IN THE SUPREME COURT OF ZAMBIA **Appeal No. 24/2017**
HOLDEN AT NDOLA **SCZ/8/269/2016**

(Civil Jurisdiction)

BETWEEN:

REPUBLIC OF ZAMBIA
SUPREME COURT OF ZAMBIA
JUDICIARY
20 MAY 2020
SUPREME COURT REGISTRY
P.O. BOX 50067, LUSAKA

MOPANI COPPER MINES PLC **APPELLANT**

AND

ZAMBIA REVENUE AUTHORITY **RESPONDENT**

Coram: **Mambilima, CJ, Malila and Mutuna, JJS**
on 3rd March, 2020 and 2020

For the Appellant: Mr. R. M. Simeza with Mr. R. Mwamba of Messrs Simeza Sangwa & Associates

For the Respondent: Mr. M. Mukwasa, Director – Legal Services, Zambia Revenue Authority

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JUDGMENT

Malila, JS, delivered the Judgment of the Court.

Cases referred to:

1. *New Zealand Shipping Co. Ltd. v. Societe Des Ateliers et Chantiers de France.*
2. *Konkola Copper Mines Plc. v. Mitchell Drilling International Ltd & Mitchell Drilling (Z) Ltd.*
3. *Lord Denning in Well and Others v. Minister of Housing and Local Government & Another (1967) 2 AllER 1091.*
4. *Western Fish Products Ltd. v. Penwith District Council and Another (1981) 1 AllER 204.*
5. *Shah & Another v. Standard Chartered Bank (1998) 4 AllER 179.*
6. *Calcutta Discount Co. Ltd. v. Income Tax Officer, Companies District & Another (AIR) (1961) 382.*
7. *Mamchand & Co. v. Commissioner of Income Tax & Others (1969) AIR p. 431.*

8. *Nakkuda Ali & Mf De S. Jayaratne (1951) AC 77.*
9. *Nkata & 4 Others v. Attorney-General (1900) ZR 124.*
10. *Attorney-General v. Marcus Kapumba Achiume (1983) ZR 1.*
11. *Zambia Revenue Authority v. Dorothy Muwanza (2010) ZR 181.*
12. *Simwanza Namposhya v. Zambia State Insurance Corporation Ltd. (2010) ZR (2) 339.*
13. *Zambia Consolidated Copper Mines Investment Holdings Plc v. Woodgate Holdings Ltd. (2011) 3 ZR 110.*
14. *Attorney-General v. Kakoma.*
15. *Patrick Makumbi and 25 Others v. Greytown Breweries Limited and 3 Others (SCZ Appeal No. 032/ 2012).*
16. *Finance Bank (Zambia) Ltd and Rajan Mathan v. Simataa Simataa (Selected Judgment No. 21 of 2017).*

Legislation referred to:

1. *Income Tax Act, Chapter 323 of the Laws of Zambia*
2. *Clerk & Lindsell on Torts (17th edn, 1995 par. 16-101*
3. *Grant Thornton Eon Poyry*
4. *Mines and Minerals Development Act 2008*
5. *Indian Income Tax Act, 1961*

1.0 Introduction

1.1 The dispute in this appeal is archetypical of the problem posed to the fiscus of many developing economies by multinational corporations engaged in the extractive industry. It also in a way highlights the inadequacy of institutional capacity to deal effectively with such corporations; exposes yearning gaps in the much needed expertise to gather and interpret essential technical information for enhanced tax revenue collection from multinational corporations.

1.2 The appeal arises from the decision of the Tax Appeals Tribunal (the Tribunal) given on 8th December, 2010 whereby the Tribunal held against the appellant on a complaint raised by the latter, disputing certain tax assessments made by the respondent.

1.3 Before us the appellant has raised a total of seven grounds of appeal alleging errors and misdirections on the part of the Tribunal.

2.0 The background facts

2.1 The appellant is a public limited company, with a transnational character, engaged in large scale mining activities in Zambia. The respondent is a statutory body entrusted with the responsibility of assessing and collecting tax revenue on behalf of the Republic of Zambia.

2.2 Sometime in December 2008, in pursuance of its statutory functions and mandate, the respondent undertook an audit on the mining industry's cost levels. The exercise involved a tax audit on costs, revenues and transfer pricing practices.

2.3 The audit of the appellant company commenced in about May 2009 and was largely centred on possible transfer pricing practices between the appellant and its shareholder, Glencore International AG (GIAG). They covered the charge years 2006/07, 2007/08 and 2009/10.

2.4 Not unexpectedly, that audit raised some concerns regarding certain related party transactions between the appellant and GIAG.

2.5 The respondent questioned some of the related party transactions, and in particular raised the issue whether these transactions were indeed at arm's length, granted GIAG's shareholding in the appellant. To this end, on the 8th of February 2011, the respondent sent a letter to the appellant advising it of is concerns regarding transfer pricing issues. In response the appellant wrote to the respondent [on 1st April 2011] addressing the related party transactions concerns raised. It reiterated that the transactions between the appellant and GIAG were at arm's length and that the prices for minerals is determined by the London Metal Exchange (LME).

2.6 Notwithstanding the response from the appellant, the respondent issued and served on the appellant its assessment on 4th May, 2011. The Assessment was numbered 79060702 and the Mineral Royalty assessment was No. 1 (Consecutive No MR 2011/05). For the first two charge years, the appellant was assessed for the sum of ZMW 311,113,798.38 and for the years 2008/09 and 2009/10 charge years the assessment sum was ZMW 140,891,939.89.

2.7 The appellant objected to the assessment on principally two grounds: first, that the source of the respondent's data informing the assessment was erroneous as all the appellant's sales were based on the LME Copper A Grade cash settlement over a quotational period. In this regard, the appellant also provided the respondent with the LME average copper price tables; and second, that there was failure on the part of the respondent to take into account the Hedging Agreement that had been concluded between the appellant and GIAG and implemented to minimize exposure to price risks – which was a common practice in the industry.

2.8 Following a meeting held on the 2nd March 2012, between the appellant and the respondent, the appellant – allegedly on the advice of the respondent – sought an opinion from Messrs Deloitte & Touche, who were identified as an independent third party, to examine its hedging transactions and pricing to determine whether indeed the said transactions met the 'above board' standard.

2.9 Upon examining the integrity of the transfer pricing policy for copper sales and the hedging arrangements, Messrs Deloitte & Touche produced a report (the Deloitte report) based on the Organisation for Economic Cooperation and Development (OECD) principles. It indicated that not only did the appellant conduct the transactions in accordance with Chapter One of the OECD Guidelines, but it had in fact received more favourable terms from GIAG as compared to any other (unrelated) parties on the market.

2.10 Following its receipt of the Deloitte report, the respondent, which had undertaken to take into account the contents of the Deloitte report in resolving the tax assessment objections raised by the appellant, only reverted to the appellant in

September 2012. Even then, it was to inform the appellant that the respondent had decided to adjust the assessment by applying the price adjustment only on 50% of the sales volumes.

