THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL APPEAL No. 0034 of 2020

(Arising from Tax Application No. 0004 of 2019)

UGANDA REVENUE AUTHORITY …………………………………… APPELLANT

VERSUS

COWI A / S ………………………………………………………………… RESPONDENT

Before: Hon Justice Stephen Mubiru.

JUDGMENT

a) The context of the dispute;

The respondent is a consultancy engineering company incorporated in Denmark where it has its principal place of business. It is registered in Uganda as a foreign company where it operates a branch. During the year 2018, the appellant conducted an audit of the respondent's branch office operations for the year 2013 – 2016. One of the appellant's findings was that the branch had not charged and / or paid VAT on the man hour cost of staff at the head office (offshore services) whose cost was allocated to the branch. While the appellant contended the services involved consultants based in Denmark doing work for the branch, the respondent contended it was a mere allocation of costs to the branch as part of an arm's length share of profits and losses within the entire group since all work was done in Denmark. The appellant nevertheless issued an assessment on 14th May, 2018 that included a component of VAT of shs. 361,167,524/= The respondent paid the tax assessed under protest and lodged an objection on 12th June, 2018. The objection was unsuccessful regarding this component, hence the application to the Tax Appeals Tribunal.

b) The proceedings before the Tax Appeals Tribunal;

On 18th January, 209 the respondent filed an application before the Tax Appeals Tribunal. The respondent contended that the man hour cost of staff at the head office was not a taxable service under the Act. The respondent is a foreign company registered in Uganda. The respondent's branch is not a separate entity but a mere place of business in Uganda for the respondent as a foreign company. The services were not performed in Uganda but at the Head Office in Denmark. The services were not imported into Uganda. Charging or allocating them to the branch was a mere arm's length share of profits and losses by the entire group. Regulations 13 of the *VAT Regulations* is inapplicable where a service is not imported; in the alternative, it is inconsistent with the Act and therefore the latter should prevail. The respondent thus claimed entitlement to a refund.

The respondent's counsel argued further that COWI A/S Denmark is not a taxable person within the meaning of section 4 (a) of the Act. The services were not performed in Uganda and therefore are not a taxable supply. Having been performed in Denmark, the services were not imported into Uganda. It was a mere arrangement of allocating costs to the branch as part of an arm's length share of profits and losses within the entire group. The respondent therefore is entitled to a refund of the amount paid in accordance with section 44 (1) (b) of the Act.

In response, counsel for the appellant argued that it was the respondent's evidence that consultancy services on drafting contracts, engineering works, road designs and accounting were rendered to the branch in Uganda by staff at the head office in Denmark. The branch in Uganda adopted the instructions given on review by the head office. They were therefore imported into Uganda. The *VAT Regulations* complement the Act and the two should be read together. There is no conflict between them. Whereas the respondent had filed the application based on a contention that the services were performed outside Uganda, were never imported into Uganda and therefore are not taxable in Uganda, before the Tribunal she had deviated by arguing that the services were performed by COWI A/S employees in Denmark, which was not part of the application. In any event, what is taxable is the service rendered by the overseas head office to the branch. The employer – employee relationship is not part of that consideration and it is entirely irrelevant. The respondent is not entitled to the relief claimed.

c) <u>The decision of the Tax Appeals Tribunal;</u>

In its ruling rendered on 22nd May, 2020 the Tax Appeals Tribunal found that the branch in Uganda sources work in Uganda which is sent to Denmark and done there. The branch sources consultancy work, which is performed in Denmark and implemented in Uganda but the costs are charged to the branch in Uganda. The company in Denmark and the office in Uganda are one and the same legal person. A taxable person under the Act is one registered for VAT yet branches do not register. For an import to take place there should be two legal persons involved in the activity. For as long as the services are rendered by employees at the head office of the respondent in Denmark, it cannot be deemed an import, although the work is used in Uganda. This is because it is one and the same person in the two countries. In this case the respondent has a head office in Denmark and a branch in Uganda. The employees at the head office provide services to the branch in Uganda.

