THE REPUBLIC OF UGANDA

IN THE TAX APPEALS TRIBUNAL OF UGANDA AT KAMPALA

APPLICATION NO. 256 OF 2022

KAMPALA CLUB LIMITED ..... APPLICANT

VERSUS

UGANDA REVENUE AUTHORITY..... RESPONDENT

BEFORE: DR. ASA MUGENYI, DR. STEPHEN AKABWAY, MR. SIRAJ ALI.

RULING

This application is in respect of Value Added Tax (VAT) assessments of Shs. 166,541,103 on subscription and registration fees paid by members of the applicant.

The applicant is a company limited by guarantee. It provides health club facilities to its registered members. On the 28th and 29th April 2022, the respondent issued VAT additional assessments of Shs. 215,854,864 for 2020 and 2021. The applicant objected to the assessments on grounds inter alia that the annual subscriptions and registration fees paid by the members are not a taxable supply.

On 27th October 2022, the respondent issued its objection decision partially allowing the objection for 2020 from Shs. 51,217,498 to Shs. 39,435,306 and for 2021 from Shs. 164,637,366 to Shs.127,105,797. It maintained a VAT tax liability of Shs. 39,435,306 for 2020 and Shs. 127,105,797 for 2021 on grounds that the members' subscription and registration fees are taxable supplies. The amount of VAT tax in dispute is Shs. 166,541,103.

Issues:

1. Whether the applicant is liable to pay VAT on registration and subscription fees paid by its members?
2. What remedies are available?

The applicant was represented by Mr. Deus Mugabe and Mr. Enock Turansatzi while the respondent by Mr. Donald Bakashaba and Mr. Amanya Mushambi.

The applicant's first witness, Mr. George Ogumbo Oguttu, its general manager stated that the applicant does not conduct business for profit. The objects for which the club is established is to provide and promote sports, recreational and entertainment as well fellowship among members, to conduct, regulate and hold tournaments, competitions, sports among others. The applicant provides health club facilities to only its registered members who pay annual subscription fees. The members also pay for refreshments which are VAT accountable. The respondent issued VAT assessments of Shs. 259,746,308 for 202 and 2021. The applicant objected to the assessment on the ground that the subscriptions and registrations fees paid by members are not a taxable supply. The objection was partially allowed and VAT reduced. He stated that the respondent misunderstood the facts relating to the operations of the applicant. It was a misconception that the applicant is in the business for VAT purposes. He testified that annual subscription fees are required for purposes of maintaining the Club facilities.

The respondent's witness, Ms. Joseph Ronald Ssemanda an officer in its domestic taxes department stated that the respondent conducted a refund audit of the applicant's tax affairs and found that there was unverified input tax claimed by the tax payer for 2020 and 2021 of Shs. 67,848,313. There was undeclared VAT on annual subscriptions, operating income and revenue from other services amounting to Shs. 1,066,100,047. It also further established that there were variances between declared revenue and operating income, hence undeclared VAT of Shs. 37,661,845. Based on the audit finding the respondent issued VAT assessments of Shs. 51,217,498 and Shs. 164,637,366 for 2020 and 2021. The applicant objected to the assessment on grounds that all disallowed input VAT was incurred and verifiable, annual subscriptions are paid to the club upon being registered as a member. The applicant contended that the payment of subscription fees is not a supply and that all revenue was accounted for in the VAT returns. Mr. Semanda stated that input tax was disallowed by the respondent on grounds that it could not be verified on EFRIS and third-party declarations. The applicant failed to avail invoices, list of members that play games at the club and the number of games played. He stated that it was further established that the applicant is making taxable supplies through provision of health club facilities including gym, sauna, tennis, massage, swimming pool among others.

The applicant submitted that S. 4 of the VAT Act states that:

> "A tax, to be known as a value added tax, shall be charged in accordance with this Act on-
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> (a) every taxable supply made by a taxable person;
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> (b) every import of goods other than an exempt import; and
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> (c) the supply of imported services, other than an exempt service, by any person."

It submitted that when a member of the applicant pays annual subscription fees, no taxable supply is made. It cited S. 18 of the VAT which states:

> "(1) A taxable supply is a supply of goods and services, other than an exempt supply, made in Uganda by a taxable person for consideration as part of his or her business activities.
>
> (2) A supply is made as part of a person's business activities if the supply is made by him or her as part of, or incidental to, any independent economic activity he or she conducts, whatever the purpose or results of that activity".

The applicant submitted that the payments in dispute are for membership in the club and are not directly linked to any service. Consideration must be directly linked to a supply for VAT to apply. S. 18(2) of the VAT Act provides that;

> "a supply is made as part of a person's business activities if the supply is made by him or her as part of, or incidental to, any independent economic activity he or she conducts, whatever the purpose or results of that activity."

