THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

CIVIL APPEAL NO. 15 OF 2013

(ARISING FROM HIGH COURT AT KAMPALA (ZEHURIKIZE, J)
CIVIL SUIT NO. 182 OF 2010)

UGANDA TAXI OPERATORS

AND DRIVERS ASSOCIATION (UTODA)::::::::::::::::::::APPELLANT

VERSUS

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

Corum: Hon Justice S.B.K. Kavuma, DCJ.
Hon. Justice A. s. Nshimye, JA.
Hon. Justice Remmy Kasule, JA.

JUDGMENT OF THE COURT.

BACKGROUND

This is an appeal against the judgment of the High Court dated 25th January 2013, (Vincent T. Zehurikize J), dismissing Civil Suit NO. 182 of 2010.

The appellant, a company limited by guarantee, sued the respondent for the refund of monies retained by the respondent as Value Added Tax (VAT) since 2004 in respect of the appellant's taxi parks operations which the appellant carried out at the material time for and on behalf of the then

Kampala City Council, (KCC), now Kampala Capital City Authority. By the year 2010 the respondent had retained from the appellant a total sum of Ug. shs. 3, 903,136, 565/= as VAT.

Before the High Court, counsel for the parties addressed Court on the question of law:-

"Whether the plaintiff, (now appellant), is liable to pay value added Tax (VAT) for its services of management of taxi parks and Taxi operations in Kampala city".

The High Court decided the question in the affirmative and dismissed the suit. The appellant being dissatisfied appealed to this court on the following grounds.

1. *The learned trial judge erred in law when he found that the management of taxi operations by the appellant is not incidental to passenger's transportation services.*

2. *The learned trial judge erred in law when he found that income accruing to the plaintiff from the business of managing the operations of taxis is not exempt from income under VAT.*

3. *The learned trial judge erred in law and fact when he engaged in speculation, guess work and conjecture.*

4. *The learned trial judge erred in law when he dismissed the entire suit without resolving the issues raised by the parties.*

5. *The learned trial judge erred in law and fact when he failed to properly evaluate the evidence on record and came to a wrong conclusion.*

During the conferencing of the appeal, three issues for determination were framed from the grounds of the Memorandum of appeal, namely:-

(i) *Whether the service provided by the appellant of management of taxi operations and Taxi Parks in and around Kampala city is incidental to the principal service of passenger transport services and hence exempt from VAT.*

(ii) *Whether the learned trial judge erred in law and fact when he dismissed the Plaintiffs' (now appellant's) suit without considering the position as agreed upon by the parties in the course of the trial.*

(iii) *What are the remedies available to the parties?*

Counsel for both parties filed in court their respective conferencing notes and legal arguments.

Representation.

Mr. Kabega Moses with Mr. Sekaana Musa represented the appellant while Ms. Mwajuma Nakku, a Litigation Supervisor in the "Legal Services and Board Affairs" department of the respondent appeared for the respondent.

Submissions for the appellant.

Counsel Kabega submitted on the first issue that the Services the appellant provided were exempt from Value Added Tax (VAT) under provisions of the value Added Tax Act. He cited **Section 4** of the **Value Added Tax Act** that establishes the Value Added Tax (VAT) chargeable on every supply to a taxable person, then **Section 18(1)** which provides that taxable supply could be of goods or services by a taxable person for a consideration. **Section 19(1)** which creates an exception for supply of goods and services found in the 2nd schedule, part (1) (n), which includes the supply of passenger transport services as the basis for his contention.

Counsel further asserted that exempt supply is defined in part 2 of the Act to mean supply of goods or services to which section 19 applies. Passenger transportation services are defined to mean **the transportation services of fair paying passengers and their personal effects by road, water or rail but does not include passenger transportation services provided by a registered tour operator.**

Counsel also cited **Section 16 (3)** as it was before the amendment of the **VAT Act.** It provided that a supply of services of, or incidental to transport takes place where the transport commences. Counsel argued that the service of management of taxi operations and the taxi park is such a service as is envisaged under the above section and that it was an incidental service to passenger transportation and as such its tax treatment is similar to that of the principal service which to him, is an exempt one.

