 31 December 2009, 6459 for the tax year ended 31 December 2010, 6460 for the tax year ended 31 December 2011, 6461 for the tax year ended 31 December 2012, and 6498 for the tax year ended 31 December 2013, and the imposition of a penalty of 60% on the unpaid tax in respect of each tax year. The aggregate principal amount due for the 5 tax years was US\$ 7 312 224 comprised of US\$ 73 463 in 2009, US\$1 012 834 in 2010, US\$2 008 878 in 2011, US\$ 1 893 175 in 2012 and US\$ 2 323 874 in 2013. The total amount inclusive of penalties for these years was US\$15 693 648.34.

On 26 April 2016, the appellant objected to the amended assessments. By letter dated 19 July 2016, the respondent disallowed various objections including those under appeal. The appellant filed its notice of appeal on 5 August 2016, and its case on 3 October 2016. The respondent filed the Commissioner's case on 28 November 2016. The initial 8 issues that were referred on appeal on 23 February 2018, were reduced to 5 by the appellant at the appeal hearing.

I will deal with the facts pertaining to each issue *seriatim*.

The issues

The following issues were referred for determination on appeal.

1. Were the franchise fees of 1.5% relating to “master branding” incurred for the purposes of trade and thus constituted a deductible expenditure?
2. Were the costs of consumable spare parts unutilized at year end deductible in terms of s 15 (2) (a) of the Income Tax Act [*Chapter 23:06*] in the year of acquisition thereof or were such spare parts stock-in-trade?
3.
 - (a). Was the cost of the removal of quarry overburden to enable the appellant to recover and utilize limestone to manufacture cement expenditure for the purposes of its trade and for the production of income?
 - (b). Was such an expense, in any event, incurred in respect of mining operations and thus deductible in terms of the Fifth Schedule to the Income Tax Act?
4. Was appellant entitled to a capital allowance in respect of the costs of computer software?
5. Whether or not it was appropriate in the circumstances of this matter for the respondent to impose a penalty at all and if so the quantum thereof?

The resolution of the issues

Were the franchise fees of 1.5% relating to “master branding” incurred for the purposes of trade and thus constituted a deductible expenditure?

It was common cause that the appellant manufactures cement and allied products under licence from its offshore based parent company. These products are sold under the parent company’s trade name consisting of its word mark and logo. The parent company adopted a Transfer Pricing Policy backdated to 1 January 2011, which comprised of four types of agreements. These were the “Master Branding Agreement”, MBA, under which the name, trademarks and associated rights were licenced; the “Intellectual Property Licence Agreement”, IPLA, for licencing patents, know-how and associated rights; the “Services Agreement”, SA, for compensating other services and the “Engineering Services Agreement”, ESA, for compensating services rendered by its engineering arm, DEC. The IPLA covered manufacturing activities while the MBA affected selling activities. There was also an Industrial Franchise Agreement, IFA, dated 1 January 2004, was renewed biennially.

The sole witness called by the appellant defined a brand as constituting both tangible and intangible aspects through which service providers’ appeal and promise unique perspectives to targeted consumers to choose their goods and services. The franchise fees were based on the three underlying agreements, which covered the 2009 to 2011 tax years and the 2012 and 2013 tax years, respectively. The IFA, embodied a composite fee of 2% for both the master branding fees and intellectual property fees. The MBA split the fees between the master branding rights and the intellectual property rights at 1.5% and 2.5%, respectively. It was common cause that the appellant paid the franchise fees to the parent company in terms of these agreements at the above stated rates in the 5 tax years in question. In the further assessments of 26 March 2016, the respondent allowed the intellectual property related fees and disallowed the master branding fees. The respondent, acting on its own accord, split the composite fee rate of 2% in the ratio 1.5 to 2.5, which related to the second agreement, and attributed 0.75% to master branding fees and the balance of 1.25% to intellectual property fees. The amounts attributed to master branding fees, which were disallowed, were in the sum US\$ 212 356.13 for the 2009 tax year, US\$312 636 for the 2010 tax year, US\$ 370 913.85 for the 2011 tax year, US\$ 863 252.70 for the 2012 tax year and US\$ 1 140 000 for the 2013, tax year¹. The basis for such disallowances was that the brand name was enhanced in the local market only through the advertising, marketing and promotion activities of the appellant and not the parent company.

¹ P 42 and 43 of r 11 documents.

