THE REPUBLIC OF UGANDA

IN THE TAX APPEALS TRIBUNAL AT KAMPALA

APPLICATION NO. 38 OF 2021

ATACAMA CONSULTING SERVICES LTD …….APPLICANT

VERSUS

UGANDA REVENUE AUTHORITY…….RESPONDENT

BEFORE: DR. ASA MUGENYI, MR. GEORGE MUGERWA, MS. CHRISTINE KATWE.

RULING

This application is in respect of a claim for input Valued Added Tax (VAT) credit of Shs. 191,749,656 for hire of the vehicles by the applicant which was rejected by the respondent.

The applicant carries on the business of environmental and management consultancy services. It contracted Mercantile Car Rental for the hire/ supply of motor vehicles. The applicant claimed input tax of Shs. 191,749,656 for the hire of the vehicles which was rejected by the respondent. The applicant applied for a private ruling in respect of the input tax claimed. The respondent issued a private ruling to the effect that the applicant is not entitled to input tax. The applicant being dissatisfied with the ruling appealed to the Tax Appeals Tribunal.

Issues:

1. Whether the applicant is entitled to the input tax claimed?
2. What remedies are available?

The applicant was represented by Ms. Belinda Nakiganda while the respondent by Mr. Barnabas Nuwaha and Ms. Patricia Ndagire.

The gist of the dispute of the parties revolves around a refund claim of input VAT arising from the hire of vehicles by the applicant. The applicant applied for a private ruling

where the claim was rejected. The parties opted not to call witnesses but file submissions.

The applicant submitted that S. 28(1) of the VAT Act provides that where S. 25 applies for the purpose of calculating the tax payable by a taxable person for a tax period, a credit is allowed to the taxable person for a tax payable in respect of all taxable supplies made to that person during the tax period if the supply is for use in the business of the taxable person. S. 28 (2) further states that where S. 26 applies for the purposes of calculating the tax payable by a taxable person for a tax period, a credit is allowed to the taxable person for any tax paid in respect of taxable supplies where the supply or is for use in the business of the taxable person. The applicant cited *Enviroserve (U) Ltd v URA* TAT of 2007, where the tribunal stated that "for a person to claim input tax they have to prove they are a taxable person; taxable supplies have been made to the applicant during the tax period and that the taxable supplies were for use in the business of the applicant". The applicant submitted that the tribunal stated that as long "as a person is registered for VAT and his registration has not been cancelled, he is deemed a taxable person". The applicant submitted that it is a taxable person under the VAT Act since 1st July 2006 as per exhibit A8.

The applicant further submitted that S. 28 (5)(a) of the VAT Act provides that a taxable person shall not qualify for input tax credit in respect of a taxable supply of passenger automobile, repair and maintenance of the automobile, including spare parts, unless the supply is in the ordinary course of continuous and regular business of selling or dealing in hiring of passenger automobiles. The Sub-section provides for an exception to S. 28. The applicant submitted because of the nature of its business it hire cars from Mercantile Car Rental in the course of its ordinary business to ensure that work is done. The services of Mercantile Car Rental in hiring out vehicles to it are taxable supplies.

The applicant argued that S. 26 of the Tax Procedure Code Act places the burden on the person objecting to the decision to prove that the decision should not have been made or should have been made differently. It contended that it applicant has proven that it is a taxable person making taxable supplies, hired auto mobiles for purposes of

transporting equipment for field activities and not solely transporting persons. The applicant prayed that the tribunal declares that it is entitled to Shs. 191,749,656, provide interests on the input tax claimed and costs of this application.

In reply, the respondent raised a preliminary objection. It contended that the applicant has no locus standi to file this application. The respondent submitted that S. 24 (1) of the Tax Procedure Code Act provides that a person dissatisfied with a tax decision may lodge an objection from which an objection decision is made. S. 45(9) of the Tax Procedure Code Act provides that "a private ruling is not a tax decision for purposes of this Act". The respondent contended that the tribunal does not have powers to hear a matter arising out of a private ruling since it is not a tax assessment or a decision as in S. 3 (b) of the Tax Procedures Code Act as amended. The respondent cited *Mujib Juma v Adam Musa & Others* Civil Appeal No. 0053 of 2015 where Justice Henry Kawesa held that:

> "Jurisdiction of court can only be granted by law. If proceedings are conducted by a court without jurisdiction, they are a nullity. This was the case in *Desai v Warsaw* (1967) EA 351. Therefore, any award or judgment arising from such proceedings of a court without jurisdiction is also a nullity".