The applicant submitted that in *Apple and Pear Development Council v Customs and Excise Commissioner,* [1988] ECR 1443 the court established a well-known principle of VAT law that there must be a direct link between the service provided and the payment received by the provider. It submitted that the payment for annual subscription fees is not made for access to the applicant's services. Payment of annual subscription fees is directly linked to being a member of the applicant. It does not directly relate to any goods or services in accordance with the VAT law. The applicant submitted that there is no direct link (as required by the VAT regime) between the payment of annual subscription fees and the activities enjoyed by the members. The payment is for membership. The payment is not for any service. The applicant does not provide the above for any remuneration. For there to be an economic activity, there must be an activity carried out in return for remuneration.

The applicant submitted that in *Wakefield College v Revenue and Customs Commissioners* [2018] EWCA Civ 952, the court made a distinction between consideration and remuneration. Because a payment is received for a service provided

does not itself mean that the activity is economic. For an activity to be regarded as economic, it must be carried out for the purpose of obtaining income (remuneration). The applicant submitted that annual subscription fees are not collected from the members of the applicant as income of the applicant. When a member makes a payment of annual subscription, the applicant does not look at this as income. He testified that annual subscription fees are required for purposes of maintaining the club facilities. They are not income.

In reply, the respondent submitted that the gist of the dispute is whether the services offered by the applicant to its members after payment of annual subscription fees amount to taxable supplies. The respondent submitted that the applicant offers taxable supplies for a consideration and is thus liable to payment of the tax assessed. It cited S. 4(a) of the VAT Act, already stated above. The respondent submitted that S. 11 (1)(b) of the VAT Act states that;

> "Except as otherwise provided under this Act, a supply of services means any supply which is not a supply of goods or money, including-
> a) the performance of services for another person.
> b) the making available of any facility or advantage."

The applicant submitted that in *Metropolitan Life Limited v Commissioner for the South African Revenue Service* A 232/2007 the court defined service' as follows:

> "Services mean anything done or to be done, including the granting, assignment, session or surrender of any right or the making available of any facility or advantage, but excluding a supply of goods, money or any stamp, form or card contemplated in paragraph (c) of the definition of good...".

The respondent submitted that the applicant's witness admitted that the latter provides services of health club facilities including swimming pool, gym, sauna, massage facilities to its registered members.

The respondent submitted that S. 18 of the VAT Act defines a taxable supply as;

> "A taxable supply is a supply of goods or services, other than an exempt supply, made by a taxable person for consideration as part of his or her business activities".

S. 19(1) of the VAT Act sets the parameters of what constitutes an exempt supply as;

> "A supply of goods or services is an exempt supply if it is specified in the Second Schedule".

The respondent submitted that the scope of services supplied by the applicant is not listed in the Second Schedule, as exempt. It submitted further that the applicant is engaged in business activities from which it derives income.

The respondent cited *Esporta Limited V Commissioner Revenue & Customs* [2014] BVC 28 where it was held that; "The contractual terms are the starting point and that the court has to consider whether those terms reflect the economic reality of the transaction." It also cited *Kennemer Golf & Country Club V Staatssecretaris van Flancni* NC-174/00 [2002] STC 502, where it was held that;

> "It is therefore clear that at least that the club's facilities do not need to actually be used by the members for there to be a supply of services."

The respondent submitted that Article 7.7 of the applicant's Constitution states that a member may be denied access to its facilities where such a member has defaulted on payment of subscription fees.

The respondent submitted that the audited financial statement of 2020 stated that the principal activity of the club includes running the club business and renting premises. It cited *Customs and Excise Commissioners v Morrison's Academy Boarding Houses Association* [1978] STC 1 where it was held that.

> "The natural meaning of the word 'business' does not require that what is done must be done commercially or with the object of making profits."

The respondent submitted that the economic reality is that the applicant is engaged in business activities and offers its members a taxable supply in form of rights to access its facilities (making available for use) upon payment of subscription fees. The applicant makes a supply to the club members as part of its business.

The respondent contended that the applicant provides services for a consideration S. 18(4) of the VAT Act states that;

> "A supply is made for consideration if the supplier directly or indirectly receives payment for the supply, whether from the person supplied or any other person, including any payment wholly or partly in money or kind."

The respondent submitted that S. 1(d) of the VAT Act defines consideration as,

> "consideration", in relation to a supply of goods or services, means the total amount in money or kind paid or payable for the supply by any person, directly or indirectly,

including any duties, levies, fees and charges paid or payable on, or by reason of, the supply other than tax, reduced by any discounts or rebates allowed and accounted for at the time of the supply."