The respondent allowed the intellectual property fees in recognition of the international best practice of compensating the use of intellectual property rights. The appellant produced in exhibit 1 an IPLA, which commenced on 1 January 2012, and in which the licence fee payable to the parent company was set at 4%. It failed to link this document to the MBA, which took effect on 1 January 2011, and the IFA. It appeared to me that the MBA and the IPLA, which were renewable annually, and the IFA operated simultaneously.

The appellant contended that it incurred master branding fees, which accrued to the parent company as the franchisor or licensor of the 183 year old brand. It attributed these fees to the subtle global awareness campaign conducted by the parent company to familiarise and create the brand as a criterion of choice for customers and consumers in the global village to which the local market belonged. The respondent contended that the rental or use and application of the trademark, word mark and logo on its own and without any advertising, marketing and promotion efforts did not produce any income and disentitled the parent company from receiving master branding income against which the appellant could deduct master branding fees.

The appellant described the global awareness campaign as a marketing intangible asset, which the parent company used to continually and regularly instilled and maintained brand loyalty in the minds of existing and prospective customers. The campaign was predicated upon the twin pillars of development and guidance. Development entailed the provision of training and support services while guidance connoted the provision of strategic leadership, market research tools and corporate communication methods. The communication tools were designed to maintain and protect and not damage, devalue or distort the image and good name of the parent company.

The IFA, IPLA and MBA defined intellectual property rights in the same way, as inclusive of “trademarks, trade names, company names” and “brands, whether registered or not”, respectively. The later agreement also defined “Licensor Intellectual Property Rights” as inclusive of “some registered products brands to accompany the sale of the product as described in annexes to this agreement”. The Group Branding Structures of the parent company were highlighted in the last 5 pages of exhibit 1. That document valued the group brand, as at 1 July 2015, at US\$ 3 783 000. It further asserted that the parent company, and not the licensee, carried the cost of creating and establishing the brand product locally while the licensee carried the costs related to the ongoing creation of value and maintenance of the brand at the local level.

Lastly, the document indicated that the marketing intangibles undertaken by the parent company created value through customer loyalty and trust.

The evidence of the sole witness established that income accrued to the appellant through the sale of branded cement and allied products. It further established that the appellant incurred expenses in manufacturing the cement and allied products and in marketing them in the local market, which constituted allowable deductions. The evidence also established that the appellant had a contractual obligation to and actually did pay master branding fees to the parent company. The dispute between the parties was whether the master branding fees were incurred either for the purposes of trade or in the production of income.

I dealt with the same issue in *DEB (Pvt) Ltd v Zimra* HH 664/2019. On the facts of that case, I held at page 7 of the cyclostyled judgment, that the trademark or brand and the product were indivisible and any expenditure arising from their use or application was deductible from a taxpayer's income as expenditure incurred for the purposes of trade or in the production of income. The deduction is based on the fact that the expense is derived from a genuine unconditional legal obligation, which the taxpayer must meet. See *Port Elizabeth Electric Tramway Company Ltd v Commissioner for Inland Revenue* 1936 CPD 241 at 244, 245 and 246, 8 SATC 13 (C) at 15, 16 and 17-18. *Sub-Nigel Ltd v Commissioner for Inland Revenue* 1948 (4) SA 580 (A), *Caltex Oil (SA) Ltd v Secretary for Inland Revenue* 1975 (1) SA 665 (A), *Commissioner for Inland Revenue v Standard Bank of South Africa Ltd* 1985 (4) SA 485 (A) at 500I; (1985) 47 SATC 179 at 196; *L v Commissioner of Taxes* 1991 (2) ZLR 164 (HC) and *G Bank Zimbabwe Ltd v Zimbabwe Revenue Authority* 2015 (1) ZLR 348 (HC).

In para 13 of his written submissions, Mr *de Bourbon* contended that:

“The expenditure for the right to use that international brand is undoubtedly incurred solely to enable the appellant to flourish in Zimbabwe, and to enable the appellant to earn income through the use of that brand.”

