**THE REPUBLIC OF UGANDA**

**IN THE TAX APPEALS TRIBUNAL AT KAMPALA**

**APPLICATION NO. TAT 17/2009**

**J.P. CONSTRUCTION SERVICES LTD……. APPLICANT**

**VERSUS**

**UGANDA REVENUE AUTHORITY……..…….. RESPONDENT**

## RULING

This ruling is in respect of application challenging a penal tax assessment of Shs. 130,987,162/= by the respondent imposed on the applicant.

The facts of this case briefly are: The applicant is a company incorporated in Uganda and carries on the business of construction services. The respondent audited the applicant for Value Added Tax (VAT) for the period January 2003 to December 2008 and raised an assessment of Sh. 168,280,574/= which is constituted of Sh. 37,293,412/= being the principal tax, interest and penalties of Sh. 130,987,162/=. The applicant paid all the principal tax assessed but objected to the penalties.

The applicant objected to the imposition of penal tax of Shs. 56,400,337/= under Section 65 (3) of the VAT Act on the grounds that it had made payment of the principal tax prior to the expiration of the due date of 27th April 2009. The applicant also objected to the imposition of Sh. 74,586,825/= penalty under section 65 (6) of the VAT Act on the grounds that it did not knowingly or recklessly submit false or misleading information to the respondent. The respondent made an objection decision maintaining the assessment of penal tax under sections 65 (3) and 65 (6) of the VAT Act hence this application to the Tribunal.

At the scheduling conference the parties agreed on two issues:-

1. Whether the respondent correctly assessed and imposed penal tax under sections 65 (3) and 65 (6) of the VAT Act?
2. What remedies are available to the parties?

Both parties agreed not to call witnesses but only make written submissions.

Counsel for the applicant submitted that the applicant regularly made returns and paid the due taxes during the period under review that is from January 2003 to December 2008. Consequently an assessment made on the applicant by the respondent after an audit can only be under section 32 (1) (b) of the VAT Act which states:-

"32(1) where

a) ……

b) The Commissioner General is not satisfied with a return lodged by a person; the Commissioner General may make an assessment of the tax payable by that person".

Counsel contended that where an assessment is made under section 32 (1) (b), then penal tax can only correctly arise after the due date of payment had expired. This due date must under section 31 (7) be stated on the notice of assessment. Counsel submitted that in the instant case the respondent did not specify the due date on the notice of assessment. Counsel therefore contended that in this particular case "the tax is not legally due since no due date is given".

In addition counsel submitted that other requirements of an assessment as provided for in section 32 (7) were not met in this particular assessment. The assessment did not give an explanation of the assessment and the time, place and manner of objecting to the assessment as required by section 32(7) (c ) and (d) consequently counsel submitted that the assessment was defective and therefore illegal.

Counsel further submitted that tax is generally due 45 days after service of a proper notice of assessment. Counsel contended that a notice of assessment cannot be issued showing that the taxpayer has failed to pay on time yet the tax payer is only aware of the tax when an assessment is served. Consequently penal tax under section 65 (3) was wrongly issued and the tax in question is therefore not legally due and payable by the applicant.

With regard to penal tax imposed under section 65 (6) counsel for the applicant submitted that the section is not applicable because the applicant did not knowingly or recklessly give false or misleading information to the respondent. Counsel submitted that the audit records did not show that the applicant gave false or misleading statements to the respondent either knowingly or recklessly.

Counsel contended that the notice of assessment did not give an explanation as to the offences committed. Counsel further submitted that since section 65 (7) provides that section 59 (4) applies in determining whether a person has made a statement to an officer of the Uganda Revenue Authority the law had to be interpreted in totality. Since section 59 (1) provides that it is an offence to make a false or misleading statement, the applicant consequently could not be guilty, of making a false or misleading statement without a prosecution. Since the applicant did not admit liability, the respondent had to charge the applicant in court to determine his guilt for making false or misleading statements to the respondent. Therefore the respondent by imposing penal tax on the applicant under section 65 (6) of the VAT Act acted unjustly and illegally.

Counsel for the applicant further contended that the applicant lost some of its documents while moving to new premises. It was therefore agreed by both parties that the available records would be used for the audit. Consequently a variance in the returns could not be because of

the applicant knowingly or recklessly giving false or misleading information. The applicant consistently explained that any variations in the returns were therefore genuine errors and consequently the application of section 65 (6) was wrong and illegal.