The respondent submitted that *Black's Law Dictionary* defines consideration as;

> "Something (such as an act, forbearance, or a return promise) bargained for and received by a promisor from a promise; that which motivates a person to do something, especially to engage in legal acts."

The respondent submitted that the subscription fees constitute legal consideration for the taxable services the applicant supplies to its members. It cited *Kennemer Golf & Country Club v Staatssecretaris van Fianeni N(supra),* where it was held that;

> "As the Commission argues, the fact that in the case before the national court the annual subscription fee is a fixed sum which cannot be related to each personal use of the golf course does not alter the fact that there is reciprocal performance between the members of a sports association such as that concerned in the main proceedings and the association itself. The services provided by the association are constituted by the making available to its members, on a permanent basis, of sports facilities and the associated advantages and not by particular services provided at the members' request. There is therefore a direct link between the annual subscription fees paid by members of a sports association such as that concerned in the main proceedings and the services which it provides."

The respondent submitted that Article 7.7 of the applicant's constitution states that a member may be denied access to the applicant's facilities where such member has defaulted on payment of subscription fees. The annual subscription fee is mandatory and failure to pay within the stipulated timelines the person automatically ceases to be a member. The respondent submitted that there is a direct link between the subscription fees paid by the applicant's members (being consideration) and the taxable services provided at the applicant's facilities.

The respondent submitted that in the alternative without prejudice, the applicant offers taxable supplies to its members for a reduced consideration. S. 18 (7) of the VAT Act states that;

> "A supply is made for reduced consideration if the supply is made between associates for no consideration or between associates for a consideration that is less than the fair market value of the supply."

The respondent submitted that the applicant and members are associates within the meaning of the VAT Act. The supply of the facilities of the applicant to its members constitutes a supply for reduced consideration. It cited *Celtel Uganda Limited v Uganda Revenue Authority* Civil Appeal 22 of 2006 where it was stated that;

> "I think the purpose of S. 3 (1) VAT Act is to impose VAT on supplies made by a taxable person to his or her associates at a reduced consideration or at no consideration at all. This was to ensure that no VAT is evaded."

The respondent submitted that the applicant offers services to its members within the meaning of the S. 18 of the VAT Act for a consideration which can either be direct, indirect or reduced consideration.

Having listened to the evidence, perused the exhibits and read the submissions of the parties this is the ruling of the tribunal.

The applicant is a company limited by guarantee. It provides health club facilities to its registered members. Around 28th April 2022, the respondent issued VAT additional assessments of Shs. 215,854,864 for 2020 and 2021 on the applicant. The respondent contended that the applicant is liable to pay VAT on registration and subscription fees paid by its members. The applicant objected to the assessments on grounds that the annual subscriptions and registration fees paid by the members are not a taxable supply. The amount in dispute was reduced to Shs. 166,541,103

The applicant's witness testified that the objects for which the club is established is to provide and promote sports, recreational and entertainment as well fellowship among members, to conduct, regulate and hold tournaments, competitions, sports among others. The applicant provides health club facilities to only its registered members who pay annual subscription fees. It objected to the assessment on the ground that the subscriptions and registrations fees paid by members are not a taxable supply. The respondent contended that it established that the applicant is making taxable supplies through provision of health club facilities including gym, sauna, tennis, massage, swimming pool among others.

The constitution of the applicant, exhibit AEX 49 states that objects of the club include under Article 4.1, to provide and promote sports, recreational and entertainment

facilities to, as well as promote fellowship among the members. Article 4.8 states that the property and income of the club shall be applied solely towards the objects of the club. Article 4.9 states that the applicant may raise, collect, hold and expend monies for the furtherance of any objects of club. Therefore, the Constitution allowed the applicant to obtain revenue so as to provide and promote sports, recreational and entertainment facilities.

The constitution further provides for fees payable by its members. The fees in contention are the subscription fees. Article 7.1(iv) provides for subscription fees. Article 7.7 of the Constitution states that

> "7.7 A member who fails to pay the subscription fee within the prescribed time:
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> (i) may be denied access to the Club premises or the use of any facilities of the club; and
>
> (ii) shall automatically cease to be a Member on the thirty first day of December of that year."

Therefore, subscription fee entitled a member access to use of any facility of the club. The applicant provides health club facilities including gym, sauna, tennis, massage, swimming pool among others. So, the question is whether the subscription fees paid by members to access the said facilities attracts VAT?

VAT is imposed by the VAT Act. S. 4(a) of the VAT Act which provides that;

> "A tax, to be known as a value added tax, shall be charged in accordance with this Act on-
>
> (a) every taxable supply in Uganda made by a taxable person".

