AN EVALUATION OF THE IMPACT OF TAX PUBLIC NOTICES ON INDUSTRY PERFORMANCE: by Elisha Tshuma

1.0 Background

The Zimbabwe Revenue Authority (ZIMRA) and the Ministry of Finance and Economic Development (MOFED) have always issued public notices. The public notices sought to give guidelines, instructions and directives on payment of taxes and filing of returns. A number of questions have been raised concerning the legal status of ZIMRA and MOFED public notices, in terms of them being legally binding or enforceable. Industry has also raised issues with regards to unintentionally misleading directives or instructions by the authorities. This paper therefore seeks to evaluate the effectiveness of public notices and/or press statements as a means of communication on the performance of the industry. It further cites specific public notices and evaluates whether taxpayers have any recourse in the event that they have complied with the instructions or directives but realise that their understanding of the instructions is different from what the Authorities seek to communicate.

2.0 Examples of unintentionally misleading public notices.

2.1 Zimra public notice: withholding tax on cotton farmers

Source:[1]

[1] https://www.google.com/search?q=images+of+cotton+plant&rlz=1C1RFPM_enZW914ZW914&sxsrf=ALeKk031lci97jC5lfS7vX4kJe1MNwKHCQ:1601353407397

In 2010 ZIMRA issued a public notice which obliged taxpayers to deduct 10% from sums payable to payees who did not have tax clearance certificates and that sums had to be remitted to ZIMRA. The notice explicitly stated:

"Exceptions to the requirement to withhold 10% include the following transactions:

1. *Amounts paid in terms of employment contracts.*
2. *Sales effected in any shop in the ordinary course of the business of the shop and any other consumer for the sale or supply of goods or services or both in which the seller or supplier is dealing in the course of business and the purchaser or user is not. This caters for sales by retailers or wholesalers to consumers.*
3. *Payments for the supply of farm produce and livestock to farmers are also exempt from the need for the amount to be withheld. There is therefore no need to ask for the tax clearances in such cases. Payments for farm produce to persons who buy for resale such as traders, retailers and wholesalers are still subject to the withholding amount requirements."*

Some if not all, cotton buyers did not deduct the 10% from farmers based on the ZIMRA public notice. In 2019, ZIMRA audited some of the cotton buying companies and demanded the 10% Withholding Tax (WT) which ought to have been deducted from payments made to cotton farmers who did not have tax clearance certificates.

The companies argued that they relied on the ZIMRA public notice and did not deduct the 10% tax. Their position was that ZIMRA was bound by its notice and cannot retrospectively seek to levy the withholding tax. They further argued that as companies, they were acting as agents on behalf of ZIMRA to collect the 10% WT and ZIMRA as the principal had issued a public notice not to collect the 10% WT. In other words, the public notice disempowered them as agents from collecting the 10% WT. On the other hand, ZIMRA did not deny issuing the public notice but stated that the notice was not binding on the Authority.

2.2. MOFED press statement: VAT on rice.

Source[2]

[2]https://www.alamy.com/stock-photo-shelves-stocked-with-rice-costa-rica-rice-is-a-daily-staple-in-the-48277048.html?pv=1&stamp=2&imageid=FCB5E95F-F62

When Zimbabwe introduced value added tax (VAT) in 2004, rice attracted VAT at a standard of 15%. In 2008, rice was zero rated through Statutory Instrument (SI) 110 of 2008. In 2016, rice was placed under exemption list through Statutory Instrument 9 of 2016. SI 20 of 2017 re-introduced VAT on rice at standard rate. There was a public outcry. SI 20 of 2017 was law for a period between 1 February 2017 and 15 February 2017. SI 26A of 2017 repealed SI 20 of 2017. "On Thursday 16th February 2017, and with immediate effect on and from that date, the Minister of Finance and Economic Development by statutory instrument 26A/2017:

1. Repealed the much-criticised SI 20/2017 [which had re-introduced 15% VAT on beef, chicken, fish, rice, potatoes, margarine and mahewu, causing a public outcry]
2. Made related changes to the lists of goods exempt from VAT [First schedule to the main VAT regulations and the lists of goods that are zero rated for VAT purposes [second schedule to the main regulations].

On the same day, the MOFED published a press statement summarising the effect of the new SI 26A as follows:

"With effect from Thursday 16th February 2017, traders should no longer charge VAT on the following items: beef, chicken, fish, rice, potatoes, margarine, mahewu.

Consumers should not be made to pay VAT on beef, chicken, fish, rice, potatoes, margarine and mahewu, effective from Thursday 16th"[3]

The press statement expressed that the traders were not supposed to charge VAT on rice and consumers should not be made to pay VAT on rice. The press statement was perceived by readers to mean that no VAT was levied on rice. The traders did not collect VAT as instructed in the press statement. However, SI 26A of 2017 kept rice classified under tariff headings 10061020 (Rice in the husk [paddy or rough] prepacked in immediate packing of less than 25kg for retail sale), 10062010 (husked [brown] rice in bulk, in immediate packing of 25kg or more), 10062020 (husked rice [brown] pre-packed in immediate packings of less than 25kg for retail sale) and 10063020 (semi-milled or wholly milled rice, whether or not polished or glazed, prepacked in immediate packings of less than 25kg for retail sale) attracting VAT at standard rate of 15% and now 14.5%. The press statement summarising the implication of SI 26A of 2017 did not mention that there was still rice attracting VAT.