Section 11 (2) of the VAT Act excludes services rendered by an employee to an employer. When Regulation 13 of the *VAT Regulations* is applied to one and the sae company would render section 11 (2) of the VAT Act inoperative. The former being subsidiary law, it should not be read to contradict the latter which is the principal legislation. Although the double taxation agreement between Uganda and Denmark is silent on VAT, the appellant can still charge the tax on consumers of its services in Uganda. It is therefore not necessary for the appellant to charge the tax on services performed by employees of the respondent in another country. The costs allocated to the branch are expenses incurred for sustenance of the branch in Uganda. They cannot be considered as income by the branch and then subject to VAT. Regulation 13 of the *VAT Regulations* does not apply to situations where employees of the company provide services to the company, it applies where a holding company provides services to a subsidiary company, and vice versa where one of them is overseas. The tribunal has the authority to annul a statutory instrument where that is deemed necessary. In the instant case though, the two provisions can be given a harmonious application. In raising a point of law, the respondent did not deviate from its case as submitted to the Tribunal since points o slaw may be raised at any stage in the proceedings. The application was therefor allowed with costs to the respondent.

d) The Grounds of appeal;

The appellant was dissatisfied with the decision and appealed to this court on the following grounds, namely:

1. The Chairman and the honourable members of the Tax Appeals Tribunal erred in law when they held that the respondent and COWI A/S (Denmark) are one and the same person for purpose of Value Added Tax (VAT) thereby erroneously holding that he respondent did not import services and thus no VAT could be due thereon.
2. The Chairman and the honourable members of the Tax Appeals Tribunal erred in law in holding that the effect of Regulation 13 of the VAT Act when applied to one and the same company would have the effect of rendering section 11 (2) of the VAT Act inoperative.
3. The Chairman and the honourable members of the Tax Appeals Tribunal erred in law when in holding that Regulation 13 of the VAT Regulations does not apply to situations where a company is being provided services by its employees, whereas not.
4. The Chairman and the honourable members of the Tax Appeals Tribunal erred in law when they held that the supply of services by the respondent's employees at the head office in Denmark cannot be considered a supply to the respondent, and therefore not subject to VAT.
5. The Chairman and the honourable members of the Tax Appeals Tribunal erred in law when they held that the costs the respondent allocates to the branch cannot be considered an income by the branch thus not subject to VAT.
6. The Chairman and the honourable members of the Tax Appeals Tribunal erred in law in setting aside the VAT assessment of shs. 371,409,113/=

e) <u>The submissions of counsel for the appellant;</u>

Counsel for the appellant, Mr. Tony Karungi submitted that in grounds one, two and five are based on the fact that the responded has permanent presence in Uganda through its branch in Uganda. Regulation 13 (3) (a) of the *VAT Regulations* states that even if it is one taxable person, provided they are carrying on business in Uganda and outside Uganda, they are taken as two different persons who are separate and VAT on imported serves is payable. It was misinterpretation of the Regulation when the tribunal found it inconsistent with section 11 of the Act. In the case of *Danske Bank A/S Denark, Sverige Filial v. Skatteverket*, a decision of the Court of Justice of the European Communities, the principle of distinguishing the principal establishment from its branch for VAT purposes was upheld. In the South African case of *Metropolitan Life Limited v. Commissioner for*

South African Revenue Service, a similar finding was made. In both cases the courts took the purposive approach to interpreting the relevant statutes. It was therefore wrong for the Tax Appeals Tribunal to have found a conflict between section 11 and Regulation 13.

