THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NUMBER 25 OF 2009

(Appeal from the decision of Hon. Anup Singh Choudry, J of the High Court of Uganda (Commercial division) in Civil Appeal No. 13 of 2008 delivered on 22nd September 2008)

UGANDA REVENUE AUTHORITY..... APPELLANT

VERSUS

FRESH HANDLING LIMITED ..... RESPONDENT

CORAM: HON. MR. JUSTICE ALFONSE OWINY- DOLLO, DCJ

HON. MR. JUSTICE GEOFFREY KIRYABWIRE, JA

HON.LADY JUSTICE ELIZABETH MUSOKE,JA

JUDGMENT OF KIRYABWIRE JA

Brief facts

The respondent (Fresh Handling Ltd) is in the business of providing cold storage and handling services including refrigeration and palletizing of flowers, freight bookings which include bargaining freight charges with airlines and booking cargo space and or chartering planes on behalf of exporters and providing clearing and forwarding services to flower exporters. The respondent (Fresh Handling Ltd) was audited for VAT for the periods June 2000 to August 2003 and December 2005 to June 2006. Following the audits, VAT assessments were raised on the Respondent in the amounts of UGX. 147,178,711/= and UGX.133,878,540 /= respectively, totaling to UGX.281,057,251/=. The respondent objected to the assessments on grounds that:

i) The basis taken to consider their sales was not realistic and unacceptable.

ii) The output was never charged to the shippers and that this was clear from their individual monthly assessments.

iii) Their services are an integral part of the fresh produce and are part of the supply of its international transportation within the meaning of the VAT statute which has been clarified by an amendment to the VAT Act.

The Appellant contended that the services provided by the respondent were to be standard rated during the periods in which the audits were carried out and were only declared zero rated effective 1st July 2006.

The Tax Appeals Tribunal on 2nd July 2008 ruled that the services rendered by the respondent enjoyed zero rate of Value Added Tax and the amendment of 2006 did not change the legal status. The Tribunal also ordered the Appellant to pay the costs of the application.

The Appellant appealed to the High Court in Civil Appeal No. 13 of 2008 against the Tribunal Ruling on grounds that:-

1. The Tribunal erred in law when it held that the services rendered by the respondent to exporters from Uganda have always enjoyed zero rate of Value Added Tax and that the amendment of 2006 did not change the legal status.
2. The Tribunal erred in law when it held that the Respondent exported services from Uganda which should not have been subjected to VAT within the meaning of the law prior to 2006 amendment.
3. The Tribunal erred in the Law when it failed to evaluate the evidence thereby coming to a wrong conclusion.

The Appeal was heard by the High Court and on the 22nd September 2008, the Hon. Justice Anup Signh Choudry ruled in favour of the Respondent and dismissed the Appeal with costs.

The High Court in its decision held that under Sec 14(1) of the VAT Act in respect to the time of supply, supply occurs on issuance of the tax invoice and that until when a tax invoice is issued, there can be no tax liability.

Being dissatisfied, the appellant appealed to this Court on the following grounds:

Grounds of the Appeal

(1) That the learned Judge of the High Court erred in law when he held that the services rendered by the Respondent which were the subject of the audit by the Appellants for the periods June 2000 to August 2003 and December 2005 to June 2006 constituted an export of service which attracted VAT at zero rate prior to June 2006.

(2) That the learned Judge of the High Court erred in law when he held that the Respondent exported services from Uganda which should not have been subjected to VAT within the meaning of the law prior to the 2006 amendment.

(3) That the learned Judge of the High Court erred in law when he held that under section 14(1) of the Value Added Tax Act, Cap 349, a supply occurs on the issuance of a tax invoice and until then tax liability does not arise because there is no tax point for VAT liability.

Representations

The appellant was represented by Ms. Mwajuma Nakku Mubiru and Mr. R. Goloba from the Legal Department of Uganda Revenue Authority while the Respondent was represented by Mr. C. Birungi and D. Shagenbe.

The parties also filed written submissions which I shall consider.