2.11 The appellant's pleas that a 100% of the sales volumes be accepted as having been at arm's length on the basis of the findings in the Deloitte report were not accepted by the respondent. The adjustment on 50% of the sales volumes meant that the penalty assessed and payable by the appellant was ZMW 112,800,760.63. Despite further orison by the appellant, the respondent remained unmoved and maintained its position.

3.0 Appeal against the decision of the respondent to the Revenue Appeals Tribunal

3.1 Convinced that the respondent's decision to adjust the appellant's price to only 50% of its sales volumes was without basis and justification, the appellant, by notice dated 16 May 2013 appealed the decision of the respondent to the Tribunal on the following three grounds, namely:

3.1.1 that the Commissioner-General erred in law and fact when he ignored the appellant's actual sales and employed his own revenue figures to determine the tax payable by the appellant;

3.1.2 that the Commissioner-General erred both in law and fact when he failed to consider the independent transfer pricing report undertaken by Deloitte & Touche when assessing the revenue due from the appellant; and

3.1.3 That the Commissioner-General misdirected himself both in law and fact when he unilaterally imposed a price adjustment of 50% on the appellant's sales volumes for the charge years 2006/07 and 2007/08.

3.2 Before the Tribunal, the parties filed written statements of case, supporting affidavits, heads of argument and lists of authorities but opted not to call any witnesses, preferring to rely solely on the documents and legal arguments as filed.

3.3 The Tribunal examined the statements and affidavit evidence before it and, as a preliminary remark in its ruling, lamented as follows:

> **We have to observe from the outset that the inability to call witnesses in a matter such as this has not helped the Tribunal. There are many contentious issues of fact that needed to be tested through cross-examination but parties decided to rely heavily on affidavits and legal arguments. For instance there has been a lot of argument on whether the appellant was requested to procure the Deloitte Report and to what extent its findings would have any effect in the transfer pricing conditions.**

3.4 Notwithstanding the tribulations it recorded, the Tribunal found that:

3.4.1 The Deloitte report was not binding on the respondent because it was not formally requested for by the respondent in a manner consistent with section 11 of the Income Tax Act chapter 323 of the laws of Zambia and further that the respondent could not be estopped from refusing to place reliance on the report for there can be no estoppel against a statute.

3.4.2 The respondent's own audit, which revealed that the appellant's sales figures to GIAG were lower compared with other third party entities, provided a sufficient basis upon which the respondent could invoke its powers under section 95 of the Income Tax Act for the charge years 2006/07 and 2007/08.

3.4.3 The hedging agreement between the appellant and GIAG was of no avail as (a) it was not produced before the Tribunal; (b) it was not demonstrated that the period of hedging was structured in terms of section 29 of the Income Tax Act, granted that it could not be open-ended; (c) Development Agreements made between the appellant and the Government of the Republic of Zambia provided for hedging and had dispute resolution provisions of their own which the appellant could have invoked, if it was so minded; and (d) the respondent was not privy to the hedging agreement and the appellant was thus entitled to

pursue its remedies from the relevant party under such hedging agreement.

3.5 For the reasons set out at paragraph 3.4, the Tribunal dismissed the appeal and ordered that the original assessments for the charge years 2006/07 and 2007/08 of ZMK 311,113,798.30 do stand. The Tribunal also found, as a fact, that there was no objection to the second tax audit assessment for the charge years 2008/09 and 2009/10 in the sum of ZMW140,891,939.89. It held that those assessments were to be settled within thirty days from the date of the Tribunal's ruling.

3.6 Almost predictably, the appellant was unhappy with the decision of the Tribunal and thus launched the present challenge.

4.0 Appeal to this Court against the decision of the Tribunal

4.1 As stated at paragraph 1.3, the appeal to this court is premised on seven grounds. These were structured as follows:

4.1.1 The Tribunal erred in law and fact when it held that the Deloitte report was not binding on the respondent as the respondent is a creature of statute.

4.1.2 The Tribunal erred both in law and fact when it held that the respondent did not request for the Deloitte report because the respondent did not issue a formal demand notice under section 11(3) of the Income Tax Act.

4.1.3 The Tribunal erred in law and fact when it held that the respondent had shown reasonable cause to invoke section 95 of the Income Tax Act for the charge years 2006/07 and 2007/08.

4.1.4 The Tribunal erred in law and fact when it dismissed the appellant's arguments relating to hedging transactions between the appellant and Glencore International AG.

4.1.5 The Tribunal erred in law and fact when it doubted the legal status of the appellant's hedging Agreement with Glencore International AG under the law in Zambia.

4.1.6 The Tribunal erred in law and fact when it ordered the appellant to pay the sum of K311,113,798.38 as tax for the charge years 2006/07 and 2007/08.

4.1.7 The Tribunal erred in law and fact when it held that the appellant did not object to the second tax audit assessment for the charge years 2008/09 and 2009/10.

4.2 Heads of argument were filed by counsel for the respective parties. At the hearing of the appeal, both parties relied on those arguments which they briefly supplemented orally.

5.0 The appellant's case on appeal

5.1 In the heads of argument filed on behalf of the appellant, grounds one and two were argued together and so were grounds four and five. The reminder of the grounds were argued individually.

5.2 As regards grounds one and two, counsel for the appellant disagreed with the holding by the Tribunal that the Deloitte report was not binding on the respondent as the latter is a creature of statute and that in any case the respondent had denied ever making a formal request for the report to be prepared. Further, that if the respondent had desired to request for the report, it would have issued a formal demand under section 11(3) of the Income Tax Act.

5.3 Quoting section 11 of the Income Tax Act, counsel contended that what that section does is to grant the Commissioner-General authority to issue forms prescribed by him for the administration of the Act. Subsection (2) of section 11

provides that any officer authorized by the Commissioner-General may sign such notice, form or demand. Section 11 does not, according to counsel, require communication from the Commissioner-General to tax payers to be in the form of a notice or demand as was held by the Tribunal. This being the case, it was entirely within the power of Commissioner-General to request the appellant to provide him with an independent audit report on transfer pricing. There is, accordingly, no requirement that such request be done by demand or notice conforming with section 11 of the Income Tax Act.

5.4 Counsel also contended that in any event, even assuming that the demand for an independent audit report was required to be made through a prescribed form or demand notice, the respondent is still bound by the independent audit report submitted to it granted that it was the respondent's duty to issue such notice or demand to the appellant. Counsel posited that the respondent cannot rely on its own default to the detriment of the appellant. Section 11 of the Income Tax Act creates an obligation for the respondent and, therefore, if any formal notice was required

to be submitted, the duty to do so lay squarely with the Commissioner-General of the respondent.