I would have agreed with him and added that the utilization and application of the brand was synonymous with what the Commissioner termed “rental” but for the definition of intellectual property rights in the IFA, IPLA and MBA, which did not distinguish between intellectual property and master branding but treated them as constituting an indivisible and integrated whole termed intellectual property. In order for the appellant to benefit from the deduction of master branding fees, separate and distinct from the cost of the other itemized categories of intellectual property used in the manufacturing process and marketing activities, the appellant would have had to establish the cost to the parent company of each utilized

intellectual property right. Otherwise, the cost would have to be included under a single indivisible amount as had been done in the 2009 to 2011 franchise agreement. The pleadings, exhibits and oral testimony of the sole witness did not establish the separate amounts that accrued to the parent company under intellectual property rights, on the one hand, and master branding, on the other. The corollary to the finding of indivisibility is that the disallowance by the Commissioner of the 1.5% master branding fees of US\$ 863 252.70 in the 2012 tax year and US\$ 1 140 000 in the 2013 tax year was correct while the split of the 2% rate in respect of the first franchise agreement was wrong. I will direct the Commissioner to deduct the amounts he added back to income on the basis that they constituted non-deductible master branding fees, the sum of US\$ 212 356.13 from the 2009 tax year, US\$ 312 636 from the 2010 tax year and US\$370 913.85 from the 2011 tax year.

Were the costs of consumable spare parts unutilized at year end deductible in terms of s 15 (2) (a) of the Income Tax Act [Chapter 23:06] in the year of acquisition thereof or were such spare parts stock in trade?-

In each year of assessment the appellant purchased consumable parts consisting of fuel and vehicle and general maintenance spare parts, which were in excess of each year's requirements. It claimed deductions of the cost of these spare parts in the years of assessment in which they were acquired. In this regard, the appellant claimed US\$ 2 336 849 in 2009, US\$ 5 116 199 in 2010, US\$ 4 813 116 in 2011, US\$ 7 713 134 in 2012 and US\$ 7 905 287 in 2013². The respondent disallowed the deductions on two grounds. The first was that, the cost could not be claimed as these spare parts did not produce any income in the year of purchase. The second was that, as they were entered in the appellant's books of account as balances, they constituted trading stock-on-hand or current assets, which could not be deducted in terms of the general deduction formula. It was common cause that s 8 (1) (h) of the Income Tax Act prescribed that closing stock be treated as part of the gross income of the subsisting tax year.

The first ground for disallowance amounts to an importation of the concept of matching into our Income Tax Act, which was specifically legislated by the insertion of s 8 (3) and s 15 (2) (a) (ii) into our Income Tax Act by ss 8 and 9 of the Finance Act (No 1) of 2018. I agree with both counsel that a new insertion in a statutory provision can either amplify or alter an existing legal position. I recently held in *SZ (Pvt) Ltd v Zimbabwe Revenue Authority* HH 142/2020 at p 10 that, the matching principle was not part of our law during the period the

² P 43 and letter from appellant's tax consultant to respondent of 23 September 2013 on p 209 of r 11 documents.

amended assessments were issued in the tax years from 31 December 2009 to 31 December 2013. I relied on the construction accorded to the sentiments of WATERMEYER CJ in *Joffe and Co Ltd v CIR* 1946 AD 157 at 163 by CENTLIVRES JA in *Sub-Nigel Ltd v CIR* 1948 (4) SA 580 (A) at 589, 591 and 592 and *ITC 815* (1955) 20 SATC 487 at 492. See also *Commissioner for Inland Revenue v Standard Bank of South Africa Ltd, supra*, at 499H³. In the light of that finding I agree with Mr *de Bourbon* that the Finance Act (No 1) of 2018 altered the legal position prevailing in Zimbabwe prior to the amendment.

The definition of trading stock provided in s 2 of the Income Tax Act covers in para (a), (b) and (c) goods and other property of any description that are, *inter alia*, acquired, by the taxpayer in the ordinary course of trade for the purpose of disposal in the ordinary course of trade and such goods and other property acquired in the ordinary course of trade or in connection with the manufacture, production, construction or improvement of goods or other property of any description for which the expenditure thereof is allowable as a deduction under the general deduction formula and any partially manufactured, improved, consumed or used goods, which are held at the tax year end. It was common cause that the consumable parts in question were not acquired for resale by the appellant but were to be used in the manufacture, production or improvement of other property of any description that were intimately related to the manufacture and transportation of cement and allied products. Notwithstanding the use of the conjunctive “and” in the definition of trading stock, it seems to me that each paragraph under that definition is disjunctive. To construe it as conjunctive would negate the efficacy of the definition.

In my view, the definition of trading stock makes the consumable spare parts closing stock, which would not be deductible under the general deduction formula. The disallowance by the Commissioner was therefore proper.