In reply counsel for the respondent submitted that it is important to know the period when a taxpayer ought to lodge a tax return and what is the due date for paying the tax. Counsel submitted that section 31 of the VAT Act provides that a taxable person shall lodge a tax return with the Commissioner General for each tax period within fifteen days after the end of the tax period. Tax period is defined in section 1 (w) of the VAT Act to mean a calendar month. Section 34 (1) (a) states that tax payable under this Act is due and payable in the case of a taxable supply by a taxable person in respect of a tax period, on the date the return for the tax period must be lodged. Counsel submitted that this therefore means that all the tax payables must be paid within but not later than the 15 days after the end of the tax period. Consequently all tax which is due and payable for each month but remains unpaid attracts penal tax compounded from the due dates the sums ought to have been paid each month. The due dates for the taxes in this case therefore are the 15th of each of the 72 months from February 2003 to January 2009.

Counsel for the respondent submitted that all four conditions provided under S. 32(7) were fulfilled by the present assessment in issue. The assessment shows the tax payable. The attachments to the notice of assessment show the date the tax is due and payable in the computations for the 72 months from January 2003 to December 2008. The assessment also gives an explanation for the assessment and the time place and manner of objecting.

On whether section 65 (6) penal tax was properly imposed counsel for the respondent submitted that the only reasonable inference it could make in the applicant's circumstances is that the applicant knowingly or recklessly gave false information to the respondent. That is

because the applicant did not take due care to ensure that their returns were correct and as such it was reckless. The respondent's counsel contended that the applicant received more than sh. 37 million VAT tax as a collection agent and did not declare it. The applicant cannot hide under feigned ignorance or error in making monthly returns to the respondent.

Counsel for the respondent further submitted that although section 65 (6) provides for imposition of penal tax sections 65 (6) and 59 provides for prosecution for knowingly or recklessly making false or misleading statements. The respondent has the option to choose to proceed under any of the sections. The respondent does not have to secure a conviction in a criminal trial under section 59 before imposing penal tax under section 65 (6).

After a careful evaluation of the submissions of both parties the Tribunal makes the following ruling. The Tribunal will divide the first issue into two.

The first sub- issue shall be whether penal tax was correctly assessed by the respondent on the applicant under section 65 (3) of the VAT Act? Section 65 (3) provides:-

> "A person who fails to pay tax imposed under this Act on or before the due date is liable to pay a penal tax on the unpaid tax at a rate specified in the fifth schedule for the tax which is outstanding."

It is important to note that the penal tax is on tax imposed by the Act that remains outstanding by the due date whether or not an assessment has been raised. The outstanding tax can arise out of several situations such as failure to lodge a return or lodging incorrect returns. Section 32(1)(a) and (b) makes provision for the Commissioner General to make an assessment of the tax due under such circumstances for purposes of collection.

Section 34 specifies what due dates are applicable in different situations. Section 34 provides:

> "The tax payable under this Act is due and payable-

a) In the case of a taxable supply by a taxable person in respect of a tax period, on the date the return for the taxable period must be lodged.
b) In the case of an assessment issued under this Act, on the date specified in the notice of assessment, or:-
c) In any other case, on the date the taxable transaction occurs as determined under this act".

Section 31 of the VAT Act provides that a taxable person shall lodge a return with the Commissioner General for each tax period within fifteen days after the end of the tax period. Tax period is defined in section 1(w) of the VAT Act to mean a "calendar month". The combined effect of the above provisions is that a taxable person who makes taxable supplies must submit returns to the Commissioner General by the 15th day after the end of every month by which date all the tax due and payable during the month must be paid. Any taxes that remain outstanding whether by non submission of returns, or by under-declarations in the return or under payment for whatever reason is liable to penal tax by virtue of section 65 (3) of the VAT Act.

Section 32 (1) (a) and (b) provide for the Commissioner General to make an assessment for purposes of recovering the total tax due at once irrespective of the number of months the taxes have remained outstanding together with the penalties under section 65 (3) that begin to operate from the due dates of each month. The due date under section 32 (7) which is required to be on the notice assessment is for purposes of collecting the entire outstanding tax all at once irrespective of the number of months the taxes and penal tax have remained unpaid.

In the present case the absence of a due date on the notice of assessment does not render the assessment defection or illegal. Section 33 (2) provides:-

"No assessment or other document purporting to be made, issued or executed under this Act shall be
(a) quashed or deemed to be void or voidable for want of form, or
(b) affected by reason of mistaken, defect, or omission in it…."