5.5 To buttress the submission that the respondent cannot lawfully take advantage of a state of affairs it had purposely created, the case of **New Zealand Shipping Co. Ltd. v. Societe Des Ateliers et Chantiers de France**[1] was cited. From that case, the learned counsel quoted the following statement of Lord Findlay LC:

> **Questions of this sort have often arisen in case of provisions that a lease should be void on non-payment of rent or non-performance of covenants by the Lessee. It has always been held that the lessee could not take advantage of his own act or default to avoid a lease ... The decisions on the point are uniform and really illustrations of the very old principle laid down by Lord Coke that a man shall not be allowed to take advantage of a condition which he himself brought.**

5.6 Counsel also cited our decision in **Konkola Copper Mines Plc. v. Mitchell Drilling International Ltd & Mitchell Drilling (Z) Ltd.**[2] where we stated as follows:

> **..... it is trite that a party cannot benefit by taking advantage of the existence of a state of things he himself produced.**

5.7 With the apparent intention of dispelling the argument around estoppel as endorsed by the Tribunal in its ruling, counsel for the appellant quoted from the judgment of Lord Denning in **Well and Others v. Minister of Housing and Local Government & Another**[3] where he stated, *inter alia*, that:

> **Now I know that a public authority cannot be estopped from doing its public duty, but I do think that it can be estopped from relying on technicalities; and this is a technicality, to be sure ..... I take the law to be that a defect in procedure can be cured, and an irregularity can be waived, even by a public authority, so as to render valid that which would otherwise be invalid.**

5.8 The learned counsel also referred to the case of **Western Fish Products Ltd. v. Penwith District Council and Another**[4] before rehashing the submission that the respondent ought to be estopped from placing reliance on its own failure to issue the demand notice for the independent audit report under section 11 of the Act; that it should not be allowed to rely on technicalities in procedures which it has itself created.

5.9 Counsel impugned the holding by the Tribunal that the Deloitte report was not binding on the respondent because the respondent was a creature of statute, contending that

whatever the Tribunal meant by that finding does not negate the fact that the respondent is not above the law, nor does the statute insulate the Tribunal from honouring its obligations to tax payers.

5.10 Referring us to [p. 140 of] the record of appeal, counsel for the appellant submitted that the suggestion that an independent auditor be commissioned to audit the appellant's transactions was made by the respondent at a meeting held on the 2nd March 2012 at the back of the respondent's admission that it did not have expertise to undertake such an audit particularly as it related to the underlying hedging relationships. The independent auditor's report was submitted to the respondent which undertook to take the findings in the report into account, yet the respondent made adjustments to 50% only of the sales volumes contrary to the findings in the report.

5.11 Counsel also submitted that the chronology of the events leading to the submission of the Deloitte report and the reaction to the report by the respondent is inconsistent with any claim that the respondent was surprised with the report

or that it did not request or expect the same to be furnished to it. He concluded that, all circumstances considered, the respondent was bound by the report and should have been guided by its findings fully.

5.12 Turning to ground three, the appellant's learned counsel maintained that the Tribunal fell into error when it held that the respondent had shown reasonable cause to invoke section 95 of the Income Tax Act for the charge years 2006/07 and 2007/08. He quoted section 95 of the Income Tax Act which empowers the Commissioner-General to direct adjustments to be made as respects liability to tax where he has reasonable grounds to believe that the main purpose for which any transaction was effected was the avoidance or reduction of liability for tax for any charge year. Under subsection (3) of section 95 of the Income Tax Act, the Commissioner-General is expected to 'specify the transaction giving rise to the direction and adjustment.'

5.13 The learned counsel for the appellant made other pointed legal arguments around section 95 of the Income Tax Act. He contended, to begin with, that section 95 makes the

Commissioner-General's 'reasonable grounds to believe,' a condition precedent to the Commissioner-General's invocation of that section. In the present situation, the question is whether the Commissioner-General did hold a belief that the main purpose for the transaction was tax avoidance or reduction of tax liability. Counsel then impugned the holding by the Tribunal that merely because the appellant's sales figures to GIAG were lower compared to third party entities such as ZAMEFA and Chambishi, there was sufficient basis for the Commissioner-General to invoke section 95 of the Income Tax Act.

5.14 It was counsel's submission that the Tribunal did not address the threshold question as to whether the Commissioner-General did hold any relevant belief before considering the reasonableness for holding such a belief. Counsel submitted that the failure by the Tribunal to address its mind to the existence of a belief before looking at the reasonableness of any such belief was a misdirection.

5.15 Counsel contended that the Tribunal misapprehended the requirements of section 95 of the Act and did not give effect to it. He argued that it was a misdirection for the Tribunal to consider the difference between the prices on sales to local entities like ZAMEFA and Chambeshi and those to GIAG, which were external sales, as the basis of the reasonableness of the belief. After all the difference in sales to local entities and those to foreign ones could easily be explained by factors such as the absence of any hedging arrangements on local or domestic transactions. Some of these differences were in fact captured in the appellant's letter to the respondent dated 2nd June, 2011 [at page 174 of the record of appeal].

5.16 The learned counsel then turned to explain what amounts to reasonable grounds. In doing so, he adverted to the case of **Shah & Another v. Standard Chartered Bank**[5] where the English Court of Appeal, citing **Clerk & Lindsell on Torts (17th edn, 1995 par. 16-101**, stated that:

> **Reasonable grounds for suspicion are not to be equated with *prima facie* proof of guilt, as the former may properly be based on matters which would not be admissible in evidence. The Court of Appeal disapprove any contention that reasonable grounds for suspicion must be based on 'a good deal more' than 'mere suspicion'. The test is simply whether**

> **in all the circumstances the objective information available to the constable supports reasonable grounds for suspicion, for conjecture or surmise of guilt. A direct charge made by a third party may be sufficient to justify arrest unless there are surrounding facts to show that the charge is unreasonable.**

5.17 We were also referred to the Indian case of **Calcutta Discount Co. Ltd. v. Income Tax Officer, Companies District & Another**[6] where the Supreme Court of that country held, among other things, that the expression 'reason to believe' postulates a belief and the existence of reasons for that belief.

5.18 As regards the hedging transaction between the appellant and GIAG, it was counsel's submission that the respondent had conceded that it did not take them into consideration, and yet, these could have explained the differences in the sales returns between domestic sales and foreign sales. The learned counsel suggested that the respondent could thus not have reasonably formed the belief that the transactions were intended for the avoidance or reduction of tax liability. He maintained that the Commissioner-General had all the relevant information at his disposal and yet, in taking the decision, he failed to take all such information into account.

5.19 Counsel cited another Indian case of **Mamchand & Co. v. Commissioner of Income Tax & Others**[7] where the Supreme Court of that country, in interpreting the words 'reason to believe' in section 132 of the Indian Income Tax Act (1961), held that those words meant 'that reasons should exist' but that the court will never go into the adequacy of such reasons. In the present case, the Commissioner-General did not, according to counsel, show the existence of reasonable grounds which were known to him before he invoked the anti-avoidance provisions in section 95 of the Act. Furthermore, the Commissioner-General appears to have been reacting to civil society demands in the public media following the leaked Grant Thornton Eon Poyry audit report on alleged transfer pricing.

5.20 We were also referred to the case of **Nakkuda Ali & Mf De S. Jayaratne**[8] where, in construing the words 'reasonable cause to believe' appearing in a statute, the English Court of Appeal explained that however read, such words must be intended to serve in some sense as a condition limiting the exercise of an otherwise arbitrary power.