Was the cost of the removal of quarry overburden to enable the appellant to recover and utilize limestone to manufacture cement revenue expenditure or capital expenditure?

It was common cause that the appellant was the owner of the quarry mine from which limestone was extracted. It produced inspection certificates, certificates of registration,

³ CORBETT JA quotes with approval the words of OGIVIE THOMPSON JA in *Commissioner for Inland Revenue v Allied Building Society* 1963 (4) SA 1 (A) at 14D “It is not, in my opinion, material whether all the money borrowed is in fact lent out again by the Society. For the Court is not concerned with whether a particular item of expenditure produced any part of the income, but whether that item of expenditure was incurred for the purpose of earning income. (see *Rand Speculation and Finance Co Ltd v CIR* 1953 (1) SA 348 (A).”

appointments of a mine manager and approvals to use explosives in its name, which established that though it was not in the business of mining, it conducted mining operations on its limestone claims. It was common cause that it removed overburden, the technical term for the soil, rocks and everything else overlaying the limestone embedded in the belly of the earth. The whole purpose of removing the overburden was to reach the limestone, the main raw material utilized in the production of cement and its allied products. The real question raised in the first sub-issue is whether the expenses incurred in the removal of overburden were of a capital or revenue nature.

I answered this very question in *SZ (Pvt) Ltd v Zimbabwe Revenue Authority* HH 142/2020 at p 12 where I held that the removal of overburden was an activity of a capital nature. I equated the removal of overburden to shaft sinking, which is treated in para 1 (1) (a) (ii) of the Fifth Schedule to the Income Tax Act as an activity of a capital nature. I further found, like in the present case, that while amortisation of the expense done by the appellant constituted a practical business and sound accounting principle derived from IFRSs, it amounted to an explicit concession by the appellant that quarry stripping was of a capital nature. I hold that in the present case, the costs of removing the overburden were expensed in creating the limestone mine or acquiring the limestone, which would become the source of profit and not in working the limestone *qua* source of profit. This finding accords with the sentiments of MELAMET J in *ITC 1594 (1995) 57 SATC 259 at 267* that:

“The Act does not contain a definition of what is expenditure of a capital nature and in the nature of things it is not possible to lay down a precise definition that will be of universal application. It is a matter which can only be decided on the facts of each particular case. The question has been considered in various cases and there are a variety of tests whether or not a particular receipt or expenditure is of a revenue nature or a capital nature. These are mere guidelines and there is no single infallible test of invariable application. Whatever guideline is chosen it should not result in a classification contrary to sound commercial and good sense. A guideline which has been applied consistently in relation to the categorisation of expenditure is summarised as follows:

“There is a great difference between money spent in creating or acquiring a source of profit and money spent working it. The one is capital expenditure the other is not.”

The case of *Blue Circle Cement Ltd v Commissioner for Inland Revenue* 1984 (2) SA 764 (A), cited by Mr *de Bourbon* in a bid to persuade me to treat the removal of overburden as expenditure of a revenue nature, is distinguishable to the present case on both the facts and the issue under consideration. That case concerned the construction of a 41km railway line to carry crushed limestone from the mine to the manufacturing plant and not the removal of overburden. The issue was whether the appellant was entitled to a machinery initial allowance in terms of s

12 (1) and a machinery investment allowance in terms of s 12 (2) of the South African Income Tax Act No. 58 of 1962 for the construction of that railway line. The answer was dependent on whether such a construction and use of the railway line fell within the ambit of a plant, as defined, in circumstances where the Commissioner conceded that the process of manufacturing commenced at the quarry, at a stage prior to loading the crushed limestone onto the railway wagons. In any event, CORBETT JA recognised by reference to the English cases that the claimed allowances were capital allowances.

Was such an expense in any event incurred in respect of mining operations and thus deductible in terms of the Fifth Schedule to the Income Tax Act?

The appellant made the alternative contention that the cost of removing the overburden was an allowable deduction in terms of s 15 (2) (f) (ii) of the Income Tax Act. The respondent contended that the deduction of quarry overburden costs were precluded by the provisions of s 15 (2) (f) (i), as the appellant did not derive income from mining activities but from the proceeds from the sale of cement.