LEGAL ARGUMENTS

GROUNDS I & II

Arguments for the Appellant

It was submitted for the appellant that **Section 24(4) of the VAT Act** and **S.1(a) and 2(b) of the Third Schedule to the VAT Act** coupled with documentary evidence which was made available to the Appellant from the Respondent prior to the raising of the assessments, show that Fresh Handling Ltd is actually engaged in handling services in Uganda which could only be zero rated effective 1st July 2006 and that the said rate could not be applied retrospectively to cover the assessments prior to the amendments of 2006 of the VAT Act.

Counsel also submitted that **S.24 (4) of the VAT Act** provides that the rate of tax imposed on taxable supplies specified in the Third Schedule is zero and that **Section 1 (a) of the Third Schedule** specifies the following supplies for the purposes of **section 24 (4)**:

"

(a) A supply of goods or services where the goods or services are exported from Uganda as part of the supply

For purposes of paragraph 1(a) goods or services are treated as exported from Uganda if:-

(b) In the case of services, the services were supplied *by a person engaged exclusively in the handling of goods for export at a port of exit or were supplied* for use or consumption outside Uganda as evidenced by documentary proof acceptable to the Commissioner General. .."

It is the case for the appellant that the words in italics were inserted into the VAT Act by the VAT Amendment Act 2006.

Counsel submitted that it is clear from the above section that if any person was engaged exclusively in the handling of goods for export at a port of exit before July 2006, then such a service was **Standard Rated** and subsequently only became **Zero Rated** effective 1st July 2006.

Accordingly, that the issue is whether FHL were supplying services:

(i) For use or consumption outside Uganda as evidenced by documentary proof acceptable to the Commissioner General.

OR

(ii) By a person engaged exclusively in handling of goods for export at a port of exit

Counsel for the appellant submitted that FHL readily acknowledged /admitted that it is a company solely concerned with providing ground handling services and to facilitate block booking of air freight to exporters at Entebbe. That they further "handle a separate activity limited to handling, storage and freight arrangement for other persons who export"

Counsel further submitted that the above stated activities had always been the true position of FHL's state of affairs and that the Respondents had disingenuously lead evidence to the contrary before the Tribunal in order to squeeze themselves within the provision of section 2(b) of the Third Schedule as it stood before the amendment of 2006 in order to make their claim for zero rated status.

For avoidance of doubt, counsel cited Section 2 (b) of the Third Schedule of the VAT Act before the amendment of 2006 which reads as follows:

"...For purpose of paragraph 1 (a) goods or services are treated as exported from Uganda if:–

(b) In the case of services, the services were supplied for use or consumption outside Uganda as evidenced by documentary proof acceptable to the Commissioner General..."

Accordingly, counsel submitted that the respondents at the time in question being exclusively in the handling of goods for export at a port of exit were liable to VAT at standard rate, and invited this Court to so find and allow this ground of appeal.

RESPONDENT'S ARGUMENTS IN REPLY

It was the respondent's response that the appellant's interpretation of the VAT (Amendment) Act amounts to applying the law retrospectively, which is wrong and that the provision **Section 2 (b) of the Third Schedule of the VAT (Amendment) Act)** only applies to the period after June 2006.

Counsel submitted that the correct law to be relied upon is that before July 2006 which provides that "*in the case of services, the services were supplied for the use or consumption outside Uganda as evidenced by Documentary Proof acceptable to the Commissioner General*"

Counsel also submitted that it is a well settled rule of interpretation allowed over time and sanctified by judicial decisions that, unless the terms of the statute expressly so provided or necessarily require it, retrospective operation should not be given to a statute so as to take away or impair an existing right or create a new obligation or impose a new liability otherwise than as regards matters of procedure.

Counsel relied on **Paragraph 1283 Halsbury's Laws Of England Vol 44(1)** which states that "***an amending enactment is generally presumed to change the relevant law only from the time of the enactment's commencement***"

Further, Paragraph 1284 states that "***the effect of an enactment is said to be retrospective when it changes the relevant law with effect from a time earlier than the enactment's commencement; or it otherwise alters the legal incidents of a transaction or other conduct effected before its commencement; or it confers on any person a power to act with retrospective effect***"

Counsel submitted that, therefore the provisions of the VAT (Amendment) Act 2006 cannot be applied retrospectively to this case.