5.21 After quoting from the Deloitte report, the learned counsel submitted that the appellant's transactions with GIAG were at arm's length and could not be said to have been intended for avoidance or reduction of tax liability.

5.22 The Tribunal was also faulted for its finding that as the respondent's audit revealed that the appellant's sales figures to GIAG were lower than those to third party entities such as Chambeshi and ZAMEFA, there was sufficient basis upon which the respondent could invoke section 95 of the Act and institute an inquiry. Counsel submitted that section 95 is the end process after an inquiry as it empowers the Commissioner-General to make adjustments if he reasonably believe that the main purpose of the transaction was tax avoidance or tax reduction. The Tribunal, according to counsel, misapprehended the effect of section 95 and upheld the actions of the respondent, believing the respondent was setting in motion an inquiry when in fact not.

5.23 Counsel also submitted that contrary to the provisions of section 95(3) which required the Commissioner-General to specify the transaction giving rise to the direction and adjustments as respects liability for tax, he did not in the instant case so specify.

5.24 Turning to grounds four and five of the appeal, counsel for the appellant challenged the basis upon which the Tribunal impeached the legal efficacy of the hedging agreements. In respect of one of those grounds, namely that hedging agreements were provided for in Development Agreements concluded within the auspices of section 9(1) of the Income Tax Act, 1995 which has since been repealed, counsel pointed out that Development Agreements were expressly nullified by section 160 of the Mines and Minerals Act, 2008. He submitted that the hedging agreements were lawful and properly recognised under the Income Tax Act applicable at the time.

5.25 Counsel furthermore contended that since the relevant Development Agreement was not produced before the Tribunal, as the Tribunal itself lamented, it was erroneous

for the Tribunal to have made findings and drawn conclusions on the content of the Development Agreement including the conclusion that the Development Agreement had a provision for dispute resolution in the event of default.

5.26 Moving on to ground six, it was the contention of the appellant that even assuming that the appellant was liable to pay the tax assessed by the respondent, the amounts payable under the charge years 2006/07 and 2007/08 is K100 billion and not K311,113,798.38 which was ordered by the Tribunal. Counsel referred us to the letter dated 25th September, 2012 appearing [at page 77 and 284] of the record of appeal where the respondent maintained that the appellant was liable to pay K100 billion.

5.27 That position was never reversed by the respondent and the Tribunal was thus wrong to award a sum of money in excess of that demanded by the respondent. This is particularly so as there was no process by way of cross-appeal by which the Tribunal could reverse the tax amount earlier demanded by the respondent and communicated to the appellant.

5.28 Counsel for the appellant extended the reasoning he used to justify the argument captured in the preceding paragraph to the tax payable under the charge years 2008/09 and 2009/10. Here, the Tribunal held that since there was no objection to the record tax audit for the charge years 2008/09 and 2009/10, the appellant was to pay the sum of K140,891,939.89. Counsel submitted that the sum payable under those charge years is K112,800,720.63 as penalty. We were referred in this connection to the letter [at page 84] in the record of appeal. Counsel insisted that the Tribunal had no power to substitute its own figure in place of that determined by the respondent.

5.29 Counsel for the appellant having abandoned ground 7 of the appeal, prayed that the appeal be allowed on the six grounds canvassed and that in the event that the court is not persuaded by the appellant's arguments in grounds 1 to 5, the amount ordered to be paid by the Tribunal be set aside and that an order be made that the amounts payable to the respondent are those communicated by the respondent (i.e. K100 billion) for the charge years 2006/07 and 2007/08, while the sum demanded for the charge years 2008/09 and

2009/10 is K140,897,939.89 less the sums so far recovered by the respondent.

6.0 The respondent's case on appeal

6.1 In opposing the appeal, the respondent's learned counsel began by dispelling the complaint by the appellant against the Commissioner-General's decision as the appellant had presented that complaint before the Tribunal. We surmise that the purpose of rehashing the argument of the respondent made before the Tribunal was to enable us appreciate why the respondent maintained that the Tribunal was right in its decision.

6.2 He argued, in respect of ground one in the proceeding before the Tribunal that there was no error in the respondent ignoring the appellant's actual sales and in employing its own revenue figures to determine the tax payable by the appellant. Based on its audit findings, the respondent established that the GIAG transactions were different from those shown under sales to third parties who were unrelated to the appellants - such as Chambeshi and ZAMEFA.

6.3 It was also submitted by counsel for the respondent that the respondent established that the conditions subsisting between the appellant and GIAG were resulting in a reduction in the amount of income taken into account when computing the income of the appellant as confirmed by the respondent's auditors. Based on the audit findings the respondent concluded, in terms of section 97A of the Income Tax Act, that the 'actual condition' on the sales to GIAG were not in line with the expected 'arm's length' conditions as defined in that section. Consequently the prices had to be adjusted upwards in order to come up with the arm's length conditions on pricing.

6.4 The learned counsel argued that the arm's length conditions as defined in the Income Tax Act are not based on the international pricing as alleged by the appellant; rather they were conditions which would have been imposed if persons were not associated with each other.

6.5 It was also submitted on behalf of the respondent that since the adjustment for the period January 2006 to December 2007 involved the tax charge years 2006/07 and 2007/08,

its auditor concluded that one of the main purposes of the transactions that the appellant engaged in with GIAG was the reduction of tax liability, making the invocation of section 95 of the Income Tax Act appropriate. This informed the respondent to indicate to the appellant that its estimate was that income tax had been under-declared.

6.6 Counsel contended that the adjustments leading to the assessment for the charge years 2008/09 and 2009/10, to which the appellant never objected, were based on section 97A(13), (14) and (15) of the Income Tax Act. However, the provisions of section 97A(13), (14) and (15) were never used in the charge years 2006/07 and 2007/08 as those provisions had not yet become part of the law.

6.7 It was also submitted that although the reference price could be LME or Metal Bulletin average cash price, there is nothing in section 97A(14) which prevented the respondent from using other prices of independent entities such as Chambishi or ZAMEFA for the 2006/07 and 2007/08 charge years.

6.8 Turning to ground two of the appeal before the Tribunal, it was submitted that the respondent was perfectly entitled not to consider the independent transfer pricing report furnished by Deloitte when making its tax assessment respecting the appellant. No law, according to counsel, compelled the respondent to accept the Deloitte report prepared on behalf of GIAG which is both the majority, and the sole buyer of the export copper from the appellant, and the undertaker of the hedging transactions on behalf of the appellant.

6.9 Counsel alluded to other areas of potential conflict of interest. In addition to GIAG being the buyer of copper from the applicant, it was also the sole and exclusive agent for the provision of all marketing and sales agency services for all the copper metal from the project on a worldwide basis. In this sense GIAG was sole buyer, marketer and hedging agent for the appellant. In these circumstances, it would have been desirable if the appellant, and not GIAG, had appointed an independent agent to do the transfer pricing documentation.

6.10 According to counsel for the respondent, the report was written for GIAG, not the appellant, by Deloitte who were themselves possibly conflicted. In any case, according to counsel, the report contained inconsistencies, for example on the limit of the hedged position. Those inconsistencies led the respondent to conclude that the report protected the position as perceived from the appellant's perspective.

