



ZFE INTERPRETATION OF THE SERVICE CHARGE PROVISIONS UNDER THE TOURISM AND HOSPITALITY ACT NO. 13 OF 2015

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1. Legislative provisions

1.1 Principal Act: The Tourism and Hospitality Act No. 13 of 2015

1.1.1 **Commencement date:** November 6, 2015 through SI No. 83 of 2015.

1.1.2 **Purpose:** *inter alia*, to provide for the sustainable development of the tourism industry through effective tourism planning, management, promotion and coordination to ensure sustainable tourism; and to repeal and replace the Tourism and Hospitality Act No. 23 of 2007.

1.1.3 **Main provision on service charge:** section 54.

1.2 Subsidiary legislation: The Tourism and Hospitality (Service Charge) Regulations, SI No. 100 of 2016

1.2.1 **Commencement date:** December 23, 2016.

1.2.2 **Main provision:** regulation 3.

	PROVISIONS	KEY DEFINITIONS ¹
SECTION 54	<p>(1) An <u>accommodation establishment</u> and <u>restaurant</u> shall add to every invoice for supply or sale of accommodation, food, beverages and other <u>tourism-related services</u> a service charge prescribed by the Minister by statutory instrument.</p> <p>(2) The service charge shall be paid in equal shares to all the employees, except employees in management.</p>	<ul style="list-style-type: none"> • Accommodation establishment means a place in or on which the business of providing accommodation, with or without any other <u>tourism-related services</u>, are conducted for gain, such as a hotel, guesthouse, bed and breakfast, bush camp, camping site and caravan park, backpacker, boarding house, hostel and self-catering facility and any building or premises used for accommodation by

¹ The definitions in both the Act and SI are preceded by the caveat that the definitions apply, “*unless the context otherwise requires.*” We saw nothing in the context to warrant a different definition and therefore used the definitions as provided.



PROVISIONS		KEY DEFINITIONS ¹
<h1 style="writing-mode: vertical-rl; transform: rotate(180deg);">SECTION 54</h1>	<p>(3) <i>Where a service charge is paid, in accordance with subsection (1), a person shall not be obliged to give a tip for any service rendered and the proprietor or hotel-keeper shall display a notice to that effect, printed in plain type, in a conspicuous place in the accommodation establishment or restaurant or eatery where it can conveniently be read.</i></p> <p>(4) <i>A proprietor or hotel-keeper who contravenes subsection (1) is liable to pay to the Board upon demand, a fine not exceeding one hundred thousand penalty units and in addition, fifty thousand penalty units for each day during which the contravention continues.²</i></p> <p>(5) <i>The court may, where a proprietor or hotel-keeper contravenes subsection (1), enter a civil judgment in favor of the employees affected and order the proprietor or hotel-keeper to pay the service charge owing.</i></p>	<p>the public and in which lodging is provided and provisions are supplied by a hotel-keeper or proprietor, but does not include a Government rest house or a company guesthouse catering specifically for its employees or a school, college or university hostel as the Minister may prescribe by statutory instrument.</p> <ul style="list-style-type: none"> • Agency means the Zambia Tourism Agency (ZTA). • Board means the Board of the Agency. • Eatery means a place that serves food and beverages for reward. • Hotel-keeper means a person responsible for keeping an accommodation establishment. • Proprietor means a person who owns or operates a tourism enterprise. • Restaurant means an eatery which meets prescribed minimum requirements, with waiters' services, but does not include— <ul style="list-style-type: none"> (a) a workers' or staff canteen maintained for the use of persons employed in any particular undertaking; (b) an eatery where food or beverage is supplied only to persons who reside or board at such premises; or (c) an informal eating place which falls below the minimum prescribed requirement of a restaurant. • Service charge means a fee that is charged on accommodation, food, beverages and other tourism-related services. • Tourism means the activities of persons travelling to and staying in places outside their usual environment for not more than one consecutive year for leisure, business and other purposes, and
<p>Regulation 3 of the Tourism and Hospitality (Service Charge) Regulations</p>	<p>3. (1) An accommodation establishment and restaurant shall impose a service charge on the total bill on accommodation, food, beverages and tourism related services.</p> <p>(2) <i>The service charge shall be a rate of ten percent of the total bill as prescribed in the Schedule.</i></p> <p>** Schedule only contains a Returns Form for regulation 5.</p>	

² A penalty unit is currently ZMW0.30 or 30n.