Regarding ground two, counsel for the Respondent noted that as indicated by the Tribunal and High Court respectively in their Judgment, the Appellant did not challenge the assertion by the Respondents that what was claimed as zero rated by the Applicants is not an export of goods or a service incidental to transport but an export of service.

Counsel further offers courier services which involves delivery of flowers outside Uganda and the end product of all contracts was nothing more that *a "door to door delivery of the cargo abroad"*. Furthermore, as the exporter of the goods the respondent finishes his part of the deal when the goods reach the importer's delivery point. Consequently, the exporter of the goods uses the services of FHL to deliver the exported goods abroad and that the service of FHL is therefore used and consumed outside Uganda.

Counsel for the respondent relied on **Section 11(1) of the VAT Act** which provides for supply of services, as follows:

"11. Supply of services

(1) 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; or

(c) The toleration of any situation or the refraining from the doing of any activity."

Counsel also relied on **Paragraph 1(a)** of the **Third Schedule** to the VAT Act which for the purposes of **section 24(4)** specifies zero rated supplies to include *"a supply of goods or services where the goods or services are exported from Uganda as part of the supply"*

Reliance was also placed on **Paragraph 2(b)** of the **Third Schedule** to the VAT Act which is to effect that **services are treated as exported from Uganda if the services were supplied for the use or consumption outside Uganda as evidenced by documentary proof acceptable to the Commissioner General.**

To conclude this ground, counsel for the respondent submitted that the respondent exported services from Uganda which should not have been subjected to VAT within the meaning of the law prior to 2006 because the services rendered to exporters from Uganda enjoyed zero rate of value added tax. Counsel prayed that the two grounds be dismissed.

DUTY OF THE COURT

I wish to recall the duty of a second appellate Court. **Section 72 of the Civil Procedure Act, Cap 71 (CPA)** provides:

" *(1) Except where otherwise expressly provided in this Act or by any other law for the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court, on any of the following grounds, namely that-*

(a) The decision is contrary to law or to some usage having the force of law

(b) The decision has failed to determine some material issue of law or usage having the force of law

(c) A substantial error or defect in the procedure provided by this Act or by any other law for the time being in force has occurred which may possibly have produced error or defect in the decision of the case upon the merits..."

Rule 32 (2) of the Judicature (Court of Appeal Rules) Directions SI 13-10 (hereinafter referred to as the "Rules of this Court") further provides:

"on any second appeal from the decision of the High Court acting in the exercise of its appellate jurisdiction, the Court shall have the power to appraise the inferences of fact drawn by the trial Court, but shall not have discretion to hear additional evidence..."

The role of a second appellate Court was exhaustively discussed in the case of **Kifamunte Henry V Uganda, SC (Cr) Appeal No 10 of 2007** where it was held:

"...the first appellate Court has a duty to review the evidence of the case and to reconsider the materials before the trial Judge. The appellate Court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it...On second appeal it is sufficient to decide whether the first appellate Court on approaching its task, applied or failed to apply such principles..."

The court went on to hold that:

"This Court will no doubt consider the facts of the appeal to the extent of considering the relevant point of law and fact raised in any appeal. If we re-evaluate the facts of each case wholesale, we shall assume the duty of the first appellate court and create unnecessary uncertainty. We can interfere with the conclusions of the Court of Appeal if it appears that in consideration of the appeal, as a first appellate court, Court of Appeal misapplied or failed to apply the principles set out in such decisions as ***Pandya v R [1957] E.A 336***"

Finally the Court also held that:

"...on second appeal the Court of Appeal is precluded from questioning the findings of fact of the trial Court, provided that there was evidence to support those findings, though it may think it possible, or even probably, that it would not have come to the same conclusion; it can only interfere where it considers that there was no evidence to support the finding of fact; this being a question of law: ***R V Hassan bin Said (1942) 9 EACA 62***"

I shall keep the above principles in mind when addressing ourselves to the grounds of appeal in this matter.