Referring to the **Cambridge International Dictionary,** counsel defined the word "incidental" to mean the happening in connection with something of greater importance.

Counsel relied on the cases of **Card Protection Plan Limited Vs Commissioner for Customs and Excise 2001 (UK HL4) , Uganda Revenue Authority Vs Total Uganda Ltd. Civil Appeal No. 011 of 2012** and **UTODA Entebbe Branch Limited Vs Uganda Revenue Authority Application No. TAT 8 of 2009** in which courts of law had dealt with to show the criteria used by courts while defining the term "incidental" as being:-

(i) Whether the parties looking at the transaction intended to have two distinctive services.

(ii) Whether the service creates an end in itself to a customer or is it just a means of better enjoying the principal service.

(iii) *Whether a single price is being charged for the service and that a single supply from an economic point of view should not be artificially split so as to avoid distorting the VAT mechanism.*

Counsel explained that the kind of service which the appellant was supposed to provide, for which he was being assessed the contested VAT, was *"the management of taxi operations at Benedicto Kiwanuka taxi park, Namirembe road taxi park and other operations but does not include other business activities around the park",* which, to him, meant running or controlling a business. This included the keeping of law and order and maintaining cleanliness and hygiene within the parks, ensuring that parking

fees are paid, controlling traffic in and around the Taxi Parks and also establishing administrative structures like stage committees, to control the loading and offloading of passengers and the handling of passenger's luggage.

Counsel posed the question whether the above outlined services could be construed as being incidental to the principal service of provision of passenger transport services, in so far as they provided an environment for the smooth enjoyment of the transport service by the ultimate consumer who is the passenger? Counsel answered the question in the affirmative and submitted that the court should also so hold.

In counsel's view, it would be illusionary to think that there could be management of transport and taxi parks when actually there was no actual transportation of passengers. The management happens as a consequence of the transportation of passengers from point A to point B, making it an incidental service and the passenger pays only one price for the service which was set by KCC and does not include VAT. According to counsel, the two cannot be separated. He relied on the authority of **Her Majesty's Commissioner of Customs and Excise Vs College of Estate Management, House of Lords, 20th October 2005,** which also referred to the earlier cases that counsel had invited court to consider.

Counsel then addressed Court on the effect of **Section 16(3) of the VAT (Amendment) Act** which amended **Section 8 of the Principal Value Added Tax Act, Cap 349** by way of substitution of the entire section. The new section makes provision for the definition of incidental services to transport.

He contended that the amendment could not have been in vain. It was intended to address what the legislature had left out of the law, namely, recognition of what constitutes "incidental services" to transport for purposes of VAT taxation. He further contended that since these services were not recognized before the amendment, they would not be the subject of VAT as opposed to the position after the amendment when they are subject to VAT. In his view, the trial judge failed to properly apply the criteria of identifying incidental services which are exempt.

He prayed that court finds that the trial judge erred in making a finding that the service by the appellant was distinct and separate from the principal service of passenger transportation services.

On the second issue of whether the trial judge erred in law and fact when he dismissed the suit without considering the parties agreed position in the course of the trial, Counsel submitted that the parties had agreed that the respondent had erroneously assessed the appellant based on the contract sum. In his view, it was incumbent upon the trial judge to inquire into that question that had been raised before dismissing the suit.

He prayed that Court answers this issue in the affirmative.

On the third issue of remedies, counsel prayed that we set aside the judgment and findings of the trial judge and order the respondent to refund to the appellant the sum of Ug. Shs.3, 903, 136, 556/= as the money wrongly paid without legal basis by the appellant to the respondent on account of VAT. On interest, counsel prayed that it be awarded at the court

rate. In finality, he prayed that the appeal be allowed with costs in this court and in the court below with a certificate for two counsel.

Submissions in reply by the respondent.