The third and fourth grounds relate to the Tribunal's lifting of the corporate veil in determining the actual providers of the service. Regulation 13 (3) (a) covers this scenario. For imported services, the entity is taken as a person and is deemed separate. The Tribunal lifted the veil further and considered individuals as separate from the corporation. In ground 6 the appellant submits that the decision was erroneous based on their erroneous findings. He prayed that the appeal be allowed.

f) <u>The submissions of counsel for the respondent;</u>

Counsel for the respondent Mr. Mubangizi Absalom with Mr. Kalara Victor argued that the respondent is based in Denmark but has operations in Uganda. It is registered in Uganda as a foreign company. It is the respondent's employees who did the work which included road designs, and administrative support services such as keeping accounts of the branch, reviewing contracts with clients and giving legal opinions. They were nationals of Denmark performing services used in Uganda. The income tax law creates a branch as an entity for tax purposes. In VAT the taxable person is Cowi A/S yet the appellant is taxing man hours of the employees. The appellant is in effect imposing tax on the services offered by the employees of the respondent to its branch. The Tribunal found Regulation 13 does not apply to the facts but sought to interpret it in a way that agrees with section 11 of the Act. It found that the regulation applies only where there is more than one entity. The purposive approach does not apply to tax laws; they have to be interpreted strictly. There is no intendment in applying tax legislation. The purposive approach does not contradict the literal rule as per the case of *NSSF v. URA. Civil Appeal No, 29 of 2020*. If Regulation 13 purports to create tax liability not provided for under the Act, it is void as per the decision in *Shah Vershi Devshi & Co. v. The Transport Licensing Board [1971] EA 289* it was held that in case of conflict between a provision in the Act and a regulation, the regulation gives way. The appeal ought to be dismissed with costs.

g) The decision;

All six grounds of the appeal gravitate around three questions; (i) whether Regulation 13 (3) (a) of *The Value Added Tax Regulations*, as amended in 2011 is inconsistent with section 11 of *The Value Added Tax Act* and; (ii) whether the respondent imported service into Uganda liable to Value Added Tax, and (iii) whether the respondent is entitled to a tax refund. Therefore for convenience, the grounds will be considered concurrently in no particular order but in so far as they relate to the issues so isolated

1. Whether Regulation 13 (3) (a) of the *VAT Regulations* is inconsistent with section 11 of the VAT Act.

Under Regulation 13 (a) of *The Value Added Tax (Amendment) Regulations, 2011,* a branch in Uganda as distinct from its head office overseas, is considered to be a taxable person for VAT purposes, even though they both form part of the same legal entity. This also applies in case of two branches with different commercial registrations. As such, a branch is registered as a taxable person in its own right. As a consequence a transaction between a local branch and its head office overseas, or between commercial registrations within the same legal entity, would be considered as a VAT relevant supply.

Generally the legal framework pertaining to a company's operations and obligations acknowledges separate legal existence as a key feature of the company structure (see *Salomon v. Salomon and Co Ltd [1897] AC 22*). From the juristic point of view, the company is a legal personality entirely distinct from its members. But in certain exceptional cases, the Court is entitled to lift the veil of the corporate entity and to pay regard to the economic realities behind the legal façade. In specified circumstances, by applying the doctrine of "piercing the corporate veil," courts and statutes disregard the separate corporate existence of the company and fix liability on the directors or other officers of the company as the case may be.

For example section 20 of *The Companies Act, 2012,* the High Court may, where a company or its directors are involved in acts including tax evasion, fraud or where, save for a single-member company, the membership of a company falls below the statutory minimum, lift the corporate veil. There are several circumstances under which the corporate veil can be lifted or pierced and shareholders / members may be directly held responsible. These include misrepresentation, fraud, misfeasance or negligence by the members; failure to maintain clear and distinct division between assets of the company and personal assets of the members; siphoning of corporate funds; using the corporate shell for carrying out unlawful activities by the dominant shareholders; tax evasion, etc. The Court has the power to disregard the corporate entity if it is used for tax evasion or to circumvent tax obligation or to perpetrate fraud. The whole concept of piercing the corporate veil is a device invented by the courts to prevent abuse of corporate personality in a manner that adversely prejudices third parties or for the protection of public interest. However the boundaries of the principle have not yet been defined and the areas where the principle may have to be applied may expand.