S. 18 of the VAT Act provides that;

> "(1) A taxable supply is a supply of goods or services, other than an exempt supply, made by a taxable person for consideration as part of his or her business activities.
>
> (2) A supply is made as part of a person's business activities if the supply is made by him or her as part of, or incidental to, any independent economic activity he or she conducts, whatever the purposes or results of that activity.
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> (3) The business activities of an individual do not include activities carried on by him or her only as part of his or her hobby or leisure activities.
>
> (4) A supply is made for consideration if the supplier directly or indirectly receives payment for the supply, whether from the person supplied or any other person, including any payment wholly or partly in money or kind."

S. 2(u) of the VAT Act defines service to mean anything that is not goods or money. In *Metropolitan Life Limited v Commissioner for the South African Revenue Service* A 232/2007 the court defined service' as follows:

> "services' mean anything done or to be done, including the granting, assignment, session or surrender of any right or the making available of any facility or advantage, but excluding a supply of goods, money or any stamp, form or card contemplated in paragraph (c) of the definition of good...".

The applicant was not providing goods or money to its members. It was providing access to health club activities such as gym, sauna, tennis, swimming which should be considered as services. S. 19(1) of the VAT Act defines what constitutes an exempt supply as;

> "A supply of goods or services is an exempt supply if it is specified in the Second Schedule".

The health services are not exempted in the Second Schedule of the VAT Act.

The Tribunal has to determine whether the subscription fees was consideration made for the provision of services? The *Cambridge Advanced Learners Dictionary* 4th Edition pg.1568 defines subscription to mean; "an amount of money that you pay regularly to receive a product or service or to a member of an organization". This means that for one to receive services of "Kampala Club" he or she must be a member of the club. *Black's Law Dictionary* 10th Edition p. 1655 defines subscription inter alia as; "An oral or a written agreement to contribute a sum of money or property, gratuitously or with consideration, to a specific person or for a specific purpose." The Tribunal does not think the subscription was being paid gratuitously. The applicant is not a church or a voluntary organization. The applicant argued that the fees paid were used for the maintenance of the club. We note that the club carries out activities like massage, spa, sports among others whose profit can be used for its maintenance. S. 11 (1)(b) of the VAT Act states that;

> "Except as otherwise provided under this Act, a supply of services means any supply which is not a supply of goods or money, including-
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> a) the performance of services for another person.
>
> b) by the making amiable of any facility or advantage."

S. 18 (4) of the VAT Act is to the effect that;

"(4) A supply is made for consideration if the supplier directly or indirectly receives payment for the supply, whether from the person supplied or any other person, including any payment wholly or partly in money or kind".

In *Kennemer Golf & Country Club V Staatssecretaris van Fianeni N(supra)* where it was held that.

"The services provided by the association are constituted by the making available to its members, on a permanent basis, of sports facilities and the associated advantages and not by particular services provided at the members' request. There is therefore a direct link between the annual subscription fees paid by members of a sports association such as that concerned in the main proceedings and the services which it provides."

The subscription was being paid by members of the applicant as consideration for the provision of health services enjoyed by members.

The audited financial statement of the applicant ending 31st December 2020 show that applicant's major source of revenue is from annual subscription fees. For 2020 the annual subscription fees were 784,150,000 while for 2019 it was 852,100,000. Note 3 states that club members are expected to pay subscription fees which is payable on the first day of January and not later that last day of March every year. A member who fails to pay subscription fee within the prescribed time automatically ceases to be a member on 31st December of that year.

The Tribunal notes that it is evident that the economic reality of the transaction is that the applicant is engaged in business activities and offers its members a taxable supply in form of access its facilities upon payment of subscription fees. It is highly unlikely that the members of the applicant would agree to pay subscription fees if it is not providing health club services. The subscription fees are used to maintain the health club facilities. Therefore, there is an economic link between the payment of the subscription fees and the members' access to the facilities. The fees contribute to a major source of income of the applicant which enable it meet its expenses.

According to S.4 of the Value Added Tax Act, the subscription by the members leads to receipt of a service which is membership. Other people do not enjoy the services of the club unless they are registered. In this case the applicant receives that subscription

fee because they supply membership to its members. This membership comes with access to health club services provided. The applicant has not exhausted the burden to prove why it should not be taxed. In this case, we find that the applicant offered a service to members and hence taxable. We find that the VAT of Shs. 166,541,103 is payable by the applicant.

This application is dismissed with costs to the respondent.

Dated at Kampala this 31st day of October 2023.

DR. ASA MUGENYI
CHAIRMAN

DR. STEPHEN AKABWAY
MEMBER

MR. SIRAJ ALI
MEMBER