On the first issue counsel Mwajuma Nakku agreed with the findings of the trial judge on the ground that **Section 4 of the VAT Act, Cap 349** establishes a tax of VAT on every taxable supply in Uganda. This supply has to be made by a taxable person who, under **Section 61 of the Value Added Tax Act,** is considered to be a person who is registered as such. A taxable supply of services is defined under **Section 11 (1) (b) of** that Act to include the making available of any facility or advantage in which category the appellant falls. She referred to the contracts that were signed between the appellants and KCC to provide services of management of taxi operations and taxi parks. **Section 19 (1)** provides for exempt supply to which the tax cannot be imposed and makes specific reference to the 2nd schedule, part one, where supply of passenger transportation services are exempt. Part 2 (c) of the same schedule defines passenger transportation services as the transportation of fare paying passengers and their personal effects by road, rail, water or air. The definition captures the actual transportation of passengers and it restricts itself to only that.

Section 16 (3) of the Act i.e **Cap 349** as it was then, provided that a supply of services of, or incidental to, transport takes place where the transport commences. For the definition of the term "incidental", counsel relied on the case of **Customs and Excise Commissioners Vs Madgett and Baldwin, (trading as Howden Court Hotel), (1998) Simon's Tax Cases 1189, page 1197**

for the assertion that the service must be regarded as ancillary to a principal service if; first, it contributes to the proper performance of the Principal Service, and second, it takes up a marginal proportion of the package price compared to the Principal Service. It does not constitute an object for customers or a service sought for it's own sake, it does not constitute for customers an aim in itself but a means of better enjoying the principal service supplied.

Counsel contended that the services offered by the appellant stood alone and constituted an end in itself as far as they were made for the purpose of managing taxi parks alone.

She further referred to the case of **Canadian National Railway Company Vs Harris, [1946] Supreme Court of Canada, 352** which adopted the definition of the Oxford Dictionary to the effect that something incidental is something occurring or liable to occur in subordinate conjunction with something else.

She contended that the inclusion of the term **"incidental"** in **Section 16(3)** of the **Act, Cap 349,** had nothing to do with the description of services that are deemed to be incidental to passenger transportation. While she agreed that passenger transportation commences when a passenger embarks a taxi in a taxi park, it was not, according to her, true that because those services provided by the appellant started from the taxi park, therefore they were incidental to passenger transportation. She supported the judgment of the trial judge to the effect that the taxi parks provided a convenient way for the supply of passenger transportation services just as the roads and stages did, but such relationships do not make these facilities part and parcel of the

transportation business. They remain separate. According to her, the business of the appellant is not listed as exempt under **Section 19(1)** and the **2nd schedule** to the **VAT Act Cap. 349.** Hence, the trial judge properly evaluated the evidence and came to the right conclusion that the appellant was being liable to pay VAT.

In reply to the appellant counsel's submission that the amendment of **Section 16(3)** of the **VAT** Act, was prompted by the decision in the **UTODA Entebbe Vs URA** case (supra), She submitted that it was not only that Section that was amended but many others were also amended that it did not have to do with the issue in that case. Learned counsel for the respondent prayed Court to ignore counsel's submission in that respect.

With regard to the second issue, of the dismissal of the case by the High Court, she argued that the appellant's earlier position was that URA had erroneously assessed the appellant company's liability of VAT basing on the figure of the contract sum. However, after reconciliation, it was confirmed that that the total amount paid in excess was shs. 471,212,014/=. A report was filed in the trial High Court. Counsel invited Court to make a finding on the position as had been agreed upon by both parties during reconciliation. She clarified that during the reconciliation, it was discovered that the respondent had taxed the appellant basing on the contract sum it was giving to KCC but the respondent ought to have assessed the VAT on the amount of money the appellant retained after handing over the contract sum to KCC.

Counsel further stated that there was no clear position taken with regard to over payment. It remained a contentious issue although the respondent's position is that if there is an over payment in any way, the appellant can apply for a refund by going through the process of filing returns.

In conclusion, she prayed that the judgment and orders in **High Court Civil Suit NO. 182 of 2010** be upheld, and the appeal be dismissed with costs.