The Tribunal agrees with counsel for the respondent that ruling otherwise would result in absurdity. Taxpayers would never file returns or make correct tax payments until the respondent makes an audit and issues an assessment with a new due date other than that already statutorily fixed. The Tribunal therefore rules that the respondent correctly assessed penal tax on the applicant under section 65 (3) of the VAT Act.

The second sub issue shall be whether the respondent correctly assessed penal tax under section 65 (6)? Section 65 (6) authorities the respondent to impose penal tax on any taxpayer who knowingly or recklessly makes a false or misleading statement in a tax return to the respondent. The section reads:

> "(6) Where a person knowingly or recklessly –
>
> (a) makes a statement or declaration to an official of the Uganda Revenue Authority that is false or false or misleading in a material particular; or
>
> (b) omits from a statement made to an officer of the Uganda Revenue Authority any matter or thing without which the statement is misleading in a material particular,
>
> and the tax properly payable by the person exceeds the tax that was assessed as payable based on the false or misleading information that person is liable to pay penal tax equal to double the amount of excess tax, refund or claim.

The applicant contends that it did not make any false or misleading statements to the respondent. The respondent on the other hand contends that the applicant filed the returns knowingly and that it was reckless because it did not take due care to ensure that the returns were correct. The respondent submitted that the applicant conceded that there are incomes that were received but not declared to the officials of the respondent, and does not dispute that tax amounting to Sh 37,293,412/= was omitted from the returns submitted to the officers of Uganda Revenue Authority.

S. 18 of the Tax Appeals Tribunal Act places the burden of proof on the applicant. In this particular instance we have to decide whether the applicant has discharged the burden of proving that they did not knowingly or recklessly give false or misleading information to the respondent. In this regard the applicant submitted that they lost some records while moving to new premises and consequently both parties agreed to use the available documents. The applicant therefore submitted that any variances in the returns were genuine mistakes attributable to loss of records. The applicant further submitted that the respondent did not show any where in the audit report that the applicant knowingly or recklessly gave false or misleading information.

A perusal of exhibit 1(ii) showing the VAT computation for the 72 months under review (Jan 2003-December, 2008) indicates that it is only in the first 11 months and December 2008 where no variances were made in the returns. In the remaining 60 months there are variances in the sales, output tax or input tax. It is inconceivable that the said variances are attributable to errors as a result of loss of documents. The additional taxes due for 36 months (Jan 2006-Dec, 2008) were computed from the applicant's own monthly VAT tax returns while for 24 months Jan, 2004-Dec, 2005 were computed from audited accounts submitted for income tax purposes. The income tax returns declarations for the period under audit were not consistent with the VAT return declarations. The applicant had for the sixty month period paid sh. 2,393,583/= only against a total VAT tax liability of 39,686,996/= which it has not disputed. The variance between the tax paid and the actual tax due is so wide that it is inconceivable that the applicant was making errors. Unless the otherwise proved the applicant either knowingly or recklessly submitted false returns. .

Taking into consideration all the circumstances above, the frequency of the variations and the length of time it took, i.e. monthly over a sixty month period and the quantum of the variance, i.e. 94% of the tax due was omitted from the returns, we are not convinced that the applicant

has discharges the burden of proving that it did not act knowingly or recklessly. We therefore find that the respondent correctly assessed penal tax under section 65 (6) of the VAT Act. We also want to point out that the respondent did not have to prove the applicant guilty in a trial under S.59 of the VAT Act before assessing penal tax under section 65 (6) although the option of a criminal prosecution was open to them.

The Tribunal notes with sympathy that though the tax liability is Shs. 37,293,412 the interest and penalty is Shs. 130,987,162/= which is harsh. However the prerogative to waive interest and penalty lies with the Minister of Finance and Economic Planning as per section 67(1) of the VAT Act. The applicant ought to have applied to the Commissioner General under the said section on consideration of hardship. Since the applicant did not apply the Tribunal shall not address the issue whether the Commissioner General did not exercise her discretion to refer the matter to the minister.

The Tribunal has also noted that the huge amount of penalty and interest arose due to the time lag between when the tax liability arose and when the audit was carried out which covered a period of six years. Although the law allows the Uganda Revenue Authority to audit and raise assessments for any number of years when it suspects fraud or willful neglect it is advisable that for it to conduct audits more frequently and promptly in cases where taxpayers regularly submit returns.

This application is consequently hereby dismissed with costs to the respondent.

Dated at Kampala this…….. day of…….. 2010

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| **ASA MUGENYI** | **MARTIN FETAA** | **PIUS BAHEMUKA** |
| **CHAIRMAN** | **MEMBER** | **MEMBER** |