6.11 Counsel further submitted that the sales adjustment reduction by 50% was done in the spirit of 'give and take' and was in no way an acceptance by the respondent of the Deloitte report. Granted that the respondent properly advised the appellant in writing by letter of 25th September 2012, the latter knew the spirit in which the waiver was given. Furthermore, the respondent reserved the right to reinstate the application of the price adjustments on the 100% of sales and would be reassessing by using revised assessments for previously waived penalties amounting to K211,065,746.45.

6.12 In regard to ground three of the appeal before the Tribunal, counsel for the respondent submitted that there was no misdirection on the part of the Commissioner-General when he imposed a price adjustment of 50% on the appellant's sales volumes for the specified charge years.

6.13 Counsel also submitted that the assessment was not done unilaterally given that the appellant was allowed to object to the 2006/07 and 2007/08 assessments. This was followed by meetings and at appropriate instances, a revision of the assessments, where necessary, were effected by way of taking the appellant's concern into account. Counsel also referred to a letter dated 19th September 2011 written by the appellant to the respondent offering a one-off settlement of K100 billion. That proposal, according to counsel, was accepted by the respondent, resulting into a waiver of the penalty in the sum of K211,065,746.45.

6.14 The learned counsel for the respondent also submitted that as early as 18th March 2011 the appellant was made aware of the audit findings on 'pricing of metals'. It should have been clear that the basis of the price adjustment was the

difference between sales to a related party GIAG and independent ones like ZAMEFA and Chambeshi. Based on the audit findings, the respondent concluded that pursuant to section 97A of the Income Tax Act, the 'actual conditions' on the sale to GIAG were not in line with the expected 'arm's length conditions' as defined.

6.15 Turning to the grounds of appeal before us, the first point made by counsel for the respondent was that all the grounds of appeal in fact assailed findings of fact and should thus not be entertained. The learned counsel cited as authority for that submission the decision of the Court of Appeal, predecessor to this court, in **Nkata & 4 Others v. Attorney-General**[9] and our decisions in **Attorney-General v. Marcus Kapumba Achiume**[10], **Zambia Revenue Authority v. Dorothy Mwanza**[11] and **Simwanza Namposhya v. Zambia State Insurance Corporation Ltd.**[12]. We were urged, on the basis of these authorities, not to entertain the appeal as the findings of the Tribunal were neither perverse nor made in the absence of proper evidence.

6.16 Notwithstanding the overarching submission made as recapped at paragraph 6.15, counsel proceeded to respond to the distinct grounds of appeal starting with a joint response to grounds one and two of the appeal.

6.17 With respect to the first two grounds of appeal, counsel submitted that the two grounds emanated from ground two of the appeal filed in the Tribunal. He reproduced portions of the Tribunal's holding and reiterated the submission in respect of that ground as made before the Tribunal. Additionally, it was submitted that the appellant had not adduced any evidence that the respondent had requested for the Deloitte report and thus the submission by counsel for the appellant in their heads of argument were unsupported.

6.18 Citing the case of **Zambia Consolidated Copper Mines Investment Holdings Plc. v. Woodgate Holdings Ltd.**[13] as authority, counsel submitted that it is incumbent upon a plaintiff who makes allegations to prove them. In the present case the appellants allege that the respondent requested for the report in question. It was thus incumbent on the appellant to prove that allegation.

6.19 The learned counsel for the respondent dispelled the submission made on behalf of the appellant that the respondent's Commissioner-General did not express surprise that the appellant has furnished the respondent with the Deloitte report because the latter was expecting it. According to counsel, correspondence in the record of appeal shows that there was a series of correspondence exchanged between the parties relating to the issue signifying a considerable amount of engagement between them. A further form of communication in the form of a report could hardly surprise the Commissioner-General

6.20 Counsel submitted that the 50% adjustment on sales was done in the 'spirit of give and take' that had developed between the appellant and the respondent and the appellant had agreed to pay the K100 billion penalty. The respondent was neither bound to implement the report nor was it precluded from considering it wholly or partially.

6.21 According to the respondent's learned counsel, ground three of the appeal stems from ground one of the appeal to the Tribunal. It impeaches the Commissioner-general's

decision on what the appellant was to pay, stating that in so doing the Commissioner-General had ignored the appellant's actual figures. Counsel reiterated that submission made before the Tribunal that the Commissioner-General acted within the provisions of the Income Tax Act when he determined that the conditions imposed on the transaction between GIAG and the appellant led to as reduction in tax liability and thus the adjustments on prices ought to be upheld.

6.22 It was further submitted on behalf of the respondent that the adjustments leading to the assessments for the charge years 2008/09 and 2009/10, to which the appellant never objected, were based on section 97A(13)(14) and (15) of the Income Tax Act – which provisions were not used in the charge years 2006/07 and 2007/08 since they were not part of the law at that time. Furthermore, that although reference for pricing could be made from the monthly LME or Metal Bulletin average cash prices, under section 97A(14) nothing prevented the respondent from using other prices applied to independent entities like Chambeshi and ZAMEFA for the 2006/07 and 2007/08 charge years. This

was because the law allowing for reference to monthly LME or Metal Bulletin average cash prices was only introduced in the charge year 2008/09 following the Income Tax (Amendment) Act No. 1 of 2008.

6.23 Counsel additionally submitted that the respondent's belief, which informed its action, was based on information uncovered during the audit on the applicant; that the respondent had all the information it required to reach a fully informed decision in invoking section 95 of the Act. Those reasons were communicated to the appellant before it lodged its appeal to the Tribunal. Those reasons were furthermore neither irrelevant nor extraneous. The appellant adduced no evidence whatsoever that the respondent was reacting to civil society demands.

6.24 Concerning the Deloitte report, counsel submitted that the report was clearly prepared for GIAG and not the appellant. GIAG was the majority buyer of the export copper from the appellant; was the undertaker of the hedging transaction for the appellant; and was the sole and exclusive agent for the provision of all marketing and sales agency services on a

worldwide basis. All this was in addition to having a controlling interest of 73.1% shareholding in the appellant.

6.25 Turning to grounds four and five of the appeal, which the respondent surmised stemmed from the holding of the Tribunal in respect of ground one and three of the appeal filed by the appellant before the Tribunal, counsel reiterated the point that the onus of proof rests on he who alleges. In this case it was incumbent upon the appellant to prove that the sales figures were based on hedged transactions on the off-take agreement between the appellant and GIAG. As it turned out, the appellant did not produce any specific hedging agreement although they sought to rely on it. Secondly, the appellant did not demonstrate that the period for which the hedging was structured complied with the law as, in terms of section 29 of the Income Tax Act, it could never be open–ended.