Submissions in rejoinder.

Counsel Kabega in reply, admitted that the appellant provided services as defined under Sections 11 of the **VAT Act Cap. 349** and that on reading the definition of passenger transportation services, it is restrictive as far as it relates to the transportation of fare paying passengers. He contended however that the term "incidental services" in the Act should be looked at in its entirety because within the same Act, there was section 16(3) that recognized incidental services to transport. Although the term was not defined in the Act, Courts, through case law, had defined the term.

He submitted that it was inconceivable for the respondent to require the appellant to pay VAT on a service related to passenger transportation when the law does not allow the appellant to charge VAT. By its very nature, VAT is a tax borne by the final consumer who is the passenger. If the appellant cannot charge it by law, why then should the appellant pay it?

On the second issue, he submitted that the figure of Ug. shs.3,903,136,565/- billion was the total figure paid by the appellant to the respondent and that

the report ought to be reconciled so as to obtain a proper reconciled figure based on a proper taxable base.

Counsel reiterated his earlier prayer and invited Court to allow the appeal and grant the orders sought.

Realising that there was need to reconcile some figures, this court directed Counsel to go out of court and prepare a reconciliation report, which they did and filed in court as reports "A and B" where they agreed that there was an overpayment to the respondent by the appellant of Ug. shs. 471,212,014/=.

Decision of the Court.

The only issue to be resolved is **whether the service provided by the appellant of management of taxi operations and Taxi Park in and around Kampala city is incidental to the principal service of passenger transport services.** This is so because the other issues on erroneous taxing and the amount overpaid were mutually resolved by the parties to this appeal through the reconciliation process. It is therefore not in contention that the appellant made an over payment of shs. 471,212,014/- to the respondent.

On the only issue before us, we note that Part 2 (c) of the second schedule to **the VAT Act, Cap 349,** defines passenger transportation services to mean the transportation of fair paying passengers and their personal effects by road, water, rail or air, but does not include passenger transport services provided by a registered tour operator.

Part 1 of the 2nd schedule Act, provides that:-

"1. *The following supplies are specified as exempt supplies for the purposes of Section 19----*

(a).....
(b).....
(n) The supply of passenger transportation services (other than tour and travel operators)
(o).....
(p)....."

When a service is exempt from taxation, then no tax is supposed to be charged in respect of the exempt service.

Section 16 (3) of VAT Act, Cap 349 which was operative at the material time stated in respect of the exempt service when it provided:-

"A supply of services of, or incidental to, transport takes place where the transport commences."

It is this Section that was operative at the time material to the case the subject of this appeal. It was deleted by the **Value Added Tax (Amendment, Act 18 of 2011** whose commencement date was 1st July, 2011. According to **Halsbury's Laws of England, Vol. 49 (1)**, when the goods/services provided under a contract consist of a number of different elements, it is a question of law, to be determined objectively, whether the supplier has made a single supply or a number of separate supplies. The distinction is only of significance where the different elements would, if separately supplied, be

subject to VAT at different rates. Where the transaction is treated as involving a composite supply, the court is obliged to determine the liability of that supply to VAT. The question to be asked in determining whether there has been a single supply or several supplies has been identified as: ***"was the supply of [the one item] incidental to, or an integral part of the supply of the other?"***

For purposes of VAT, provision of passenger transport is a supply of a service. It is covered by **Section 11 of the VAT Act.** The making available of any facility or advantage is also a supply of services (S.11 (1) (b). A supply of goods incidental to the supply of services is part of the supply of services (S.12 (2).

In the case of **Customs & Excise Commissioners V. United Biscuits (UK) Ltd. (t/a Simmers) [1992] STC 325**, it was held that a decorative tin costing more than the biscuits it contained was an integral part of a zero rated supply of biscuits.