The concept of piercing of corporate veil is applied by the courts in various situations. Two situations where such principle is consistently applied are, one; where the statute itself so permits or provides for; and second where, due to glaring facts established on record, it is found that a complex web has been created only with a view to defraud the revenue interest of the state. Where it is found that incorporation of an entity is only to create a smoke screen to defraud the revenue and shield the individuals who behind the corporate veil are the real operators of the company and beneficiaries of the fraud, the courts will not hesitate in ignoring the corporate status and striking at the real beneficiaries of such complex design. When the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons. If facts are established that a company is used as conduit to defraud revenue, even a director of public limited company can be held liable for recovery of the tax demanded of the company. Similarly, it will be lifted where the statute itself so permits or provides for piercing of the corporate veil is specified circumstances.

The limited liability principle is designed primarily to benefit individual shareholders, and therefore the policies favouring limited liability probably are not as strong in cases involving subsidiary or affiliated corporations. For this reason, the courts often are more willing to pierce the corporate veil if the shareholder is a corporation. Corporate entities rarely are disregarded for the benefit of shareholders but mostly in public interest. The courts have shown an acute appreciation that juristic personality is a statutory creation and that their separate existence remains a figment of law, liable to be curtailed or withdrawn when the objects of their creation are abused or thwarted, or by statute in public interest.

In tax practice, the task of determining whether a transaction is a sham or an illusory transaction or a device or ruse, tax authorities are entitled to penetrate the veil covering it and ascertain the truth (see *In Re Sir Dinshaw Maneckji Petit Bari, AIR 1927 Bom.371*). In such cases, the tax authorities and the courts will explore the economic realities of the transaction to determine whether it seeks to avoid tax liability or to evade any obligations imposed by the law or whether any other such transgresses have actually transpired, by consideration of the real purpose of a transaction as against its legal form, and the disguise of the controlling hand through subsidiary companies. As a general principle, the taxpayer cannot be allowed to get away with any colourable device or artificial sham transaction. Therefore, it becomes an important function of the tax authorities to look into the devices and natures of transactions used by the taxpayer, and decide upon the character and nature of such devices and transactions. That veil may be lifted in cases where the aim is to avoid a taxation statute or to evade obligations imposed by the law or for the protection of public interest.

Similarly, Regulation 13 (a) of *The Value Added Tax (Amendment) Regulations, 2011*, lifts the corporate veil as a means of creating an even playing field between local and overseas businesses. VAT is a tax on local consumption, and hence, is levied on all taxable supplies of goods and services consumed in Uganda, whether they are procured locally or from overseas. Services that are procured from overseas suppliers are subject to tax if the service is consumed in Uganda is subject to VAT. It is particularly important that the application of VAT to international supplies does not produce a tax advantage when compared with comparable domestic transactions. This includes the level at which taxation is applied, the costs of collection and administration and the corresponding burdens placed on businesses and tax administrations. It is not in doubt that imported services provided by overseas suppliers which do not have an establishment in Uganda are subject to VAT. Non-taxation of imported services by overseas suppliers who have an establishment in Uganda would create an uneven playing field between local and overseas businesses. Regulation 13 (a) of *The Value Added Tax (Amendment) Regulations, 2011,* is intended to level the VAT treatment for services procured from overseas and those procured locally so as to achieve parity in VAT treatment for all services consumed in Uganda. It is therefore a provision intended for the protection of public interest.

Lifting the corporate veil imposed by Regulation 13 (a) of *The Value Added Tax (Amendment) Regulations, 2011* is based on the concept of tax neutrality in VAT which has a number of dimensions, including the absence of discrimination in a tax environment that is unbiased and impartial and the elimination of undue tax burdens and disproportionate or inappropriate compliance costs for businesses. Businesses in similar situations carrying out similar transactions should be subject to similar levels of taxation. The tax should be neutral and equitable in similar circumstances. This is to ensure that the tax ultimately collected along a particular supply chain is proportional to the amount paid by the final consumer, whatever the nature of the supply, the structure of the distribution chain, the number of transactions or economic operators involved and the technical means used.

