THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)

CIVIL APPEAL NO.0042 OF 2022
(ARISING FROM TAT APPLICATION NO.40 OF 2022)

COLAS EAST AFRICA LIMITED:::::::::::::::::::::::::::: APPELLANT

VERSUS

UGANDA REVENUE AUTHORITY:::::::::::::::::::::::: RESPONDENT

Before the Hon. Lady Justice Patricia Kahigi Asiimwe

Judgment

Introduction:

1. This is an Appeal against the ruling of the Tax Appeals Tribunal in TAT Application No.40 of 2022. In that Ruling, the Tribunal held that the Respondent was justified in using method 2 under the fourth schedule of the East African Community Customs Management Act (EACCMA) of customs valuation in computing the Appellant's tax liability arising out of the post customs clearance audit.

Background:

2. The facts in so far as can be ascertained from the record of appeal are that the Appellant is a private company incorporated in Kenya and registered in Uganda as a branch Company. The Appellant's head office is in Kenya and its Country Office/branch in Uganda are one and the same company. The Appellant's business in Uganda involves the importation and sale of Bitumen road construction materials. The Respondent did a post customs clearance audit on the Appellant in Uganda for the period 2015—2019 in accordance with sections 235 & 236 of the East African Community Customs Management Act. The relevant findings of the audit were as follows:

i. Most of the consignments to which origin criteria was accorded had duly signed certificates of origin and were physically verified as originating from Kenya except Bitumen 80/100Kg and Bitumen 60/70 183Kg which were accorded Kenyan origin criteria yet they originated from the United Arab Emirates. This misuse of origin criteria resulted into unpaid taxes amounting to UGX 27,295,901.

ii. Comparison of the unit values of similar items supplied by Colas East Africa Limited—Kenya to other importers in Uganda showed higher commercial invoice values compared to those of the Appellant's branch in Uganda for the two items; Bitumen Emulsion KI-60 200lt and Bitumen cutback MC-30 200lt. The Respondent conducted a comparison of unit values of similar or identical items to non-related parties which were found higher and the audit team uplifted the values of Colas East Africa Limited—Uganda branch resulting in unpaid taxes amounting to UGX 706,958,865.

3. By its letter dated 8th January 2021 at page 124 of Volume B of the Joint Trial Bundle, the Appellant acknowledged the tax liability of UGX 27,295,901, arising from its wrong declaration of country of origin of Bitumen 80/100Kg and Bitumen 60/70 183Kg. It however disputed the computed tax liability of UGX 706,958,865.

4. The Appellant highlighted some computational errors in the disputed tax liability of UGX 706,958,865. These were acknowledged by the Respondent which thereby adjusted the said computed tax liability to UGX 694,037,728.

Application before the Tribunal:

5. On 8th February 2022, the Appellant filed an Application before the Tribunal disputing the tax assessment UGX 694,037,728.

6. The Appellant's case before the Tribunal was that the Appellant was a sole distributor of bitumen products as a branch in Uganda of Colas East Africa Limited—Kenya and therefore at different commercial levels with the other importers in the Respondent's study who were end-users of the goods in issue. Accordingly, the Respondent should have considered this difference in commercial levels and made the necessary adjustments when disregarding the use of method 1 of customs valuation as required by paragraphs 2 & 3 of the 4th Schedule to the East African Community Customs Management Act (EACCMA).

7. The Respondent's case was that Advisory Opinion 1.1 of the WTO was considered when applying section 122 and the 4th Schedule of the EACCMA. Method 1 does not apply to transactions where goods are imported by branches which are not independent legal entities from their suppliers. The Respondent examined imports of identical bitumen products from the same exporter (the Applicant/Appellant in Kenya) on the same INCOTERMS to Uganda for the period 2015-2019 by a unit value analysis of the Applicant, and other importers like Dott Services Ltd, General Nile Company and Zhongmei Engineering Company Ltd.

Decision of the Tribunal:

8. In its ruling delivered on 2nd September 2022, the Tribunal upheld the tax assessments arising from the audit findings while observing that the dispute has complexities. The Tribunal noted that goods imported from Kenya are from within the East African Community and do not attract customs duty, while goods imported from the UAE attract

customs duty. The Tribunal observed further that the Appellant contends that it imported goods from Kenya and the UAE. The Tribunal noted that goods must have come from a third-party if they came from the UAE. However, the Tribunal observed that there was no evidence that the third party who sold to the Applicant or its branch in Kampala were related. The Tribunal noted therefore that if the Applicant imported the goods from the UAE and it contends that it is liable to pay the transaction value, then the import documents become suspect. The Tribunal observed however that the invoices show that the Applicant bought the goods from Kenya. The Tribunal noted therefore that if that is the case, no customs duty was due as Kenya is within the East African Community. The Tribunal noted further if that were the case, the Applicant would not insist on paying the customs using the transaction value when the goods are from Kenya.