PROVISIONS		KEY DEFINITIONS ¹
		<p>includes cultural tourism, family tourism, health tourism, sports tourism, education tourism, mining tourism, heritage tourism, eco-tourism and wildlife tourism;</p> <ul style="list-style-type: none"> • Tourism-related service includes transport, fishing, spa treatment, taxis, arts and cultural centers, carnivals, festivals, fairs, outside catering or other business activity related to tourism as the Minister may declare by statutory instrument.

2. Applicable principles of statutory interpretation³

- 2.1 The primary rule of interpretation of statutes is that words should be given their ordinary grammatical and natural meaning. ‘Ordinary grammatical meaning’ means that where a word is not specifically defined within the Act itself, a good English Dictionary should be referred to⁴.
- 2.2 It is only if there is ambiguity in the natural meaning of the words and the intention cannot be ascertained from the words used by Parliament, that recourse can be had to the purposive approach to interpretation. The purposive approach entails adopting an interpretation that promotes the general legislative intentions underlying the provision. The essence of purposive interpretation of a statute is to give effect to its foundational values and objects.
- 2.3 In short, the purposive approach should be resorted to only if the literal meaning leads to absurdity. Nevertheless, even when an absurdity does arise, the Court’s authority to cure it through the purposive approach is generally limited.
- 2.4 In our view, section 54 of the Tourism and Hospitality Act 2015 appears to be clear and unambiguous. The key terms such as ‘accommodation establishment’, ‘restaurant’, ‘tourism-related service’, ‘hotel-keeper’ and ‘proprietor’ are defined under section 3 of the Act and themselves appear clear. We therefore see no justification for adopting a purposive approach to try and determine what Parliament had intended in enacting section 54.
- 2.5 Even if we were, for the sake of argument, to go into the Parliamentary debates to try

³ *Attorney General v Lewanika and Others (1993 – 1994) Z.R. 164 (SCZ); Mazoka and Others v Mwanawasa and Others (2005) Z.R. 138 (S.C.); The Minister of Information and Broadcasting Services and The Attorney General v Chembo And Others (2007) ZR 82 (SCZ); Agro Fuel Investment Ltd v Zambia Revenue Authority (2012) (SCZ); and Steven Katuka (Suing as Secretary General of the UPND) and Law Association of Zambia v Attorney General, Ngosa Simbyakula and 63 Others, S.J. No. 29 of 2016 (CC)*

⁴ For the purposes of this interpretation, we used the *Longman Dictionary of Contemporary English*.



to understand section 54⁵, they would be of no assistance as regards the scope of its application. At the Bill's Second Reading on July 29, 2015, the preceding Minister of Tourism, Hon. Namugala, MP, strongly argued against service charge as another reason why Zambia was an expensive tourist destination.⁶

- 2.6 That argument was countered by the then Minister of Tourism, Hon. Kapata, MP. She stated that:

[Mr. Speaker,] on the issue of service charges that Hon. Namugala has talked about, I want to say that, in 2007, the Hotel and Catering Association of Zambia opposed the removal of the service charge. This is because the 10 per cent compensates for the low wages which those in the hospitality industry get. That 10 per cent has been there for a long time and Hon. Namugala knows this because she left it in place and also understands it better. So, we are sitting on a time bomb and if we remove it, people will resort to industrial strikes and we may not contain such a situation.

- 2.7 It therefore seems that the general intent behind service charge was to supplement the income of the low-waged workers of the hospitality industry. Unfortunately, that is as much as the debates contain on the purpose of service charge. Other contributions were merely to the inclusion of 'food' to subsection (1) of section 54⁷.

- 2.8 The lack of other substantive contributions on service charge could be attributed to the low turnout of stakeholders to the Lands, Environment and Tourism Committee Consultations on the Bill. Also during the Bill's Second Reading, the Committee Chairperson Hon. Muntanga, MP reported to the House that:

Mr. Speaker, your Committee wishes to underscore the need for Committees to be allocated adequate time to consider this important aspect of their work. As a result of the brevity of time, many witnesses, especially those slotted in the first few days, did not appear before your Committee.