With VAT, tax neutrality is achieved in principle by the multi-stage payment system: each business pays VAT to its providers on its inputs and receives VAT from its customers on its outputs. To ensure that the "right" amount of tax is remitted to tax authorities, input VAT incurred by each business is offset against its output VAT, resulting in a liability to pay the net amount or balance of those two. This means that VAT normally "flows through the business" to tax the final consumers. It is therefore important that at each stage, the supplier be entitled to a full right of deduction of input tax, so that the tax burden eventually rests on the final consumer rather than on the intermediaries in the supply chain. Neutrality is one of the principles that help to ensure the collection of the right amount of revenue by governments. It is only if all economic activities that add similar value are taxed similarly that a fair and easily administrable tax can exist.

This mode of lifting the veil of incorporation for tax purposes in not unique to Uganda. For example in *Danske Bank A/S Denark, Sverige Filial v. Skatteverket, case C-812/19* the appellant was a bank headquartered in Denmark which operated in Sweden through a branch. Its head office was a member of a Danish VAT group while its branch was not part of a Swedish VAT group. Its head office provided services to its Swedish branch and charged the branch for the use of a computer platform. The IT platform of the appellant Bank was also used for the activity of its Swedish branch and part of the IT costs were therefore allocated / recharged by the Danish head office to its branch. The Swedish Tax Authority considered that the appellant and its branch were separate taxable persons as a result of the appellant's VAT group membership, with the result that the charges represented consideration for taxable supplies by the VAT group to the branch, and that therefore those supplies were subject to the reverse charge in Sweden. The appellant argued that a branch and its head office must be treated as a single taxable person in the absence of a legal relationship, which depends on whether the branch carries out independent economic activities or not (e.g. autonomy), and that therefore the transactions between them were outside the scope of VAT. The Court of Justice of the European Union (CJEU) found that the Danish head office and the Swedish branch could not be considered as a single VAT taxable person. Hence, the services between them had to be considered for VAT purposes. The decision thus upheld the view that any supply between a branch and its overseas head office falls within the scope of VAT provided that one establishment, either the branch or the head office, is member of an (EU) VAT group.

In justifying its decision, the court made reference to Article 11 of *The VAT Directives* by virtue of which each Member State had the right to regard as a single taxable person any persons established in the territory of that Member State who, while legally independent, are closely bound to one another by financial, economic and organisational links, yet Article 9 (1) of that directive defined a "Taxable person" to mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity. The Court opined that *The Directive* must be interpreted as meaning that, for VAT purposes, the principal establishment of a company, situated in a Member State and forming part of a VAT group formed on the basis of Article 11, and the branch of that company, established in another Member State, must be regarded as separate taxable persons where that principal establishment provides that branch with services and imputes the costs thereof to the branch.

Regulation 13 (a) of *The Value Added Tax (Amendment) Regulations, 2011,* is designed to apply in a fair and even-handed way to ensure there is no unfair competitive advantage afforded to domestic or foreign businesses that may otherwise distort international trade in services and limit consumer choice. It ensures that imports of services are taxed on the same basis and at the same rate as domestic supplies. It ensures that the net tax burden on imports is equal to the net tax burden on the same supplies in the domestic market. In addition, it also ensures that the amount of tax refunded or credited in the case of exports is equal to the amount of tax that has been levied.

On the other hand, a taxable person is either; (i) one registered under the Act or (ii) one who is not registered, but who is required to apply to be registered (see section 6 of the Act). Such person usually independently carries out an economic activity, whatever the purpose or results of that activity. It is the reason that section 11 (2) of *The Value Added Tax Act* excludes a supply of services made by an employee to an employer by reason of employment from VAT since employees do not independently carry out an economic activity. Thus no liability to this tax arises in respect of the provision of services by an employee in performing the duties of the employment. This provision also covers all those holding office, such as company directors, in so far as they are bound to an employer by a contract of employment or by any other legal ties creating the relationship of employer and employee as regards working conditions, remuneration and the employer's liability. However any service rendered by an employee in another capacity will constitute a supply of service.

The result under traditional lifting of the corporate veil analysis normally is to treat the corporation as a partnership and hold all directors and shareholders liable as partners, even if some directors and shareholders were not parties to the fraud or injustice. Under Regulation 13 (a) of *The Value Added Tax (Amendment) Regulations, 2011,* it is the activities of the two "corporate entities" that are scrutinised rather than the individuals working for the corporation. This shift in emphasis causes a shift in result, limiting the analysis to the activities of the two "corporate entities."