The respondent contended further that the applicant is not entitled to claim input tax credit claimed for the hire of passenger automobiles. The respondent submitted that S. 25(8)(a) of the VAT Act provides that a taxable person shall not qualify for input tax credit in respect of maintenance a taxable supply or import of a passenger automobile, the repair and maintenance of that automobile , including spare parts , unless the automobile is acquired by the taxable person exclusively for the purpose of making a taxable supply of that automobile in the ordinary course of a continuous and regular business of selling or dealing in or hiring of passenger automobiles. The respondent submitted that the applicant is a not taxable person nor was there a taxable supply of motor vehicles by the applicant from Mercantile Car Rentals. The respondent further contended that the applicant did not adduce evidence to show that it acquired the automobiles exclusively for the purpose of making a taxable supply of automobiles in the ordinary course of a continuous and regular business of selling or dealing in or

hiring of passenger automobiles. The applicant carries on the business of environment consultancy and as such the applicant cannot benefit from the said exception.

The respondent submitted that the burden of proof in tax disputes is on the taxpayer under the Tax Procedure Codes Act and The Tax Appeals Tribunal Act. The respondent cited *Williamson Diamonds Ltd v Commissioner General* [2008] 4 TTLR 167, where the Tax Revenue Appeals Tribunal of Tanzania held that:

> "…the burden of proving that an assessment issued by the respondent is excessive or erroneous lies on the tax payer (appellant) and in no way is it shifted to the respondent".

The respondent contended that the applicant has the onus to prove that the taxation decision by the respondent was erroneous, which it failed to discharge.

In rejoinder, the applicant contended that the respondent did not plead its preliminary objection. It cited *Yaya v Obur and others* HCCA 81of 2018 where it was stated that a defendant wishing to rely on points of law as a preliminary issue is required to set out such points of law in the written statement of defence before the preliminary issue is regarded as properly raised. Order 6 rule 6 of the Civil Procedure Rules states grounds that may be raised in a preliminary objection. The applicant cited *A Better Place Uganda Ltd. v URA* HCCA 37 of 2019 where the court considered the raising of a preliminary objection which was not pleaded as smuggling a matter into the proceedings.

The applicant reiterated it position that it acquired the vehicles from Mercantile Car Rentals for use in its business. The vehicles were modified to suit the requirements of the project. The applicant contended that if the vehicles hired by the applicant are for transporting cargo and persons, they fall outside the ambit of S. 28(5) of the VAT Act.

Having read the submission and perused the evidence of both parties, this is the ruling of the tribunal

The respondent raised a preliminary objection that the applicant does not have *locus standi* and the Tribunal does not have jurisdiction to entertain the matter. In *Mukisa*

Biscuit Manufacturing Co. Limited v West End Distributors Limited [1996] EA 696 Sir Charles Newbold stated that;

> "A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea in limitation…."

The respondent contended that a preliminary point of law can be raised at any time before the trial. Order 6 Rule 28 of the Civil Procedure Rules states that a point of law that is pleaded which when so raised is capable of disposing of the suit, may then by consent of the parties, or by order of the court on the application of either party, be set down for hearing and disposed of at any time before the hearing.

The applicant contended that a preliminary point of law should be pleaded. The applicant cited *Yaya v Obur and others* HCCA 81of 2018 where it was stated that a defendant wishing to rely on points of law as a preliminary issue is required to set out such points of law in the written statement of defence before the preliminary issue is regarded as properly raised. The Tribunal notes that where a preliminary issue on law is not properly raised it still has to dispose of it. In *Makula International limited v Cardinal Nsubuga* Civil Appeal 4 of 1981 it was stated that once an illegality is brought to the attention of court it takes precedence over all pleadings. In *Desai V Warsaw* (1967) EA 351 it was noted that any award or judgment arising from such proceedings of court without jurisdiction is also a nullity. Therefore the Tribunal has to address the preliminary objection on a point of law especially if it touches its jurisdiction.

The respondent's preliminary objection is grounded in S. 3 of the Tax Procedure Code Act 2014 as amended 2021 which defines a taxation decision to:

> "a) a tax assessment;
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> b) a decision on any matter left to the discretion, judgment, direction, opinion, approval, satisfaction, or determination of the Commissioner other than:
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> i) a decision made in relation to a tax assessment;
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> ii) a decision to refuse, issue or revoke a practice note or private ruling or an omission to issue or revoke a practice note or private ruling;
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> iii) a decision or omission that affects a tax officer or employee or agent of URA; or

iv) the compoundment of an offence under any tax law."

S. 3 of the Tax Procedure Code Act was amended in 2021. It takes effect from 1st July 2021. The applicant filed its application on 14th May 2021.The amendment cannot act retrospectively. However, the respondent cited S. 45(9) of the Tax Procedure Code Act 2014 which reads that a private ruling is not a tax decision for the purpose of this Act. S. 24 of the Tax Procedure Code Act requires a person dissatisfied with a tax decision to lodge an objection with the Commissioner after receiving notice of the tax decision. S. 24(5) enables the Commissioner to make an objection decision. Under S. 25 a person dissatisfied with an objection decision may lodge an application to the Tax Appeals Tribunal. The applicant did not object to the private ruling. Even so, the applicant could not object to the private ruling as it is not a tax decision. Therefore if there is no objection decision in this matter the Tribunal does not have jurisdiction to entertain a matter where there is no objection decision or taxation decision. The preliminary objection is sustained.