9. The Tribunal cited Advisory Opinion 1.1 of the WTO and held that Method 1 does not apply to transactions where goods are imported by branches which are not separate legal entities. The Tribunal noted that the evidence adduced did not support the Applicant's argument that the Respondent ought to have used method 1. The Tribunal held that in the absence of evidence that the Respondent ought to have used method 1, the Respondent's use of method 2 was justified. The Tribunal cited section 18 of the Tax Appeals Tribunal Act which places the burden on the Applicant to show that the Respondent ought to have made a different decision from the one taken. In the Tribunal's view, that burden was not discharged.

Grounds of Appeal:

10. Dissatisfied with the above decision, the Appellant filed this appeal on four grounds of appeal as follows:

I. The Tax Appeals Tribunal erred in law when it held that Method 2 which the Respondent used to assess the Appellant tax worth UGX 694,037,728 was applied correctly when the Respondent had not considered the commercial levels related to the importers.

II. The Tax Appeals Tribunal erred in law in rendering a decision that contravenes the express provisions of the Fourth Schedule of the EACMA in respect to valuation of goods under method 2 thereby arriving at the wrong decision.

III. The Tax Appeals Tribunal erred in law when it misapplied the criteria on establishing origin of goods for import purposes when it erroneously concluded that all the subject goods originated from UAE thereby arriving at the wrong decision.

IV. The Tax Appeals Tribunal erred in law when it erroneously applied section 18 of the Tax Appeals Tribunal Act on burden of proof of the Applicant in total disregard of the rules of evidence and principles of burden of proof as set in the Evidence Act, Cap 6.

Representation:

11. The Appellant was represented by M/s Bluebell Legal Advocates and the Respondent was represented by the Legal Affairs and Board Affairs Department of the Respondent. Both parties filed written submissions. At the hearing held on 30th May 2023 for Counsels to highlight their respective written submissions, the Appellant's representatives and their Counsel were absent. Mr. Tonny Kalungi appeared for the Respondent and summarised the Respondent's submissions.

Resolution:

12. I will first address the preliminary point of law raised by the Respondent in respect to ground 2 which states as follows:

Ground 2: The Tax Appeals Tribunal erred in law in rendering a decision that contravenes the express provisions of the

Fourth Schedule of the EACMA in respect to valuation of goods under method 2 thereby arriving at the wrong decision.

13. The Respondent's Counsel submitted that the ground is too general because it does not state which part of the decision is in issue and does not state which part of the 4th schedule of the EACCMA in respect to valuation of goods under method 2 was contravened. Counsel noted that it is not surprising that the Appellant's Counsel argued this second ground of appeal alongside the first. Counsel submitted that the 2nd ground of appeal should therefore be struck out. Counsel cited the case of **Attorney General V. Baliraine Civil Appeal No.79 of 2013** where Kakuru J, struck out grounds of appeal that were in his opinion too general.

14. I do not find the ground too general so as to warrant it being struck out. The Appellant is dissatisfied with the decision of the Tribunal relating to the valuation of the goods in question under method 2. I do however note that it is related to ground 1 and will therefore address them together.

Grounds 1 and 2:

Ground 1: The Tax Appeals Tribunal erred in law when it held that Method 2 which the Respondent used to assess the Appellant tax worth UGX. 694,037,728 was applied correctly when the Respondent had not considered the commercial levels related to the importers.
Ground 2: The Tax Appeals Tribunal erred in law in rendering a decision that contravenes the express provisions of the Fourth Schedule of the EACMA in respect to valuation of goods under method 2 thereby arriving at the wrong decision.

15. The Appellant's Counsel addressed the 1st and 2nd ground together and submitted that in applying methods 1 and 2 under Paragraphs 2 and 3 of the Fourth Schedule of the EACCMA, due account must be taken of demonstrated

differences in commercial levels and quantity levels and necessary adjustments made. Counsel submitted that the commercial levels relate to the level of the transaction at which a sale is concluded, that is the step at which the goods are changing hands. Counsel noted the evidence of the Appellant's witness, Ms. Esta Musoke, who informed the Tribunal that the Appellant is a sole distributor of the subject goods. Counsel argued that all the companies applied in the study engage in the business of construction while the Appellant does not. Counsel submitted that the Appellant and the said companies are at different commercial levels.