In his oral submissions, Mr *de Bourbon* correctly conceded that the appellant did not derive any income from mining activities notwithstanding the averment in para 26 of his written submissions, that “a small quantity of the overburden was sold as aggregates and the income from those sales included in the declared income of the appellant”. It is correct that aggregates, consisting of ¾ stones, 6mm stones, crusher run and washed sand, were sold and included in the income declared by the appellant in its initial tax computations in each of the tax years under consideration⁴. This ground was not raised in the objection and could not properly be raised for the first time in the notice of appeal without the consent of the respondent or leave of the Court, both of which were never sought by the appellant. I agree that the appellant could not claim the deductions under s 15 (2) (f) (i) of the Income Tax Act.

Section 15 (2) (f) (ii) states:

“(2) (f) The deductions allowed shall be—

- (ii) where the taxpayer is a miner, any expenditure (other than expenditure in respect of which a deduction is allowable in terms of paragraph (a)), which is proved to the satisfaction of the Commissioner to have been incurred during the year of assessment by the taxpayer on surveys, boreholes, trenches, pits and other prospecting and exploratory works undertaken for the purpose of acquiring rights to mine minerals in Zimbabwe or incurred on a mining location in Zimbabwe, together with any other expenditure (other than expenditure referred to in paragraph (a) of the definition of “capital

⁴ P119-130 of the r 11 documents

expenditure” in paragraph 1 of the Fifth Schedule) which, in the opinion of the Commissioner, is incidental thereto:

Provided that the taxpayer may elect (which election shall be binding) that the expenditure be—

- (a) allowed in the year of assessment in which it is incurred; or
- (b) carried forward and allowed against income from mining operations in any subsequent year of assessment.

For the purposes of this subparagraph—

“miner” means any person who at the time the expenditure was incurred was—

- (a) the owner, tributor or option holder of a mining location; or (underlining my own for emphasis)

The requisite elements prescribed in s 15 (2) (f) (ii) are:

- a. The taxpayer must be a miner;
- b. The expenditure must be any expenditure, excluding expenditure deductible under the general deduction formula, proved to the satisfaction of the Commissioner to have been incurred:
 - (i) in the year of assessment on surveys, boreholes, trenches, pits and other prospecting and exploratory work undertaken to acquire rights to minerals; or
 - (ii) on a mining location in Zimbabwe, together with any other expenditure, excluding capital expenditure as defined in para 1 of the Fifth Schedule, which in the opinion of the Commissioner is incidental thereto;
- c. the miner makes a binding election to:
 - (i) claim the whole amount in the year in which it was incurred; or
 - (ii) carry it forward and claim it against income from mining operations in any subsequent tax year.”

Both Mr *de Bourbon* and Mr *Bhebhe* were in agreement that the three requisites were conjunctive and not disjunctive. This, therefore, means the appellant can only benefit from the provisions of s 15 (2) (f) (ii) if it is able to establish each requirement on a balance of probabilities.

It was common cause that the appellant was a miner. This is apparent from the definition of miner provided in the sub-para under consideration. In any event, limestone is specifically identified and defined as a mineral in section 2 of the Income Tax Act. See *SZ (Pvt) Ltd, supra*, at p 5. The appellant meets the first requisite element.

It was also common cause that the appellant amortised US\$3 782 791 in the 2013 tax year, which was disallowed. I have already held that the appellant could not claim the deduction under the general deduction formula. It was common cause that the expenditure claimed did not relate to prospecting and exploratory work undertaken to acquire the right to mine the limestone. The mining rights to the claims had been acquired more than 20 years before the tax

years in question. The appellant did not, therefore, establish the requirement prescribed in (b) (i) of my formulation.

Mr *de Bourbon* contended that the claimed deduction had been proved to the satisfaction of the Commissioner to have been incurred on a mining location in Zimbabwe. He submitted that the deduction was properly claimed under (b) (ii), above. Mr *Bhebhe* conceded that the expenditure had been incurred on a mining location in Zimbabwe but argued that the appellant had failed to establish that the expenditure did not fall into the excluded category of “capital expenditure” as defined in paragraph 1 (1) (a) of the Fifth Schedule to the Income Tax Act.