Excluding the supply of services made by an employee to an employer by reason of employment from VAT is not by necessary implication inconsistent with lifting the veil of incorporation as a means of creating an even playing field between local and overseas businesses where such service is rendered by overseas based employees to the operations of a branch in Uganda. Once the corporate veil is lifted rendering a branch in Uganda distinct from its head office overseas, thereby characterising the latter as a taxable person for VAT purposes, employees of the branch will be deemed separate from employees at the head office, each rendering service to that respective entity of which they under direct supervision. The result is that the services rendered by employees at the head office for consumption at the branch cannot be considered as "internal" transactions within the same legal entity. If an employee's activities done on behalf of a corporation at its head office are intended for the benefit of the branch, then they are deemed services by the head office to the branch, regardless of the existence of the corporate entity. The result is that the employees at the head office render service to that office and in turn the office as an entity renders service to the branch as another separate entity for VAT purposes.

It has for long been a well-established principle in the interpretation of tax legislation that the taxpayer may only be taxed by clear words (see *Russell v. Scott [I948] A.C. 422* and *Macpherson v. Hall (H.M. Inspector of Taxes) (1969-1973) 48 TC 210*). In the event of ambiguity in tax legislation (where the provisions is so obscure that no meaning can be given to it), the taxpayer will be given the benefit of the ambiguity (see *Fleming v. Associated Newspapers Ltd. (1970) 48 T.C. 382 at 390*). Until relatively recently courts generally used this "strict and literal" approach to the interpretation of statutes, especially in fiscal matters, to overcome interpretational problems. It did not matter that such approach led to unfairness or even hardship.

However in modern times, any exercise in interpretation and application of statutes cannot be undertaken on the assumption that it is an exercise without any object, that the Acts have no "spirit" or aim. For example the House of Lords, in *Pepper (Inspector of Taxes) v. Hart [1993] 1 All ER 42*, used the "purposive" approach to the interpretation of a fiscal statute and confirmed that it is permissible to use the Hansard Reports as an aid to statutory interpretation. Lord Denning led the way in *Davis v. Johnson [1978] 1 All ER 841*, when he used the Hansard Parliamentary Debates Reports (the "Hansard Reports"), the use of which was previously denied to the judiciary, as an aid to assist the court in finding the intention of Parliament and the purpose behind a provision. He rejected the notion that judges should "grope about in the dark for the meaning of an Act without switching on the light. "

The harmonious rule of legislative interpretation is adopted when there is a conflict between two or more statutes or between two provisions of the same statute. The rule requires that a legislative instrument must be construed on the *prima facie* basis that its provisions are intended to give effect to harmonious goals. The provisions of one statute should be interpreted in harmony with the tenor of other statutory provisions or the overall statutory purpose. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions. However, if this is not possible then it is settled law that where there is a conflict between two sections, and one cannot reconcile the two, one has to determine which the leading provision is and which the subordinate provision is, and which one must give way to the other.

In *Metropolitan Life Limited v. Commissioner for the South African Revenue Services [2008] 4 All SA 558 (C),* the court was of the view that when faced with apparently conflicting provisions in tax legislation, the interpreter must endeavour to arrive at an interpretation which gives effect to the purpose with which the Legislature enacted the relevant provisions. The purpose (which is usually clear or easily discernible) is used, in conjunction with the appropriate meaning of the language of the provision, as a guide in order to ascertain the legislator's intention and the scope of the provision. The court will then consider the extent to which the meaning that is given to the words achieves or defeats the apparent scope and purpose of the legislation.