6.26 The respondent's counsel submitted that in addition to failing to produce the hedging agreement, the appellant also failed to produce before the Tribunal the Development Agreement. That failure properly reacted against the

appellant. For this submission counsel relied on our decision in the case of **Konkola Copper Mines Plc. v. Michelle Drilling International Ltd. & Mitchell Drilling (Z) Ltd.**[2]

6.27 Moving to ground six of the appeal, counsel submitted that the Tribunal cannot be faulted for ordering the appellant to pay the sum of K311,113,798.38 as tax for the charge years 2006/07 and 2007/08 because by appealing to the Tribunal the appellant had forfeited the revised assessment of K100 billion which had been negotiated in a 'spirit of give and take' with a view to settling the dispute amicably. Counsel added that, that was a finding of fact which was neither perverse nor made in the absence of relevant evidence, nor was it a misapprehension of the relevant facts.

6.28 With regard to ground seven of the appeal, notwithstanding that the appellant had intimated that it would not pursue that ground, the respondent's counsel put up spirited arguments supporting the holding of the Tribunal. We find it unnecessary to recast the arguments of the appellant on this ground. Counsel prayed that we dismiss the whole appeal.

7.0 The appellant's arguments in riposte

7.1 The learned counsel for the appellant was granted leave at the hearing of the appeal to file heads of argument in reply.

7.2 In those heads of argument in reply the appellant made two preliminary observations. The first was that it was unusual for the respondent to reproduce the arguments that it made before the Tribunal. According to counsel for the appellant, in having unconventionally done so, the respondent appears to have argued a rather different case from that argued by the appellant. The second preliminary observation was that although the respondent claims that the appellant's appeal before this court is on findings of fact, it has not been demonstrated that this is indeed the case.

7.3 In relation to grounds 1 and 2, the thrust of the arguments in response that the Tribunal did not adopt a correct approach to interpreting section 11 of the Income Tax Act. The learned counsel spent a considerable amount of space explaining what he considers to be the correct import of section 11. Once again he reiterated the earlier argument as

to why the respondent should be held bound by the Deloitte report.

7.4 Responding specifically with respect to the argument around section 95 of the Income Tax Act, counsel for the respondent pointed out that the appellant did not dispute that there was transfer pricing between the appellant and GIAG, which he submitted was normal business practice.

7.5 State Counsel argued that section 95 of the Income Tax Act was wrongly invoked in a case of transfer pricing as that section can only be invoked where there is reason to believe that the main purpose of the transaction was to avoid or reduce liability with respect to tax in which case the Commissioner-General would direct that a particular adjustment be made. The explanation State Counsel Simeza made mirrored closely those he had made in the main submission.

7.6 In regard to grounds 4 and 5, counsel submitted that the off-take agreement was produced before the Tribunal together with the Deloitte report. Hedging, according to counsel, was permitted in the Development Agreement.

Although the Tribunal held that the Development Agreement was not produced, it nonetheless concluded that the Development Agreement had a provision for dispute resolution of its own.

7.7 Concerning ground six of the appeal, the learned State Counsel rehashed the arguments he had made in his earlier heads of argument that the Tribunal had no power to substitute an assessment made by the Commissioner-General for its own. We were once again urged to uphold the appeal.

8.0 The issues for determination before us

8.1 Having reviewed the documents deployed before us and having heard the arguments of the parties, we perceive the overarching issue as being whether the respondent was, all circumstances considered, entitled to make the assessments that it did in apparent disregard of the Deloitte report. Of course this broad issue gives rise to several subsidiary questions from which the grounds of appeal appear to emanate.

8.2 With the foregoing broad understanding in mind, we now address the grounds of appeal in the order in which they have been raised and argued.

9.0 Analysis and decisions of this court

9.1 As regards grounds one and two, it is obvious that these are so intrinsically connected that a decision on one ground invariably determines the fate of the other. If, in considering ground one of the appeal, we agree with the holding by the Tribunal that the Deloitte report was not binding on the respondent, it should follow that ground two is inconsequential as it should matter not whether or not the respondent requested for the report.

9.2 The question whether or not the respondent requested for the Deloitte report is clearly a factual issue. Before us and before the Tribunal, the parties invested so much energy arguing around that question. We suppose the reason for the prolonged and meticulous arguments on this issue is because the parties veered into connecting the factual question that ground two raised namely, whether or not the report was requested for, to the legal question of a request

by the respondent complying with section 11 of the Income Tax Act.

9.3 At paragraph 3.3 of this judgment we recorded the lamentation of the Tribunal that there were no witnesses of fact to testify specifically on the claim by the appellant that the respondent had requested for the report at a meeting that was held on the 2nd March 2012. The respondent denied that any such request was made, stating that was any such request to be made, it would have had to comply with section 11 of the Income Tax Act as to its form. This is what prompted the animated arguments in rebuttal by the appellant's learned counsel centered around section 11 of the Income Tax Act, which arguments we have recounted elsewhere in this judgment.

9.4 Mr. Simeza, SC, in fact argued in his supplementary arguments that ground one turned on the interpretation of section 11 of the Income Tax Act – the issue being whether the Deloitte report was supposed to be requested for by way of a notice complying with that section. With admirable clarity, he developed his argument around that section in

an effort to show that the respondent was not obliged to issue a request in a format envisioned in section 11 and that, in case it was obliged to do so, the obligation to conform with the section lay squarely with the respondent who cannot use its own failure to conform as an excuse not to perform.

9.5 We are of the firm view that extending the argument to section 11 of the Income Tax Act was totally unnecessary. And, as we shall demonstrate shortly, the labours of counsel on this point were but in vain.

9.6 We have already intimated that the arguments around that issue took a totally wrong trajectory and went into needless depth on a question that was purely factual in character. We thus are not inclined to make any decision on the efficacy of the rival arguments which were so consummately debated by the learned counsel for the parties on the interpretation of section 11. This, in our view, is entirely expendable.

9.7 Whether or not a request for the report was made by the respondent is, as we have stated already, a factual question that could be resolved by evidence.

9.8 The leaned counsel for the respondent relied on this court's decision in **Zambia Consolidated Copper Mines Investments Holdings Plc. v. Woodgate Holdings Ltd**[13] for the submission that the burden of proof lay on the appellant to prove that the respondent had requested for the report. We agree that the onus was clearly on the appellant to demonstrate to the Tribunal that the respondent had requested for the Deloitte report. Clear and credible evidence should have been laid before the Tribunal that the respondent made the request for the report particularly in light of the denial by the respondent that it made any such request. To the contrary, what is distillable from the record does not suggest that the respondent asked for the report in question.

9.9 The letter from Deloitte dated 6th August 2012 undercover of which the report was submitted, was addressed to GIAG. In it there is a write-up on how and why the report was prepared. Conspicuously missing in that letter is any

suggestion or reference to the respondent as the engaging or commissioning party for the report.