RESOLUTION OF COURT

This being a second appeal, the grounds must raise points of law to be determined by this Court. I find, in this appeal that the grounds require our determination of two questions:

1) The interpretation of **Section 24(4)** of the VAT Act as well as **Sections 1(a) and 2(b) of the Third Schedule** to the VAT Act.

2) The implication of **Section 2(b) of the Third Schedule** to the **Value Added Tax (Amendment) Act, 2006** to the VAT liability of the respondent.

In addressing the first question, it is imperative to review the said provisions. **Section 24(4)** of the **VAT Act** provides that the rate of tax imposed on taxable supplies specified in the Third Schedule is zero.

Paragraph 1 (a) of the **Third Schedule** to the VAT Act for the purposes of **section 24(4)** specifies zero rated supplies to include ***"a supply of goods or services where the goods or services are exported from Uganda as part of the supply"***

Paragraph 2(b) of the **Third Schedule** to the VAT Act provides that **services are treated as exported from Uganda if the services were supplied for use or consumption outside Uganda as evidenced by documentary proof acceptable to the Commissioner General.**

I find that S.24 (4) of the VAT Act provides for taxable supplies that attract a zero rate of value added tax as specified in the Third Schedule. Of particular relevance to this appeal are Paragraphs 1(a) and 2(b) of the Third Schedule to the VAT Act. Para. 1(a) specifies a supply of goods or services exported from Uganda as part of the supply. The record shows that the respondent is in the business of providing cold storage and handling services including refrigeration and palletizing of flowers, freight bookings which include bargaining freight charges with airlines and booking cargo space and or chartering planes on behalf of exporters and providing clearing and forwarding services to flower exporters.

I find that it is fairly settled that the respondent is engaged in providing/ exporting a service by acting as a courier through their agent FHL. Accordingly, **Para 2(b) of the Third Schedule**, treats services as exported from Uganda if the services were supplied

for use or consumption outside Uganda as evidenced by documentary proof acceptable to the Commissioner General.

In my view, the VAT Act prior to the 2006 amendment made all the taxable supplies listed in the Third Schedule zero rated. Para 2(b) was also a broadly worded provision which entitled even those taxable persons who previously were not exclusively engaged in handling of goods for export at a port of exit to enjoy the zero rate.

On that note, I will now proceed to the second question to consider Para 2(b) of the Third Schedule in the Value Added Tax (Amendment) Act, 2006. The appellant argued that since the respondent claimed that they were engaged exclusively in the handling of services for export prior to the 2006 Amendment, then their taxable supplies at that time were standard rated. I disagree with that argument.

Para 2(b) of the VAT (Amendment) Act, 2006 provided that:

"7. Amendment of the Third Schedule to the principal Act

The Third Schedule to the principal Act is amended by substituting for paragraph 2(b) the following-

For purpose of paragraph 1 (a) goods or services are treated as exported from Uganda if:-

(b) in the case of services, the services were supplied by a person engaged exclusively in handling of goods for export at a port of exit or were supplied for use or consumption outside Uganda as evidenced by documentary proof acceptable to the Commissioner General."

It is my considered opinion that the correct interpretation of the 2006 Amendment is that it simply restricted the zero rate status to persons engaged exclusively in handling of goods for export at a port of exit or were supplied for use or consumption outside Uganda. I find that it did not however, exclude those other persons who previously were not exclusively engaged in handling goods for export. I have already found and held that Para 2(b) prior to the 2006 Amendment accommodated a broader category of persons

engaged in handling of even though the actual handling services was a small component of their overall business.

I therefore find it is wrong to use the Amendment as a basis to imply and or deduce that those exclusively engaged in handling of goods for export prior to the amendment all of a sudden became standard rated. This, in my view, amounts to retrospective application of the law which is erroneous. The VAT liability of the respondents should not be applied by implication or other deductive reasoning of the 2006 Amendment which only restricted but did not exclude persons exclusively engaged in handling goods for export from enjoying the zero rate prior to the amendment. Furthermore, it is settled law in this respect that a taxing provision or section has to be clear and unambiguous so as to provide certainty in taxation.