Sir, your Committee further notes, with disappointment, that, generally, indigenous Zambians shy away from invitations when given an opportunity to input into laws which impact on [them]. In this regard, other than the professional associations, the two Zambian owned businesses in the tourism industry that were requested to make submissions to your Committee stayed away. Your Committee, in this regard, wishes implore its citizens to take this right and use it when the opportunity presents itself.

- 2.9 The Tourism Council of Zambia's (TCZ) submissions on service charge were only to

⁵ Using the principle in *Pepper (Inspector of Taxes) v Hart [1992] UKHL 3*

⁶ National Assembly Debates – July 29, 2015, *Second reading of the Tourism and Hospitality Bill N.A.B 14 of 2015*. Available at <http://www.parliament.gov.zm/node/4548> (Accessed on Nov. 2, 2017)

⁷ National Assembly Debates – July 31, 2015, *House in Committee consideration of the Tourism and Hospitality Bill 2015*. Available at <http://www.parliament.gov.zm/node/4551> (Accessed on Nov. 2, 2017)



delete it from the Bill and allow for further consultation on it.⁸ TCZ did not appear to delve into the language of the provision.

2.10 We were requested by our members in the tourism and hospitality sector in December 2015 to engage the Ministry of Tourism on this issue. Unfortunately, by then it was too late. The Act had already been operationalized in November. The Minister issued the SI on service charge at the end of December 2015, shortly after receiving our letter.

2.11 In any event, as we noted above, we are of the view that section 54 is clear and unambiguous. By the established principles of statutory interpretation, that means that we must read section 54 in its ordinary grammatical sense. To that end, our understanding of section 54 and the Tourism and Hospitality (Service Charge) Regulations SI No. 100 of 2016 is as follows.

3. ZFE interpretation of 'service charge' provisions

3.1 Who must add service charge to their invoice / bill?

3.1.1 An "accommodation establishment" and a "restaurant" (AE&R), respectively being:

- (a) any establishment that provides lodging facilities or a place to sleep for gain. This is everything from a self-catering camp site to a luxurious hotel; and
- (b) any establishment with waiters' services that serves food and beverages for gain, except for, *inter alia*, one that serves food only to persons who reside or board at such premises (in order words, a '**restaurant**' that is open only to those who are staying at the establishment).

3.2 What services attract service charge?

3.2.1 These are:

- (a) the supply or sale of accommodation (a place to sleep);
- (b) the supply or sale of food and beverages; and
- (c) the supply or sale of '**tourism-related services**' as defined by the Act.

3.2.2 In accordance with the Act, the full scope of chargeable services is:

- accommodation;
- food and beverages;
- transport;
- fishing;
- spa treatment;
- taxis;
- arts and cultural centers;

⁸ Tourism Council of Zambia, *Submissions to the Committee on Land, Environment and Tourism on the Tourism and Hospitality Bill 2015 NAB 14* (July 15, 2015)



- carnivals, festivals, fairs; and
- outside catering.

3.2.3 The definition of “*tourism-related service*” uses the non-exhaustive term ‘includes’, not the exhaustive term ‘means’ like the other relevant definitions. That however does not mean that every single thing a ‘tourist’ does is automatically a ‘tourism related service’ regardless of whether it is in the list or not.⁹ The Latin principle *noscitur a sociis*, or simply ‘words are known by the company they keep’, applies in such a case. It means that the scope of ‘includes’ will be restricted by its context.

3.2.4 For instance, ‘tourism-related service’ is connected to the term ‘tourism’ under the Act. ‘Tourism’ is exhaustively defined by the Act in the following way:

“tourism” means the activities of persons travelling to and staying in places outside their usual environment for not more than one consecutive year for leisure, business and other purposes...

3.2.5 So, a ‘tourism-related service’ is a service related to transport, fishing, spa treatment, taxis, arts and cultural centers, carnivals, festivals, fairs and outside catering, that a person who travels to and stays in a place outside their usual environment for not more than one year receives while out on that trip.