9.10 Notwithstanding the absence of direct witness' evidence on the factual question whether or not the respondent requested for the Deloitte report, the Tribunal discerned from what was presented before it, a position which informed its conclusion, that the respondent did not make a formal request for the report. To the extent relevant, the Tribunal stated as follows:

> **It therefore follows from this that the Deloitte Report was not binding on the respondent as it is a creature of statute. Secondly, the respondent denied ever making a formal request for this report as it would have issued a formal demand under section 11(3) aforesaid. We so find as a fact on the affidavit and statement of facts filed before us in the absence of witness testimony at the hearing. This disposes of ground two.**

9.11 There is clearly an evidentiary issue here with two contesting positions as to whether or not a request for the report was made. The Tribunal preferred the evidence of the respondent to that of the appellant, and indeed it had the responsibility to make a judicious assessment of whatever evidence was deployed before it before coming to the

decision on that point. In **Attorney-General v. Kakoma**[14] we stated that:

> **[a] Court is entitled to make findings of fact where the parties advance directly conflicting stories, and the court must make those findings on the evidence before it having seen and heard the witnesses giving evidence.**

9.12 We have already noted that in the present case the parties did not call any witness to testify before the Tribunal. So was the case, but that did not take away the obligation on the part of the Tribunal to make an assessment of what was presented before it and come to a position. Absent any demonstration that there was perversity in the conclusion of the Tribunal, we are loathe to interfere with its finding.

9.13 We, of course, do not agree with the submission of the appellant before the Tribunal and the holding of the latter that any request for the report would have had to comply with section 11 of the Act. We find the arguments of Simeza, SC, around this issue, though as we have stated already, peripheral, but quite persuasive. However, that does not put our anxiety over the request for the report to rest. As we

aptly observed in **Patrick Makumbi and 25 Others v. Greytown Breweries Limited and 3 Others**[15]:

> **assessment of conflicting witnesses' evidences in the province of the trial court; it does not belong here.**

9.14 The Tribunal found that the respondent did not request for the report. It cannot be faulted for giving the appellant's argument short thrift. Ground two is without merit and must fail.

9.15 As we have observed early on, even assuming that we had to agree with appellant that the Deloitte report was requested for by the respondent, we still have to determine whether the respondent was bound by the contents of such report. And this to us is even more grievous than the factual question of whether the report was requisitioned or not.

9.16 As for Mr. Simeza, SC's contention that having relied on the report partially, the respondent should be estopped from refusing to place full reliance on it, it bonds well to recall that the chronology of events leading to the impasse between the parties suggests that the adjustment of the appellant's initially assessed tax obligation on 50% volume

sales came after the report. In fact the letter dated 25th September 2012 from the respondent to the appellant makes every suggestion that the adjustment was motivated by the contents of the report. That letter states in part that:

> **Reference is made to our letter dated 15th June 2012 and the accompanying Deloitte report. Based on the aforementioned, we have decided to adjust the assessment as follows....**

9.17 The appellant's position should be weighed against that of the respondent which is that there were ongoing negotiations even before the letter to the appellant referred to in the preceding paragraph. Those negotiations culminated in the appellant writing to the respondent on 19th September 2011, proposing to make a settlement sum of K100 billion to be paid in instalments. That proposal was accepted.

9.18 Mr. Mukwasa referred us to the affidavit of the appellant filed before the Tribunal and drew our attention to paragraph 29. That paragraph reads, as far as is relevant, as follows:

That while it is true that the respondents are not bound to accept the Deloitte report on the third party transfer pricing ... the said report was obtained at the respondent's request ...

9.19 He submitted that by the above quoted statement, the appellant had itself acknowledged that the Deloitte report was not binding on the respondent.

9.20 It is the respondent's case all along that there is no law that obliges it to accept a report submitted to it in circumstances such as those existing between the parties implicated in the report, or involved in its preparation. Indeed, the learned counsel for the appellant did not, in his submissions before us, point us to any legal authority creating an obligation on the part of the respondent to receive and consider the report produced by Deloitte.

9.21 The only basis for the appellant's claim that the Deloitte report was binding on the respondent is that it was properly requested for and that it was the basis of the respondent's partial action on reducing the assessment.

9.22 The learned counsel for the respondent went to considerable lengths explaining why the Deloitte report could not be taken as an objective exposition of the trading relationship between the appellant and its shareholder, GIAG, as well as the seemingly conflicted position of the author of the report. We were also invited to consider some apparent contradictions in the report, correspondence and other related documents.

9.23 More importantly perhaps the respondent maintained that it relied on information uncovered by its own audit. This position has not been controverted.

9.24 We accept the position articulated on behalf of the respondent that the respondent, having undertaken its own audit, suspicion as to the transactions between the appellant and GIAG was aroused. We also agree that in the circumstances as confirmed by the evidence on record to which the learned counsel for the respondent eloquently spoke, it would have been ill-advised for the respondent to have relied on the Deloitte report entirely. What is more, there is no law obliging the respondent to rely on

information supplied by any particular source when it undertakes its investigations in relation to tax matters.

9.25 Worse still, it would be incongruous for a tax authority such as the respondent to be content with an audit report requested for by a party so closely related to the taxpayer in a relationship which naturally arouses suspicion. It is for these reasons that we are inclined to accept the respondent's submissions that ground one of the appeal is destitute of merit. We dismiss it accordingly

9.26 Under ground three of the appeal the grievance relates to the reasonableness of invoking section 95 of the Income Tax Act. The question to be decided is whether the appellant had reasonable cause to invoke section 95 of the Income Tax Act. This clearly requires that an interpretation of section 95 of the Act be made.

9.27 Section 95 of the Income Tax Act provides that:

> **(1) Where the Commissioner-General has reasonable grounds to believe that the main purpose or one of the main purposes for which any transaction was effected (whether before or after the commencement of this Act) was the avoidance or reduction of tax liability for any charge year, or that the main benefit which might have been expected**

to accrue from the transaction within three years immediately following the completion thereof, was the avoidance or reduction of liability to tax, he may, if he determines it to be just and reasonable, direct that such adjustment shall be made as respects liability to tax as he considers appropriate to counteract that avoidance or reduction of liability to tax which would otherwise be effected by the transactions.

9.28 Mr. Simeza, SC, makes a pointed legal argument. He contends that section 95 can only be invoked in two instances namely, where the Commissioner-General determines that the main purpose of the transaction was the avoidance or reduction of tax liability for any charge year and secondly, where he determines that the main benefit expected to accrue from the transaction within three years of the completion of the transaction was tax avoidance or reduction of tax liability.

9.29 The learned State Counsel built his argument from that premises, contending that the respondent did not explain which of the two instances motivated the respondent's Commissioner-General to invoke section 95 of the Income Tax Act and that the mere fact that the audit reveals sales pricing differences on prices that an associated party bought

copper and the price that an independent party bought it at did not, in itself, warrant the invocation of the section.

9.30 Our reading of section 95 of the Income Tax Act is that the Commissioner-General needs only to have 'reasonable grounds to believe' before he can invoke section 95(1) of the Act. Those reasonable grounds can be generated by any circumstances. The section does not identify or limit the basis of the 'reasonable grounds'. Provided those grounds lead the Commissioner-General to believe that the main purpose, or one of the main purposes of a transaction was tax avoidance or tax reduction, and provided also that such ground is reasonable, the Commissioner-General is entitled to invoke section 95(1).

9.31 What section 95 of the Income Tax Act does is to repose in the Commissioner-General of the respondent the power and right to take the prescribed measures premised on his reasonable belief. Our understanding is that 'reasonable belief' is a conviction that an ordinary prudent person in the same circumstances as the actor would hold. 'Belief' in its ordinary meaning is a state of conjecture or surmise where

proof is lacking. 'Reasonable belief,' therefore, is a belief that is based on what the believer thinks is reasonable. In our estimation there can be no objectively reasonable belief.