In the process of providing passenger transport, other services are usually provided to passengers. These can be either:

- ***Incidental to the supply of passenger transport.***
- ***Ancillary to the supply of passenger transport.***

On the amendment of the **VAT Act, Cap 349**, by the **VAT (amendment Act 18 of 2011,** Section 16 was done away with. It was substituted by a wholly new Section 16 which has no equivalent of the old **Section 16(3) of the VAT Act, Cap 349.** Thus today the Act does not recognize incidental services. So

in this case, we will only refer to that Act i.e Cap 349 before the same was amendment.

We clearly understand that passenger transportation services were at the material time exempt from taxation but the question to be answered is whether the additional management contract the appellant undertook was also exempt from taxation.

Both counsel in their submissions defined the term incidental services. The main characteristics are that they should be provided at no extra cost and where an additional charge is made to the passenger it is regarded as a supplement to the fare.

Ancillary services are not part of the single supply of passenger transport services but are supplied separately. These are normally standard-rated. They may include; Meals, snacks, and sandwiches, drinks etc.

We are of the view that indeed no proper passenger transport system can exist without the services rendered by the appellant and forming part of the dispute sought to be resolved through the instant appeal. Without them the suffering and inconvenience would befall the passengers and this would result into a lot of inconvenience to the passengers as they access the transportation service. Those services were incidental to the principal service of passenger transport and are exempt from VAT under the law then in place.

We thus accept the appellant's submissions and reference and reliance on the persuasive authority of **UTODA Entebbe Branch Ltd. Vs Uganda Revenue Authority Tax Appeals Tribunal Application No. TAT 8 of 2009,**

which referred to the case of **Card Protection Plan Limited Vs Commissioners Customs and Excise [2001] UKHL 4 by Lord Slynn of Hadley** who held that:-

> *" ...every supply of a service must normally be regarded as distinct and independent and, secondly that a supply which comprises a single service from an economic point of view should not be artificially split, so as not to distort the functioning of the VAT system, the essential features of the transaction must be ascertained in order to determine whether the taxable person is supplying the customer, being a typical customer, with several distinct principal services or with a single service...a service must be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied..."*

In the result, we answer issue one in the positive.

The second issue related to whether or not the trial judge erred in law and fact when he dismissed the suit without considering the position as agreed by the parties in the course of the trial.

In the High court, the parties framed two issues as indicated earlier in this judgment. One of the issues was;

"*Whether the assessment by Uganda Revenue Authority for payment of VAT was proper, based on the contract sum of Uganda shs 290,000,000/- as the taxable value*"

In the course of the hearing of the appeal, counsel for the respondent conceded that it was an error on their part to have assessed VAT on the contract price which was being paid to Kampala City Council. We would therefore answer issue 2 in the negative and in favour of the appellant.

On the issue of the interest payable on the refundable amount which was reflected in report **"B"**. The interest is based on **Section 44 (1) (c) of the VAT Act** which provides;

"Interest on Overpayments and Late Refunds

Where the Commissioner General is required to refund an amount of tax to a person as a result of-

(a) A decision under section 33B;

(b) A decision of the Tax Appeals Tribunal; or

(c) A decision of the High Court, the Court of Appeal or the Supreme Court,

He or she shall pay interest at the rate of two percent per month compounded on the tax to be refunded."

We find the provision of the Act clear and precise. It is our duty as a Court of law to give the provision, which embodies the intentions of parliament on this point, full effect by applying it to the facts and the evidence before us in the instant appeal.

We therefore, accordingly order that all the VAT amounting to 3,903,136,565/- collected from the appellant be refunded. That amount shall carry interest at the rate of 2% per month compounded from the time

it was paid until the date of this judgment. Thereafter, the decretal amount shall carry interest at the rate of 10% p.a from the date of judgment hereof till payment in full.

The appellant is also awarded costs of the appeal here and in the Court below with a certificate of two counsel.

DATED AT KAMPALA THIS .....DAY OF JUNE 2015.

HON JUSTICE S.B.K. KAVUMA,

DEPUTY CHIEF JUSTICE.

HON. JUSTICE A.S. NSHIMYE,

JUSTICE OF APPEAL.

HON. JUSTICE REMMY KAGULE,

JUSTICE OF APPEAL.