ZIMRA demanded the VAT that was not collected. The industry approached MOFED highlighting the challenges they have in raising funds to settle the VAT debt being created. The Ministry rejected the appeal and instructed industry to approach ZIMRA for a payment plan. The Ministry wrote *"You will, however, appreciate that the reclassification of rice in packages of 25kg or less, had a public policy objective. More specifically, the measure was aimed at supporting the local packaging industry through promoting repackaging of cheaper bulk rice into smaller units."* Nonetheless, the Ministry of Industry, Commerce and Enterprise Development placed packaging materials and plastic polymers under Open General Import License (OGIL) through Statutory Instrument 237A of 2018. This meant that importation of packaging material and polymers no longer needed an import licence. The MOFED argues that levying VAT on certain packages of rice would promote local packaging industry while the Ministry responsible for industry is facilitating importation of packaging material by removing the need for an import license. This made the argument by the MOFED unconvincing.

[3] Veritas bill watch 5/2017

The MOFED further argued *"that legislation to give effect to the measure was promulgated timely and taxpayers had an opportunity to seek clarity or raise concerns over any omissions with Treasury."* We believe that the Ministry`s press statement was misleading to everyone including the tax authority (ZIMRA). This explains why it has taken ZIMRA three years to follow-up on the issue. Importers have also advised that even the ZIMRA ASYCUDA was not configured to charge VAT on rice at the time of importation. If this is correct then ZIMRA will need to follow all importers and collect VAT which ought to have been collected. This seems unfair to our ailing industry and commerce and will put the price of rice beyond the reach of many citizens.

3.0 Points of law

ZIMRA and MOFED public notices and/or press statements have no binding or legal effect on anyone. A taxpayer cannot rely on them in any proceedings before the Commissioner General (CG) or courts of law and succeed. Neither can Zimra likewise rely on them. They fall outside the definition of an advance tax ruling as defined in the Revenue Authority Act. It follows that, in the event that a taxpayer uses the guidance of the ZIMRA or MOFED public notice which is misleading, and as a result understates his taxes which in turn results in assessment of additional tax and/or penalties from ZIMRA, a taxpayer will not succeed in arguing his case on the strength of the public notice issued by the ZIMRA or MOFED. A public notice does not bind the Commissioner and neither does it bind a taxpayer. In addition, in the event that any public notice or press statement happens to be at variance with the law, it will be invalid and a taxpayer can still not use it as a defence and succeed in any proceedings before the courts. The reasons for these conclusions are as follows:

Paragraph 4(6) of the 4th Schedule to the Revenue Authority Act reads: "*A publication or other written statement issued by the Commissioner- General does not have any binding effect unless it is an advance tax ruling*." Now a look at ZIMRA public notices shows that they are issued as such – Public Notices. They therefore constitute "publications" or "statements" issued by the CG which do not have any binding effect.

Section 34D as read with the Fourth Schedule of the Revenue Authority Act [Chapter 23:11] provides for Advance Tax Rulings. The schedule defines "advance tax ruling" as "a written statement in the form of a binding general ruling, binding private ruling and binding class ruling issued by the Commissioner-General regarding the interpretation or application of the relevant Act".

In turn, a Binding General Ruling (BGR) - means an advance tax ruling issued in accordance with the requirements of the relevant Act and affects all taxpayers. ZIMRA can issue such ruling at any time and at its discretion. However, the case is different with binding private ruling (BPR) and binding class rulings (BCR). A binding private ruling is an advance tax ruling issued in response to an application by a taxpayer regarding the application or interpretation of the relevant Act in respect of a proposed transaction as it affects the applicant alone.

A binding class ruling is issued in response to an application by a taxpayer regarding the application or interpretation of the relevant Act as it affects a specific class of persons or taxpayers. So, for ZIMRA to issue a binding private ruling and binding class ruling, there must have been an application by a person. These two classes of advance tax rulings will be addressed to the person(s) who would have made the application. The effect of advance tax rulings (ATRs) is that a Binding General Ruling may be cited by ZIMRA or any person in any proceedings before the Commissioner or the courts, while a Binding Private Ruling or a Binding Class Ruling can only be cited by the person whom the ruling was issued or by a person belonging to a class of (affected) persons to whom the ruling was issued. Any other person cannot cite it before the CG or the courts and neither can the CG do the

same. ZIMRA is compelled to interpret or apply the relevant Act in favour of the applicant or otherwise in accordance with the advance tax ruling given. ATRs are applied for in a form prescribed by the Commissioner – ATR 1 (ADVANCE TAX RULINGS APPLICATION FORM) and the taxpayer is required to provide a number of issues amongst them a detailed description of the contemplated transaction. Likewise, an ATR being issued by the CG will be clearly specified by its type, whether BGR, BPR, BCR or non-binding private opinion.[4]

In practice, if it is confirmed that a taxpayer acted on the strength of a Public Notice by ZIMRA which was not amended or withdrawn, the Commissioner has been waiving the penalties arising from assessments raised as a result of application of the Public Notice. There can be no legitimate expectation arising out of an error of law to the effect that a tax which is due to treasury should not be collected. This position is reinforced in D Bank Limited v ZIMRA HH135/15 in which the court held that: "…. an opinion wrong at law cannot establish a practice."