Using both the purposive and harmonious rules of legislative interpretation, a court must read two allegedly conflicting statutes or instruments made thereunder to give effect to each if it can do so while preserving their sense and purpose. The preferred interpretative approach is for both provisions to be interpreted purposively and holistically in order to be given a clear meaning whenever plausible, so that the provisions in the Regulations can be made to do work within the scheme of the Act. Only if provisions of two different statutes are irreconcilably conflicting, or if the later statute covers the whole subject of the earlier one and is clearly intended as a substitute, will courts apply the rule that the later of the two prevails. Only when there is an irreconcilable inconsistency between provisions of a statute and regulations made thereunder, that resort will be made to section 18 (4) of *The Interpretation Act* which states that any provision of a statutory instrument that is inconsistent with any provision of the Act under which the instrument was made is void to the extent of the inconsistency. Court rarely finds repeal by implication; repeals by implication are not favoured, and will not be found unless an intent to repeal is clear and manifest.

It is then abundantly clear in this case that incorporation does not cut off liability for Value Added Tax on a supply of services made by an employee to an employer at all times and in all circumstances. Whereas Section 11 (2) of *The Value Added Tax Act* characterises a supply of services made by an employee to an employer by reason of employment as not being a supply made by the employee, to the extent that the part of the business carried on outside Uganda is treated as if it were carried on by a an overseas person separate from the taxable person in Uganda, Regulation 13 (a) of *The Value Added Tax (Amendment) Regulations, 2011*, creates an exception where there is an internal provision of services from the part outside Uganda to the part in Uganda, rendering such service liable to tax as an imported service.

In conclusion, the Tax Appeals Tribunal erred in law when it failed to find that where a company carries on a business both in and outside Uganda and there is an internal provision of services from the part outside Uganda to the part in Uganda, those services are to be considered as taxable transactions. In the instant case, as the services were provided by the head office in Denmark to the branch in Uganda, the head office and the branch cannot be considered as being a single VAT taxable person. Consequently, transactions of services rendered between the respondent's head office and its branch in Uganda are considered as falling within the scope of VAT and are liable to that tax.

2. <u>Whether the respondent imported services into Uganda liable to Value Added Tax</u>.

Value Added Tax is a consumption tax. Consumption taxes find their taxable event in a transaction, involving the exchange of goods and services for consideration either at the last point of sale to the final end use or on intermediate transactions between businesses. The overarching purpose of Value Added Tax as a levy on final consumption, coupled with its central design feature of a staged collection process, lays the foundation for the core Value Added Tax principles bearing on internationally traded services. Internationally traded services and intangibles are taxed according to the rules of the jurisdiction of consumption. The destination principle is to the effect that tax revenue belongs to the jurisdiction where consumption takes place. Tax is ultimately levied only on the final consumption that occurs within the taxing jurisdiction.

Under the destination principle, exports are not subject to tax with refund of input taxes (that is, “free of VAT” or “zero-rated”) and imports are taxed on the same basis and at the same rates as domestic supplies. The key economic impact of the destination principle is that it places all businesses competing in a given jurisdiction on an even footing. The destination principle is the international norm and is sanctioned by World Trade Organization rules (see Article III of *The General Agreement on Tariffs and Trade* (GATT).

According to section 1 (t) of *The Value Added Tax Act*, “services” means anything that is not goods or money. Services are supplied whenever value is added because of a transaction that falls within the scope of Value Added Tax. A transaction will fall within the scope of Value Added Tax under the normal rules if the transaction is a business transaction, if the person making the supply is a taxable person, and if some other person makes a payment for the supply. A supply will occur whenever there is some transaction or event involving a taxable person whereby the taxable person receives payment (or consideration) for the effects of that transaction or event. Section 16 of *The Value Added Tax Act* as amended by Act 18 of 2011 thus charges VAT on services physically performed in Uganda by a person who is in Uganda at the time of the supply. Under this section, VAT is chargeable on a supply, it is therefore the supplier's liability.

On the other hand, section 4 (c) of *The Value Added Tax Act* imposes tax on “the supply of imported services, other than exempt service, by any person.” Section 1 (h) of *The Value Added Tax Act*, defines “import” as bringing, or causing to be brought, into Uganda from a foreign country or place. By this provision, tax on the supply of imported taxable services is a liability of the registered person receiving the supply and, subject to the provisions relating to accounting and payment, becomes due at the time of the supply.