Accordingly, grounds I and II of this appeal fail.

Ground III

Arguments for the Appellant

Counsel reiterated the High Court decision which held that in relation to time of supply, supply occurs on issuance of a tax invoice and that until a tax invoice is issued, there can be no tax liability since there was no tax point giving rise to any VAT liability.

Section 14(1) of VAT Act provides that:

> *"(1) Except as otherwise provided under this Act, a supply of goods or services occurs:*
>
> *(a).....*
>
> *(b).....*
>
> *(c) In any other case on the earliest of the date on which:–*
>
> *(i) the goods are delivered or made available or the performance of the service is completed.*
>
> *(ii) payment for the goods or services is made; or*

(iii) a tax invoice is issued"

It was the appellant submission that the time of supply is the earliest date of either completion of the service or payment for the services offered and in this particular case it is at the time of completion of performance of the services in Uganda. Counsel emphasized the operative words being *"the earliest of the date"*.

Counsel submitted that **Section 14(1) of the VAT Act** does not make it mandatory that VAT shall only be paid after issuance of a tax invoice. That, VAT can also be paid when payment for the goods has been made but goods have not been received or when a performance of a service has been completed. Counsel submitted that it is therefore misleading and a distortion of the VAT regime as envisaged under section 14 to argue that VAT is only payable after issuance of a tax invoice.

In light of the above submissions, counsel prayed that the Appeal be allowed and the orders of the High Court be set aside with costs in this Court and the Courts below.

Respondent's Argument

In reply to the third ground of appeal, respondent counsel pointed out that the performance of the service was completed in Holland and not Uganda. **Section 14 (1) (c) (iii)** provides that a supply of goods or services occurs in any other case, on the earliest of the date on which a tax invoice is issued. Counsel submitted that it is derived from this provision that until a tax invoice is issued there can be no tax liability and that the tax invoice is the tax point at which the tax liability arises.

Counsel also submitted that the performance of the service is only completed when the goods are delivered in the Netherlands and payment for services is also done under the provisions as per the Agreement on page 63 of the record of appeal which conforms to the export test.

More so according to the evidence on file, counsel submitted that the Appellant did not raise any tax invoices under **Section 14(1)(c)(iii)** of the **VAT Act** and they did not become liable to pay any VAT because the export of service was zero-rated. Counsel

therefore prayed that this Appeal be dismissed with costs and the decision of the High Court be upheld.

RESOLUTION OF COURT

The point of law for determination in this ground appears to be when a taxable supply is said to be made under Section 14 of the VAT Act.

On this point, the High Court held:

> *"Counsel for the Appellant raised an important matter that had not been covered by the parties or the Tribunal before. This was Sec 14(1) that dealt with the time when supply occurs. Under this provision supply occurs on issuance of the tax invoice. Until then tax liability does not arise, because there is no tax point for VAT liability"*

As noted, this point was not an issue at the Tribunal. It is not clear why this ground was framed in relation to this specific appeal; as this point of law was not in issue. Its resolution in my opinion would not change the fortunes of this appeal. The application of S 14 (1), notwithstanding its importance, was at best an observation by the appellate Judge or obiter dictum. I find no merit saying anything more on the matter.

This ground also fails.

Dated at Kampala this 28th day of May 2019.

HON. MR. JUSTICE GEOFFREY KIRYABWIRE

Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Coram: DCJ, Kiryabwire and Musoke, JJA)

CIVIL APPEAL NO. 25 OF 2009

(Appeal from the decision of Hon. Anup Singh Choudry, J of the High Court of Uganda (Commercial Division) in Civil Appeal No. 13 of 2008 delivered on 22nd September 2008)

BETWEEN

UGANDA REVENUE AUTHORITY:: APPELLANT

AND

FRESH HANDLING LIMITED:: RESPONDENT

JUDGMENT OF ELIZABETH MUSOKE, JA

I have had the benefit of reading in draft the Judgment of my brother, Geoffrey Kiryabwire, JA with which I agree. I have nothing useful to add.

Dated at Kampala this ..... day of 2019

28th May

Elizabeth Musoke

JUSTICE OF APPEAL