In the event the Tribunal is wrong, it will address the merits of the application without prejudice. The applicant carries on business of environmental and management consultancy services. It contracted Mercantile Car Rental for the hire of motor vehicles. The applicant claimed input tax of Shs. 191,749,656 for hire of the vehicles which was rejected by the respondent on the ground that it was not entitled to it.

S. 1(l) VAT Act defines input tax as tax paid or payable in respect of a taxable supply to or an import of goods by a taxable person. S. 28(1) and (2) of the VAT Act state, briefly, that a credit is allowed to a taxable person for any tax paid in respect of taxable supplies to, or imports by the taxable person where the supply is for use in the business of the taxable person. In *Enviroserve (U) Ltd v URA* TAT of 2007, the tribunal stated that "for a person to claim input tax they have to prove they are a taxable person; taxable supplies have been made to the applicant during the tax period and that the taxable supplies were for use in the business of the applicant". S. 1(x) of the VAT Act provides that "a taxable person" has the meaning in S. 6 which defines him as a person registered under S. 7, which is to effect that a taxable person is one from the time the registration takes effect. The applicant is a taxable person.

It is not disputed that there was a taxable supply of motor vehicles (hire) by the applicant from Mercantile Car Rentals. What is in contention is whether the applicant can claim input tax credit under S. 28(5)(a) of the VAT Act which reads:

> "A taxable person under this Section shall not qualify for input credit in respect of a taxable supply or import of-
>
> (a) a passenger automobile, and the repair and maintenance of that automobile, including spare parts, unless the automobile is acquired by the taxable person exclusively for the purpose of making a taxable supply of that automobile in the ordinary course of a continuous and regular business of selling or dealing in or hiring of passenger automobiles."

The VAT Act does not define a passenger automobile. Christine Mugume in *Managing Taxation in Uganda* 2nd Edition p. 20/57 defines 'passenger automobiles' to mean "road vehicles designed solely for the transport of sitting passengers, such as saloon cars." This as noted by Christine Mugume would exclude road vehicles that are designed to carry goods such as pickups, lorries and trailers.

The applicant contended that it hired vehicles from Mercantile Car Rental. Is the hire of passenger automobiles a supply of goods or that of services? S. 10 of the VAT Act provides that

> "(1) Except as otherwise provided under this Act, a supply of goods means any arrangement under which the owner of the goods parts or will part with possession of the goods, including a lease or an agreement of sale and purchase."

Hiring of vehicle involves parting with possession of goods. Therefore, the hire of vehicle would be a supply of goods and would fall under S. 28(5) of the VAT Act

However, for a taxable supply of passenger automobile to enable a taxable person claim input tax credit, it must in the ordinary course of a continuous and regular business of selling or dealing in or hiring of passenger automobiles exclusively. The applicant does not deny it is in the business of environmental and management consultancy services. The said services are different from those of selling, dealing or hiring of passenger automobiles. It is only Mercantile Car Rentals that deal in such business that can claim input credit if it was hiring the said vehicles from another

company. The applicant does not have locus standi to bring such a claim. The intention of the legislature was to only allow taxable persons who exclusively supply, deal or lease passenger automobiles claim input credit when the supply is in the ordinary course of its business. It was intended to discourage taxable persons from claiming input credit incurred for travels such as those of employees. However, vehicles other than passenger automobiles which supply goods can claim input tax credit. The applicant stated that the vehicles it hired are used to transport employees and sensitive equipment for field work. Field work is not in the ordinary course of selling, dealing or hiring of passenger automobiles. Therefore, the applicant's business does not fall within the exception under S. 28(5) of the VAT Act.

Lastly, the Tribunal notes that the applicant sought for a private ruling. In its application for the ruling the applicant indicated that some of its vehicles were passenger automobiles. In the said application there is no evidence to indicate that the applicant incurred input tax credit of Shs. 191,749,656. The receipts and invoices were not attached to the private ruling. However, the said figure was smuggled into the trial with no evidence to show that the applicant incurred the said amount. Therefore, if the Tribunal was wrong to state that the applicant was not in the ordinary course of a continuous and regular business of selling or dealing in or hiring of passenger automobiles, there is no evidence that the applicant incurred the credit input tax claimed.

Taking all the above into consideration, this application is dismissed with costs to the respondent.

Dated at Kampala this 25th day of November 2021.

DR. ASA MUGENYI	**MR. GEORGE MUGERWA**	**MS. CHRISTINE KATWE**

CHAIRMAN **MEMBER** **MEMBER**