3.2.6 A closer look at each of the components under ‘*tourism-related services*’ shows that none appear to be specifically defined by the Act. Therefore, a standard English Dictionary definition of them will apply. For instance, ‘transport’ means the conveyance of people or goods from one place to another, or from point A to point B. It does not mean a circuitous journey back to point A. The use of ‘taxis’ in the same list reinforces this because that is the purpose of a taxi.

3.2.7 Similarly, “*arts and cultural centers, carnivals, festivals and fairs*” all refer to locations or events of a particular nature. The inclusion of “outside catering” on that list therefore cannot be extended to include, for instance, an average ‘kitchen party’. Something so different from the other components of the definition would have to be expressly included, as it is in the definition of “event” under the Tourism and Hospitality (Tourism Levy) Regulations SI No. 56 of 2016 (as amended by SI No. 35 of 2017).

3.3 What services do not attract service charge?

3.3.1 In our view, there are two categories of services that do not attract service charge:

- (i) any service provided by an AE&R that does not fall within section 54(1); and
- (ii) any service provided any other tourism enterprise that is not an ‘accommodation establishment’ or a ‘restaurant’.

3.3.2 We again use the analogous tourism levy for illustration. The Zambia Revenue

⁹ *Commissioners of Customs and Excise v Savoy Hotel Ltd [1966] 2 All ER 299*



Authority (ZRA) illustrated how tourism levy is restricted to what expressly falls within the definition of 'leviable services' under the Tourism Levy Regulations:¹⁰

Customer's bill	Leviable services
1. Accommodation for 2 nights	1. Accommodation for 2 nights
2. Meals and beverages	2. Meals and beverages
3. Conference room	3. Conference room
4. Laundry	-----
5. Shuttle services	

3.3.3 This illustration shows the established method of statutory interpretation. That is, the literal interpretation. Although there are many services incidental to those provided by an AE, it is not everything that the levy is attached to. The same principle applies to service charge.

3.3.4 For instance, laundry is an incidental service in all AE's. Nevertheless, it is not within section 54(1) and is therefore not subject to service charge. For accuracy, the AE must make a very clear demarcation on the invoice or bill on what is subject to service charge and what is not. Another illustration of this from ZRA is shown below in relation to how service charge is calculated.

3.4 Who 'provides' the services that attract service charge?

3.4.1 This is an important question in relation to the services that the AE&R use a third party contractor for. The language of the legislative provisions is not particularly clear in this respect:

- (i) **Section 54 (1):** *An accommodation establishment and restaurant shall add to every invoice for supply or sale of...*
- (ii) **Regulation 2:** *Service charge means a fee that is charged on accommodation, food, beverages and tourism-related services;*
- (iii) **Regulation 3:** *An accommodation establishment and restaurant shall impose a service charge on the total bill...*

3.4.2 We interpret this from two perspectives. The first perspective is agency law, and the second is the intention behind service charge. Agency law applies because laws do not exist in a vacuum. A statute is not independent of the common law in existence in the legal system under which the statute is enacted, regardless of the nature of the statute. Common law can only be overlooked, "where and so far as the statute is plainly intended to alter the course of common law."¹¹ We do not see any such alteration intended under the Tourism and Hospitality Act 2015.

3.4.3 In that light, under agency law, the agent has no relevance to the transaction. The agent is merely the go-between for the vendor and the purchaser, who will

¹⁰ Zambia Revenue Authority, *Practice Note No. 1/2017*, at page 44

¹¹ *Bridget Mutwale v Professional Services Limited (1984) ZR 72 (S.C.)*, at page 74



be the only parties to the contract. To 'supply' is to *provide*. It is not to *facilitate the provision of*. For instance, if an AE&R arranges tickets for a cultural center for its guests, and in so doing must pay the center for the tickets, it is merely acting as an agent. But that is only if the tickets are in the names of the guests. If they are in the name of the AE&R, it is not an agent in those circumstances – it is the 'supplier'.