In terms of s 2 of the Income Tax Act, a mining location is defined as:

“mining location” means a mining location registered as such in terms of the Mines and Minerals Act [*Chapter 21:05*];

And s 5 of the Mines and Minerals Act defines it as follows:

““mining location” means a defined area of ground in respect to which mining rights, or rights in connection with mining, have been acquired under this Act or which were acquired under any previous law relating to mines and minerals and which were held immediately before the 1st November, 1961;”

The limestone “quarry” owned by the appellant meets the Income Tax Act definition of a mining location. The conduct of the appellant fell into the first part of (b) (ii) of my formulation. However, the appellant can only succeed in claiming the deduction if it further establishes that the provisions set out in the second portion of b (ii), in my above stated formulation, did not apply to it.

Para 1 (1) (a) of the Fifth Schedule to the Income Tax Act defines capital expenditure in the following manner:

“1. (1) In this Schedule—capital expenditure” means—
(a) expenditure, in relation to mining operations (other than expenditure in respect of which a deduction is allowable in terms of subparagraph (ii) of paragraph (f) of subsection (2) of section *fifteen*)—
(i) on buildings, works or equipment,.....
(ii) on shaft sinking;
(iii) incurred prior to the commencement of production or during any period of non-production on preliminary surveys, bore-holes, development, general administration and management, including any interest payable on loans utilized for mining purposes;”

Capital expenditure as defined in the above subparagraph encompasses the costs incurred in mining operations before the commencement of production or during any period of non-production, *inter alia*, of development. It also covers the cost of works and shaft sinking

in relation to mining operations. Mr *Bhebhe* pinned his colours to the mast of sub-para (iii) of para 1 (1) (a) of the Fifth Schedule for the contention that the removal of overburden constituted a period before the commencement of production. One of the many permutations of production enumerated in the *Shorter Oxford Dictionary* is to “bring a thing into existence from its raw materials or elements.” The same dictionary defines development as “bringing forth a latent or elementary condition”. These two definitions aptly describe the process of removing overburden in relation to the mining of limestone. The removal of overburden is done to expose the limestone in order to bring it out in its natural state. Again, the removal of overburden constitutes “works” defined in the same dictionary as “something that is or was done, actions involving effort”. A reading of the “Geomining Quarry Block Modelling, Reserve Calculation and Mining Plan⁵”, produced into evidence by the appellant, leaves no doubt in my mind that the removal of overburden constituted the type of works or development envisaged in the definition of capital expenditure in para 1 (1) (a) of the Fifth Schedule. I have already equated it to shaft sinking; the expenses of which are precluded from deduction. I, therefore, agree with Mr *Bhebhe* that, the expenses incurred in the removal of overburden fall into the category of costs that a taxpayer is precluded from deducting by the second portion of b (ii) of my formulation.

Accordingly, the Commissioner correctly disallowed the deduction of the amortised quarry development costs of US\$ 3 782 791 claimed by the appellant in the 2013 tax year.

Was appellant entitled to a capital allowance in respect of the costs of computer software?

The appellant claimed special capital allowances in respect of the costs of computer software incurred in the 2011, 2012 and 2013 tax years in the sum of US\$10 000, US\$ 20 090 and US\$ 6 372, respectively. The appellant relied on my decision in *D Bank Ltd v Zimbabwe Revenue Authority* 2015 (1) ZLR 176, where I held that the taxpayer was entitled to the deduction of special initial allowance on computer software. The Commissioner took the decision on appeal in *Zimbabwe Revenue Authority v Stanbic Bank Zimbabwe Ltd* SC 13/2019, where he successfully argued that para 2 (c) of the Fourth Schedule to the Income Tax Act, as worded before the amendment brought about by s 13 the Finance Act (No. 3) of 2014, which took effect on 1 January 2015, precluded any claims for special initial allowances on computer software.

⁵ P7-28 of exhibit 1 and p 5-28 of exhibit 2

I, therefore, hold that the appellant improperly claimed for the deductions of the special initial allowances in each of the 3 years in question.

Whether or not it was appropriate in the circumstances of this matter for the respondent to impose a penalty at all and if so the quantum thereof?

The Commissioner imposed a penalty of 60% on the principal tax not paid by the appellant in each of the 5 years in question. I set out the principles that an appeal Court would necessarily consider in assessing an appropriate penalty in *PL Mines v Zimbabwe Revenue Authority* 2015 (1) ZLR 708. I held that the Court would have to consider the triad of the offender, the offence and the interests of society.

In the present matter, the Commissioner averred that he took into account some of the issues raised on appeal by the appellant, when he disallowed the objection on penalties. These pertained to the full disclosure and co-operation exhibited by the appellant during the investigations.