Consequently, section 18 (8) of the Act which characterises as a taxable supply, any supply of services by a foreign person for consideration, as part of the person’s business activities, if the services are considered as taking place in Uganda under section 16 of the Act (services physically performed in Uganda by a person who is in Uganda at the time of the supply), is neither inconsistent with section 4 (c) of the Act nor Regulation 13 (1) of *The Value Added Tax Regulations*. VAT is a destination based tax, i.e., the goods / services are taxed at the place where they are consumed and not at the origin. Section 18 (8) of the Act thus applies to "foreign persons" making taxable supplies of goods or services within the territory of Uganda. A foreign person includes a non-resident alien individual, foreign corporation, foreign partnership, foreign trust, foreign estate, and any other person that is not a citizen of Uganda. The provision is inapplicable to imported services.

Imported services in essence involve a supply of services that is made by a supplier who is resident or carries on business outside Uganda to a recipient who is a resident of or carries on business in Uganda to the extent that such services are utilised or consumed in Uganda. Any transaction involving supply of goods or services without consideration is not a supply, barring a few exceptions, in which a transaction is deemed to be a supply even without consideration. Further, import of services for a consideration, whether or not in the course or furtherance of business is treated as supply. In the instant case, before the Tax Appeals Tribunal, the respondent's witness Mr. Jenes Rene Petersen testified that the cost allocated to the branch included support or supervisory / administrative work done by staff at the head office, such as reviewing legal and accounting work contracted out by the branch for compliance with group standards and policies, review of road designs, consultancies on engineering works, and so on. The branch in Uganda would be required to act in accordance with the outcome of the reviews.

Support or supervisory / administrative work rendered to a branch from a head office overseas in the course or furtherance of business of the branch, becomes a supply when it is made for a consideration. That such services were made for consideration in the instant case is proved by the fact that these services were charged to the branch as a cost. This therefore was not a mere arrangement of allocating costs to the branch as part of an arm's length share of profits and losses within the entire group, as contended by counsel for the respondent, but rather a supply of services from overseas. Since a service is imported into Uganda when it is provided for use or consumption in Uganda, these therefore were services imported into Uganda.

According to Regulation 13 (1) of *The Value Added Tax Regulations*, as amended by *The Value Added Tax (Amendment) Regulations, 2011*, the taxpayer is required to account for that tax when performance of the service is completed, or when payment for the service is made, or when the invoice is received from the foreign supplier, whichever is the earliest. It may be that the "supply" is not one supply, but a series of supplies. Alternatively, it may be that the contract between the supplier and the customer shows that the services are supplied, in effect, on a series of separate occasions. If so, it is usual to treat each supply as made when a partial payment for the supply is made or when an invoice is issued for that part. Where a supply of services is over a long period or a continuing supply, the supply might be regarded as never reaching the point at which it "is performed" until the contract between the supplier and the customer is ended, hence the alternative for the taxpayer to account for that tax when payment for the service is made, or when the invoice is received from the foreign supplier, whichever is the earliest. For these reasons, the imported services rendered in the present case were assessed correctly as charged to VAT. Consequently the Tax Appeals Tribunal erred in law in setting aside the VAT assessment of shs. 371,409,113/=

3. <u>Whether the respondent is entitled to a tax refund</u>.

A tax refund is a reimbursement to a taxpayer of any excess amount paid to government. Under section 42 (1) of *The Value Added Tax Act*, a taxable person is entitled to a refund where the taxable person's input credit exceeds his or her liability for tax, for the tax period in issue. Tax refund arises in case of a mismatch between the tax amount paid and the actual payable amount. It is therefore claimed upon proof of overpayment. The respondent not having proved that the amount paid exceeded the actual payable amount, is not entitled to any refund.

In the final result, the appeal succeeds on all grounds. For that reason the appeal is allowed with costs to the appellant and the ruling of the Tax Appeals Tribunal is accordingly set aside.

Delivered electronically this 18th day of October, 2021

……Stephen Mubiru…………

Stephen Mubiru
Judge,
18th October, 2021.