- 3.4.4 The second perspective is the intention behind service charge as a supplement to the wages of the AE&R employees. The AE&R cannot reasonably be expected to supplement the wages of its workers with money it does not earn. If, for instance, an AE&R contracted an independent boat owner to take the AE&R's customer's fishing, it can be argued that it is not the AE&R that is 'supplying' the fishing service. After all, the AE&R may add the charge for the fishing onto the same invoice / bill as all its own services, but will in fact not retain that income. It will have to pay the boat owner.
- 3.4.5 Ultimately, even if the regulations are couched in very general terms, they must be read within the confines of the section that gives them authority, that is, section 54. In our view, reading all the provisions together, it seems the intent is that the charge is only on the actual supplier or provider of the service and not also the one who facilitates the provision of the service from a third party. The name of the recipient of the service is critical to understanding who the 'provider' legally is: the AE&R or the third party contractor.

3.5 How is service charge calculated?

3.5.1 Section 54 (1) of the Act and regulation 3 of the SI respectively provide:

Section 54 (1)	Regulation 3
<p>(1) An accommodation establishment and restaurant shall add to every invoice for supply or sale of accommodation, food, beverages and other tourism-related services a service charge prescribed by the Minister by statutory instrument.</p>	<p>3. (1) An accommodation establishment and restaurant shall impose a service charge on the total bill on accommodation, food, beverages and tourism related services.</p> <p>(2) The service charge shall be a rate of ten percent of the total bill as prescribed in the Schedule.¹²</p>

3.5.2 Regulation 3 obtains its legitimacy from section 54 (1) and cannot contradict it. 'Total bill' therefore stems from 'invoice'; and both are restricted to the "supply or sale of accommodation, food, beverages and other tourism-related services."

3.5.3 Even if one were to take 'total bill' on its own, the *ejudem generis* principle of interpretation will restrict it to its context. The principle means that a general word in the context of a list of specific words is restricted in meaning to that list. 'Total bill' therefore is not the gross that the tourist pays inclusive of taxes.

¹² Note that the Schedule only contains a returns form in accordance with Regulation 5.



‘Total bill’ is restricted to what is charged for accommodation, food, beverages and tourism related services, *period*.

3.5.4 This restriction makes sense when considered with the term ‘service charge’. It is the charge on the specified *services* themselves, and Regulation 3 of the SI should be read in that light.

3.5.5 We can again use the Tourism Levy Regulations that are couched in similar terms for illustration. Those regulations provide that:

Leviable services: 4. *A tourism enterprise or tourism facility providing accommodation services and events shall charge a tourism levy for the provision of accommodation services and events.*

Payment of tourism levy: 5. (1) *A tourism enterprise or tourism facility shall charge a person a tourism levy of one point five percent of that person’s total bill on the services referred to in regulation 4.*

3.5.6 ZRA in its leaflet on Tourism Levy¹³ shows that service charge is added directly to the actual chargeable services provided by the establishment. Tourism levy is added on the ‘leviable services’ only. It is not added to the ‘total bill’ inclusive of everything else. The only charge on the ‘total bill’ in the ordinary sense is value added tax.

Date	Description	Quantity	Amount (K)	Total Amount
03/01/2016	Room charge per person	1	650	850.00
03/01/2016	Incidental charges	1	300	150
		Sub-total		1000.00
	10% Service charge			100.00
		Sub-total		1100.00
	16% VAT			176.00
	1.5% Tourism Levy (accommodation)			12.75
		Total due		1288.75

3.5.7 The Service Charge Regulations do not have the statutory form ‘promised’ by Regulation 3. It is therefore incumbent upon all AE&Rs to disaggregate their own invoices / bills by nature of service, in order to ensure that the service charge is appropriately imposed. That is not only for the customer’s benefit. It is also for the AE&R’s compliance requirements due to the high penalties for non-compliance with section 54.

4. Consequences of non-compliance

¹³ Available at

http://www.zra.org.zm/manageUpload.htm?ACTION_TYPE=view&CIRCULAR_KEY=TourismLevy&DOC.ID=99900000003760 (Accessed on 10.18.17)



- 4.1 The 2015 Tourism and Hospitality Act has a different enforcement mechanism for service charge than the 2007 Act.