There were admitted instances of wrong deductions made by the appellant. I also found that it did so in almost all of the instances appealed against. Such deductions are deemed by s 46 (4) of the Income Tax Act to be culpable omissions for which a penalty may be imposed. Section 46 (6) of the same Act prescribes the measure of penalties that may be imposed. These range from the maximum dollar for dollar penalty to a complete waiver of penalty. The amount of penalty for an omission depends on whether the taxpayer intended to evade tax. If it did, then the maximum penalty becomes mandatory. If it did not so intend, then the Commissioner and on appeal the Court, has complete and unfettered discretion to impose an appropriate penalty.

In this appeal, the appellant raised the same personal circumstances that it raised on objection, which the Commissioner took into account in imposing the 60% penalty. In regards to the offences, the appellant did not address how the Court should treat those grounds of appeal it did not object to and those which it did but abandoned on appeal for which the same penalty appealed against was imposed.

The capital allowances claimed on the installation of in the XRF Panalytical machine were in the equal amount of US\$ 13 441.71 in the 2009 and 2010 tax years. The failure to retain appropriate invoices justifying the claim raised the moral turpitude of the appellant. The same applied to the abandoned write-off of obsolete spare parts. The appellant sought to deduct the amount, which had already been accounted for in its income statement. The amounts disallowed in respect of employee benefits were in the sum of US\$355 558 for 2009, US\$ 449

414 for 2010, US\$ 715 352 for 2011, US\$ 547 350 for 2012 and US\$ 762 501 for 2013. The appellant did not disclose the basis for its capitulation in regards to employee benefits. These amounts were relatively high. There is an obvious need to personally deter the appellant from attempting to deprive the fiscus of tax that was properly due to it.

The amounts involved in the franchise claims and consumable spare parts were extremely high while those relating to costs of computer software deductions were low. The cost of software deductions were made long before the *D Bank* judgment was delivered. I regard the reliance placed by the appellant on that judgment at the objection stage as opportunistic. It was apparent from a reading of that judgment that the award of the special initial allowance was not based on the interpretation of the relevant provisions of the Fourth Schedule to the Income Tax Act. I do not consider the opportunistic reliance on an unexplained order lessens the moral blameworthiness of the appellant. The appellant exhibited serious lapses of judgment which call for both personal and general deterrence.

In the exercise of my own discretion I would impose the same penalty as the Commissioner in the present matter. Accordingly, the 60% penalty imposed by the Commissioner stands.

Costs

I do not find the claims of the Commissioner to be unreasonable nor the grounds of appeal therefrom frivolous. I will, therefore, make no adverse order for costs against either party.

The appellant prayed for s 15 (2) (aa) costs. These are costs incurred by the taxpayer in connection with a s 65 of the Income Tax appeal, which have to be taxed by the registrar of the High Court, that are allowed as a deduction by order of this Court in those circumstances where the appeal has been allowed in full or to a substantial degree. The appellant did not achieve anything approximating to substantial success in this appeal. I cannot, therefore make the s 15 (2) (aa) order sought by the appellant.

Disposition

Accordingly, it is ordered that:

1. The manual notices of assessment for income tax numbers 6458 for the 2009 tax year, 6459 for the 2010 tax year, 6460 for the 2011 tax year, 6461 for the 2012 tax year and 6498 for the 2013 tax year issued by the Commissioner to the appellant on 22 March 2016 be and are hereby set aside.

2. The Commissioner shall issue further amended assessments for the 2009 to 2013 tax years, in accordance with this judgment, which:
 - a. Allow the deduction of master branding fees in the sum of US\$ 212 356.13 in the 2009 tax year, US\$312 636 in the 2010 tax year and US\$ 370 913.85 in the 2011 tax year.
 - b. Disallow the deduction of US\$ 863 252.70 in the 2012 tax year and US\$1 140 000 in the 2013 tax year.
 - c. Disallow the deduction of the amounts relating to consumable spare parts in the respective years in which the amounts were incurred.
 - d. Disallow the deduction of the amortised quarry development cost in the sum of US\$ 3 782 791 in the 2013 tax year.
 - e. Impose a penalty of 60% on the unpaid principal income tax chargeable in each tax year, respectively.
3. There shall be no order as to costs.

Gill, Godlonton and Gerrans, the appellant's legal practitioners
Kantor & Immerman, the respondent's legal practitioners