In Commissioner of Taxes v Astra Holdings (Private) Limited t/a Puzey & Payne SC131/2002, the court stated the following: "In my view such an arrangement would be null and void ab initio. It is a bargain the Commissioner could not make at law because it would have the effect of being in breach of his statutory duty to collect tax which is due to revenue. It is one thing for the revenue authority to enter into an arrangement with a taxpayer on how, in the exercise of its managerial powers, it will collect tax, but is another for it to seek to decide that a particular tax imposed by Parliament is not due from a taxpayer when in fact it is and in doing so disclaim the right to the tax and abandon the statutory power to collect it."(at page 15-16).

In view of the above legal provisions and earlier court pronouncements, we are of the view that both the cotton buyers and rice packaging industry have little prospects of succeeding in legal processes. They will need to seek another avenue to legally mitigate their tax burden. What can be that alternative? Is there a precedence?

4.0 Precedence.

There are so many reasons to sympathise with the industry. They were misled into non-compliance by institutions that they should rely on for proper guidance. The first step is for both ZIMRA and the MOFED to admit that they had a part to play in the mess that the affected taxpayers find themselves in. They should then look at a bigger picture. The affected taxpayers were agents who were supposed to collect these taxes on behalf of treasury. They did not collect the tax because of the misleading public notices issued by the authorities. The taxpayers now have to pay these taxes from their own coffers or they need to borrow to pay these taxes. What will be the effect of this on the affected taxpayers? The timing of the demand is also not sensitive for companies trying to recover from the effects of the Corona Virus Disease of 2019 (Covid-19) lockdown.

A bigger picture will inform that the affected taxpayers need help more so as they prepare to trade under the Africa Continental Free Trade Area (AFCFTA). The industry needs every government institution`s support. Zimbabwean institutions should not entangle themselves if ever they dream of making an impact under AFCFTA.

Laws are made by the people for the benefit of the people. It is our view that as we prepare for the 2021 national budget, a proposal can be made to zero rate all the rice retrospectively to February 2017. Has such a thing happened before? The answer is in the affirmative. The following is a self-explanatory extract from the 2014 National budget statement.

[4]Refer to Tax Matrix monthly tax update July 2019

"VAT Zero Rating of White Sugar

1002. At the inception of VAT in 2004, Government zero rated a number of basic commodities that include bread, mealie-meal, and brown sugar, among others. White sugar was, however, excluded from the list of zero rating.

1003. Since white sugar was exempted from sales tax before the inception of VAT, manufacturers and retailers assumed that the product was also zero rated under the VAT regime.

1004. As a result, manufacturers and retailers accumulated substantial amounts of VAT to the fiscus back-dated to 2009 and, hence, may have to borrow in order to liquidate outstanding VAT.

1005. In order to avail relief to manufacturers and retailers, I propose to zero rate white sugar with effect from 1 February 2009."[5]

In our view, there are a lot of similarities between the VAT on white sugar case and the VAT on rice case. Traders' genuiningly believed that no VAT was due on any rice. This understanding came from the reasons why SI 20 of 2017 was repealed and the explanation given in the press statement. Taxpayers have now accumulated substantial amounts of VAT to the fiscus back-dated to 2017. In short term, the fiscus may benefit by forcing affected taxpayers to borrow money to pay the VAT on rice. It will help them to meet and surpass 2020 national budget. However, in the long run it may lose out as it may have killed the hen that lays the golden eggs.

5.0 Lessons learnt

The authorities should have quality control mechanisms in place to ensure that public notices do not mislead people into non-compliance, for example, ZIMRA public notices should be approved by their legal division to ensure compliance with the law if this is not already happening. Misleading public notices create unnecessary huge numbers of sinners.

When there are changes in taxation law and practice, ZIMRA should quickly educate its clients and quickly carry-out some audits to check on compliance. Waiting for more than a year to audit affected taxpayers results in huge tax bills that cannot be paid. Such a situation does not help either the fiscus or the taxpayers.

Taxpayers should confirm contents of public notices with the actual provisions of the law. If in doubt, taxpayers should apply for a binding ruling from the Commissioner.

Where ZIMRA or any relevant authority have made an error in their Public Notices, they should give the clients benefit of doubt and not penalise them for their misleading information and any remedying legislation should be issued with an effect not prejudicing clients as trade will have been concluded without any way of recovering the revenue.

[5] Refer to 2014 Zimbabwe national budget statement.

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