16. Counsel further submitted that in applying the customs valuation methods, the Respondent disregarded the fact that the Appellant and the persons used in the comparative study were at different commercial levels and thus failed to take into account the necessary adjustments as required under the Fourth Schedule. Counsel submitted further that this failure is highlighted by the testimony of Carolyne Yamanye in cross-examination where she stated that the Respondent did not find out the purpose for which the third parties use the goods imported. Counsel submitted that the Respondent clearly ignored numerous aspects of the valuation methods in its comparative study that resulted in erroneously uplifting the values of the subject goods. Counsel noted that the study implies that the Appellant and the third parties are importing the same products under the same terms which is not the case.

17. The Respondent's Counsel defended the Tribunal's ruling that the Respondent rightly applied method 2 in assessing the Appellant's tax liability of UGX 694,037,728. Counsel submitted that the Respondent duly considered the commercial levels of the Appellant and the related to the importers.

18. I have considered the submissions of the parties and the evidence on record and resolve these grounds as follows:

19. Under the Application to the Tribunal, the key reasons for the Application advanced by the Appellant were that the Respondent's Application of the transaction value of identical goods was flawed. In her testimony, the Appellant's witness stated that they object to the tax liability because the Respondent did not consider the commercial levels between the Applicant and its branch in Uganda vis a vis other unrelated importers that buy directly from it.

20. I have reviewed the decision of the Tribunal and I note with due respect that the Tribunal seems to have addressed the wrong issue. The Tribunal seems to have addressed the issue as to whether or not the Respondent was justified in applying Method 2 as opposed to Method 1 in assessing the tax payable.

21. However, from the record, it is clear that the contention was not whether the Respondent should have applied method 1 or 2 in assessing the tax. The real issue was whether method 2 was correctly applied by the Respondent in the assessment of tax.

22. Paragraph 3 of the Fourth Schedule to the EACCMA on the assessment of tax using the transaction value of identical goods (Method 2) provides as follows:

> *3. (1) (a) Where the customs value of the imported goods cannot be determined under the provisions of paragraph 2, the customs value shall be the transaction value of identical goods sold for export to the Partner State and exported at or about the same time as the goods being valued:*

(b) In applying the provisions of this paragraph, the transaction value of identical goods in a sale at the same commercial level and in substantially the same quantity as the goods being valued shall be used to determine the customs value and where no such sale is found, the transaction value of identical goods sold at the different commercial level or in different quantities, adjusted to take account of differences attributable to commercial level or to quantity, shall be used, provided that such adjustments can be made on the basis of demonstrated evidence which clearly establishes the reasonableness and accuracy of the adjustment, whether the adjustment leads to an increase or decrease in the value;

23. The above provisions provide for the criteria for application of method 2.

24. On page 12 of its decision, the Tribunal held as follows:

The evidence adduced before the Tribunal does not support the applicant's argument that the respondent ought to have used method 1. There were no import documents to show that the imports from UAE were from a related party. In the absence of evidence that the Respondent ought to have used method 1, the Respondent was justified to use method 2 which deals with the transaction value of identical goods. S. 18 of the Tax Appeals Tribunal places the burden on the applicant to show that the respondent ought to have made a different decision from the one taken. The said burden has not been discharged.

25. The Tribunal therefore determined that the Respondent was justified in using Method 2 but did not go a step further to determine whether the Respondent applied Method 2 in accordance with paragraph 3 of the Fourth schedule of EACCMA on transaction value of identical goods. The reason

for the applicant therefore was not fully addressed by the Tribunal.

26. Under *section 27 (3) of the Tax Appeals Tribunals Act Cap 345* it is provided as follows:

> *The High Court shall hear and determine the appeal and shall make such order as it thinks appropriate by reason of its decision, including an order affirming or setting aside the decision of the tribunal or an order remitting the case to the tribunal for reconsideration.*

27. In the case of **Uganda Revenue Authority Versus Rugarama Construction Company Limited HCT-00-CC-CA-12 -2011, Obura J** found that the Tribunal erred in setting aside the decision of the Uganda Revenue Authority and not substituting it with its own or remitting the matter back to the decision maker for reconsideration. In other words, the Tribunal made an incomplete decision. The judge referred the matter back to the Tribunal under *section 27 (3) of the Tax Appeals Tribunals Act.*

28. In the same vein, having found that the Tribunal fell short in addressing the issue before it for resolution, I find that the appropriate remedy is to refer the matter back to the Tribunal for reconsideration in the interest of ensuring that justice is done.

29. In light of the powers granted to this court under section 27 (3) cited above, I hereby remit this matter back to the Tribunal for reconsideration as to whether or not the Respondent in assessing the tax payable under Method 2 complied with the provisions of the Fourth Schedule of EACCMA.

30. I have not deemed it necessary to address grounds 3 and 4 since they are also affected by the findings under grounds 1 and 2 above.

31. The costs of this Application are awarded to the Applicant.

Dated this 5th day of October 2023.

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Patricia Kahigi Asiimwe
Judge
Delivered on ECCMIS