9.32 We, however, agree that for any belief to be reasonable, it must be premised on a given set of circumstances. In other words, the belief must be informed or inspired by the existence of a reason or set of reason, so that it would in truth be a fraud on logic to form what is purported to be a reasonable belief based on nothing.

9.33 Mr. Mukwasa explained the nature of the symbiotic business relationship between the appellant and GIAG and how that special relationship reflected in the sales of the copper produced by the appellant. The audit by the respondent revealed issues that could cause any prudent tax authority to have misgivings about the arm's length claim of the transactions between the appellant and GIAG. This, in our view, rightly raised reasonable suspicion sufficient to lead the respondent to invoke section 95 of the Act.

9.34 The respondent's argument before the Tribunal and before us is that its own audit revealed that the appellant's sales figures to GIAG were lower as compared to other third party entities such as Chambeshi and ZAMEFA. The Tribunal considered this as a sufficient basis upon which the respondent invoked its powers under section 95 of the Income Tax Act for the charge years 2006/07 and 2007/08. The appellant has not argued against the assessments for the charge years 2008/09 and 2009/10 and the invocation of section 97A(13), (14) and (15) of the Income Tax Act.

9.35 Neither did the appellant dispute the respondent's claim that following the audit which uncovered information which caused the respondent to have reasonable belief, those reasons were communicated to it by the appellant.

9.36 Our view, therefore, is that notwithstanding the detailed submission made by State Counsel Simeza, which no doubt have *prima facie* attraction, we do not agree with them for the reasons we have articulated. We find ground three to be without merit and we dismiss it accordingly.

9.37 As regards grounds four and five of the appeal. The appellants grouse is with the Tribunal's treatment of the hedging transactions between the appellant and GIAG.

9.38 The contention of the appellant, in a nutshell, is that the Tribunal was not justified to have had reservations regarding hedging agreements for these were provided for in Development Agreements recognized under section 9(1) of the Income Tax Act 1996 which has since been repealed.

9.39 We have earlier on alluded to the settled position that he who alleges must prove. In the present case the appellant sought to rely on a development agreement between it and the Government of Zambia as well as on the hedging agreement between it and GIAG. These were, however, not produced. Mr. Simeza, SC, contended that Development Agreements were part of the law before their abrogation by the Mines and Minerals Development Act 2008. Being a matter of law, their production as documents was thus unnecessary.

9.40 We see the force in Mr. Simeza's argument implying that a party need not produce copies of the law in his bundle of documents submitted before a trial court to prove the state of the law. The laws of Zambia are a matter of which the court takes judicial notice and may freely be referred to in any proceedings.

9.41 Our understanding of Development Agreements in the repealed Mines and Minerals Act, chapter 213 of the laws of Zambia, however, is that by section 9(2) of that Act, these were properly recognized and had to contain certain provisions binding on the Republic of Zambia. A series of possible provisions such agreements could contain were set out in that section. One such provision could relate to settlement of disputes by international arbitration.

9.42 The Republic of Zambia and individual mining companies entered into separate development agreements and although they could have some of the matters referred to in section 9(2) of the Mines and Minerals Development Act chapter 213 of the laws of Zambia, they could be significantly different. In any case the Development

Agreements did not become the law as in being an Act of Parliament or a Statutory Instrument. They were, in our view, documents that ought to have been specifically produced.

9.43 For the reasons we have given, grounds four and five are bound to fail and we dismiss them accordingly.

9.44 Ground six of the appeal questions the basis upon which the Tribunal ordered the appellant to pay the sum of K311,113,793.38 as tax for the charge years 2006/07 and 2007/08 given that the parties had entered into a settlement agreement underwhich the appellant was to pay K100 billion.

9.45 Counsel for the appellant made detailed arguments around this issue to show that the Tribunal neither had the legal power nor any reasonable cause to impose the prenegotiated assessment sums. The respondent, on the other hand, argues that by appealing to the Tribunal, the appellant had forfeited the benefit of the revised assessment of K100 billion which had been reached in 'a spirit of give and take'.

9.46 In making its determination on the matter the Tribunal stated as follows:

> **For the foregoing reasons, the two grounds are equally dismissed. For the avoidance of doubt, we order that the original assessments for the Charge Years 2006/07 and 2007/08 of ZMW34,311,113,798.38 do stand and we further find as a fact that there was no objection to the second tax audit assessment for the Charge Years 2008/09 and 2009/10 in the sum of ZMW140,891,939.89. These assessments are to be settled within 30 days from the date of this judgment.**

9.47 We believe that it is absolutely important to bear in mind the events that animated the preTribunal appeal settlement. That settlement was done against a backdrop of disputed assessments followed by agreement in 'a spirit of give and take'. The result of the negotiations was the K100 billion agreed settlement.

9.48 In the case of **Finance Bank (Zambia) Ltd. and Rajan Mathan v. Simataa Simataa**[16] we reiterated the point that public policy encourages consensual resolution of disputes and favours settlement agreements. Indeed, we cannot overstate the

value to our justice system of the settlement of disputes outside the judicial process whenever possible.

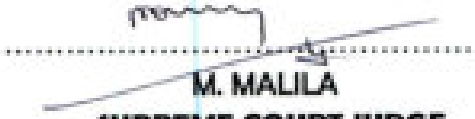
9.49 We do not consider an appeal to the Tribunal by the appellant as having constituted forfeiture of the agreed settlement position between the appellant and the respondent. Indeed, before the Tribunal the respondent did not make any claim against the appellant for moneys that were waived following the settlement, nor is there any evidence that the respondent had retracted its reduced demand.

9.50 We find merit in ground six of the appeal. We hold therefore that the Tribunal was wrong to have ordered payment of the pre-settlement assessment figure of ZMW311,113,798.38. The appellant is liable to pay the agreed sum of K100 billion.

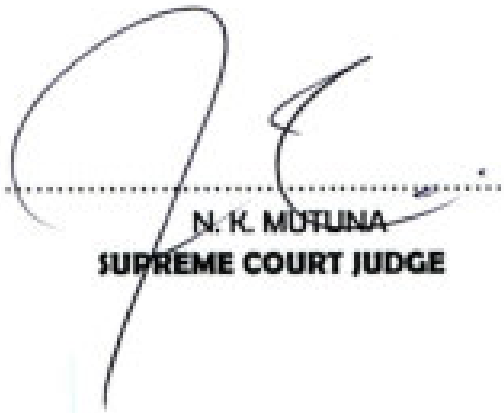
9.51 Ground seven having been abandoned, the upshot of our judgment is that grounds one, two, three, four and five fail, while ground six succeeds.

9.52 The respondent shall have eighty-three percent of the costs of this appeal to be taxed in default of agreement.

I.C. MAMBILIMA
CHIEF JUSTICE



M. MALILA
SUPREME COURT JUDGE



N. K. MUTUNA
SUPREME COURT JUDGE