Act No. 23 of 2007: section 46	Act No. 13 of 2015: section 54
<p>(1) A hotel shall add to every bill a service charge of ten per centum of the bill, which shall be paid in equal shares to all the employees except employees in management.</p> <p>(2) An hotel-keeper who contravenes the provisions of subsection (1) <u>commits an offence and shall be liable, upon conviction, to a fine not exceeding ten thousand penalty units or to imprisonment for a term not exceeding three months, or both.</u></p> <p>(3) The court convicting a hotel-keeper for contravention of subsection (1), shall in addition to the penalties prescribed in subsection (2), enter civil judgment in favor of the workers affected and order the hotel-keeper to pay the money owing.</p>	<p>(1) An accommodation establishment and restaurant shall add to every invoice for supply or sale of accommodation, food, beverages and other tourism-related services a service charge prescribed by the Minister by statutory instrument.</p> <p>(2) The service charge shall be paid in equal shares to all the employees, except employees in management.</p> <p>...</p> <p>(4) A proprietor or hotel-keeper who contravenes subsection (1) <u>is liable to pay to the Board, upon demand, a fine not exceeding one hundred thousand penalty units and in addition, fifty thousand penalty units for each day during which the contravention continues.</u></p> <p>(5) The court may, where a proprietor or hotel-keeper contravenes subsection (1), enter a civil judgment in favor of the employees affected and order the proprietor or hotel-keeper to pay the service charge owing.</p>

- 4.2 Under the 2007 Act, the non-compliant 'hotel-keeper' had to go through the criminal prosecution process before they could be penalized for failing to charge service charge. Once convicted, the court could then also order the hotel-keeper to pay the employees the service charge it owed them.

- 4.3 In contrast, the 2015 Act empowers the Board of the Zambia Tourism Agency (ZTA) to fine a 'proprietor' or 'hotel-keeper' up to one hundred thousand penalty units, or ZMW30, 000.00 at the current penalty unit of 30n. Additionally, the proprietor or hotel-keeper would have to pay fifty thousand penalty units or ZMW15, 000.00 for each day that the default continues. We presume that the fifty thousand penalty units per day of default was intended to equally be a maximum figure, although that is not expressly stated.

- 4.4 The one aspect of non-compliance that seems relatively unchanged is how the employees who are owed the service charge may obtain it. Both section 46 of the 2007 Act and section 54 of the 2015 Act require the employees to go to a Court of competent jurisdiction to obtain an order against the hotel-keeper for payment of the money owed, as a civil debt.



4.5 Under section 71 of the 2015 Act, a person aggrieved with a decision of the ZTA Board may appeal to the Minister of Tourism and from there to the High Court for Zambia. There is no provision for such appeals to automatically stay the liability to pay the penalty ordered by the ZTA Board. A stay would therefore have to be specifically requested.

5. **Conclusion: Should we adopt a strictly literal or more generous interpretation of section 54?**

5.1 Firstly, the language seems clear. A literal interpretation is therefore justified. Secondly, generous interpretations are effectively purposive ones, which are inapplicable when the literal interpretation produces a clear result and are in any event reserved for Constitutional rights.

5.2 Thirdly, section 54 is also a penal section as non-compliance will attract a penalty from the ZTA Board. Under criminal law, penal provisions are always interpreted strictly in order to protect the weaker citizen from abuse by the State. So, yes, we believe we are justified in using a strictly literal interpretation of the section in the same way that ZRA uses a strictly literal interpretation of the Tourism Levy Regulations.

5.3 To that end, accommodation, food and beverages are fairly clear as far as service charge goes. 'Tourism-related services' require some interpretation. But as stated above, that interpretation is restricted to the kinds of services related to the component parts of the definition. Transport and taxis are related as conveyance from point A to point B.

5.4 'Supply or sale' is directly and not through facilitation by a third party, because the 'hotel-keeper' makes no income from the facilitation in real terms. That is subject to the AE&R maintaining the legal position of agent in relation to a third party contractor. Lastly, simply because a tourist requests laundry services, that cannot logically make laundry a 'tourism-related service' under the terms of the Act.

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1. The Tourism and Hospitality Act No. 23 of 2007
2. The Tourism and Hospitality Act No. 13 of 2015
3. The Tourism and Hospitality (Service Charge) Regulations, SI No. 100 of 2016
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Case law

1. **Zambian**
 - *Agro Fuel Investment Ltd v Zambia Revenue Authority (2012) (SCZ)*
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2. **Foreign**
 - *Commissioners of Customs and Excise v Savoy Hotel Ltd [1966] 2 All ER 299*
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