THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL COURT DIVISION

CIVIL APPEAL NO 13 0F 2008

UGANDA REVENUE AUTHORITY::::::::::APELLANT(RESPONDENT)

-Vs-

FRESH HANDLING LIMITED::::::::::::::::RESPONDENT(APPLICANT)

JUDGMENT

This is an Appeal by the Appellant against the decision of the Tax Appeal Tribunal given on 2nd July 2008.

The grounds of Appeal are that:

1. The Tribunal erred in law when it held that the services rendered by the appellant 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 Applicant exported services from Uganda which should not have been subjected to VAT within the meaning of the law prior to the 2006 amendment.

3. The Tribunal erred in law when it failed to evaluate the evidenced thereby coming to a wrong conclusion.

Tribunal decision:

1. Whether the assessment of the tax for the periods June 2000 – August 2003 and December 2005 to June 2006 were lawful.

   The Tribunal has observed that the Respondents have not challenged the assertion by the Applicants 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 a service.

   The testimony of M.S. Reddy was considered by the Tribunal to understand the way the Applicants conduct their business.

   The Tribunal has considered the Respondents assertion that the comments of the Financial Controller in the meeting of 8/9/2006 amount to an admission. The Tribunal has noted that a letter of objection was written by the Applicants on 18/9/2006 and necessarily overruled the admissions if there had been any. Refer to URA Vs Uganda Consolidated Properties Ltd. CA No. 31 of 2000 which considers when an objection decision is said to be made.

   The Respondent did not appear at the hearing to challenge the evidence of the Financial Controller and as such it was not controverted that Flowerings is an agent of the Applicant and that it provides the services of delivering Flowers outside Uganda on behalf of the

Applicant and in execution of the contract with exporters in Uganda which is the Applicant's sole business.

The Tribunal considers that the provisions in the VAT (Amendment) Act 2006 cannot be applied retrospectively to this case but that in any case, the amendment left the old provision in the Third Schedule 2 (b) intact but added an alternative condition.

The Tribunal also considers Sections 32(3) of the VAT Act inapplicable in this case in as far as there is no indication that any documents required of the Applicant to conclude the audit were not provided or that the provisions of S.32(7) were compiled with by URA.

The VAT law as provided does not specify how much of a service provided abroad qualifies for zero-rating. In other words even If 99% of the earnings are made from the business within Ugandan borders and 1% is outside Uganda, the law does not make any restrictions based on the quantum of exports.

Having satisfied ourselves that the Applicant provided documentary proof to the agents or the Commissioner General who conducted the audit that services were supplied by Flowerings in countries outside Uganda, the Tribunal is satisfied that there was an export of a service.
The documents related to the transactions between the Applicant and Flowerings were not challenged by the Respondent and were available to the Audit team. The Tribunal is convinced that Flowerings acted on behalf of the Applicants in A20, R10, A19 and A 21 confirm the transactions that the assessments be amended to 'Nil' and the money held by Respondent be refunded with interest.

In respect of the arguments made in the alternative, being that the computations were wrong, the Tribunal is of the opinion that the arguments become academic and are disregarded.

However, the Tribunal would agree with the Applicant the at the two different computations on the same subject cannot both be correct and the Tribunal is inclined to

find that the Applicant has discharged its burden of proof that the assessments should not have been made or should have been made differently.

Consequently, the Tribunal rules that the facts and the evidence of the instant application show that the Applicant exported services from Uganda which should not have been subjected to VAT within the meaning of the law prior to year 2006 amendment. The applicable law then was section 11, 24(4) and the Third Schedule of the Value Added Tax Act. The submission of the Respondent that prior to 2006 amendment export services were standard rated or that the amendment cured a defect by making export services Zero-rated is not correct.

It is our considered view that services rendered 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 as is claimed in the instant case.

The Tribunal further rules that the funds of the Applicant were unlawfully collected from the bank and should be refunded with interest from the time of the Agency Notice.

Counsel for Barclay's Bank:

Counsel for Barclay's bank appeared briefly at the beginning and informed the court that the bank had released payment to the URA at their behest under Section 40 of the VAT Act.

Appellant's Case:

The Appellant's Counsel agreed that there was no issue with respect to payment of tax at zero-rates by the Respondents after the Amendment of 2006.

The Appellant's primary concern was non-payment of tax prior to 2006 i.e. for the period June 2000 to August 2003 and December 2005 to June 2006 on the grounds that their supplies were standard rated and therefore tax is payable; the Amendment of 2006 could not be applied respectively.

Mr. Arike Counsel for the Appellant took the court through various provision of the VAT Act to make his point.

Sec. 24 Sub sec. 1(a) of Third Schedule deal with Zero-rated supply
Sec. 24 (4)(2)(a) The supply of goods or services where the goods or services are exported from Uganda as part of the supply.

Sec 24(4)(2)(b) Goods or services are treated as exported from Uganda 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.
Sec. 11 deals with Supply of services.

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

Sec. 16(4) to which paragraph 1 (a) of Third Schedule applies shall be regarded as having been made in Uganda.

Counsel for Appellant argued that under Sec. 24(b) services were supplied by a person exclusively in handling goods for exportation if:

(1) Except as otherwise provided under this Act, a supply of services takes place where the services are rendered.
(3) A supply of services of, or incidental to, transport takes place where the transport commences.
(4) A supply of services to which clause 1 (a) of the Third Schedule applies shall be regarded as having been made in Uganda.

Sec. 14 (1) except as otherwise provided under this Act, a supply of goods or services occurs: -

(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.

I will deal with this last provision in the end.

The Appellant's Counsel argues that :

(1) For purpose of Paragraph 1(a) of the third schedule goods or services are treated as exported from Uganda if the services were supplied by a person engage exclusively in handling of goods, for export at a point of exit or for use or consumption outside Uganda.
(2) The confirmation of the Financial Controller in the meeting on 8/9/06 amounted to admission that supplies were not zero-rated.

(3) That the contract documents produced as evidence were contracts signed after 2006.

(4) Counsel also argued that equipment such as freezer and transport was made available and that this did not render it a service under Sec. 11(b).

Respondent's Reason:

Mr. Cephas Counsel for the Respondent pointed out that an admission was rescinded by letter of objection and it was not challenged nor were the contracts challenged at the audit or before the Tribunal.

The services provided by the Respondent were akin to those provided by the DHL. It was an export of service; the law did not state where the service started from; rate of tax abroad was zero-rated, and that there was no tax invoice issued by the clients.

This court will only set aside an award or decision made by the Tribunal if there was an error of judgment and if the Tribunal misdirected itself.

This court has considered arguments put forward by both the parties and makes the following observations:

1. Admissibility of evidence

   Respondents subsequently objected and this was not an admission.

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2. Contract signed after 2006 Amendments were formalizing a business course of dealings for a number of years. It did not alter the facts.

3. The equipment the Respondents used such as freezers, storage and transport were the tools necessary for providing the service rather than the service itself. Hence was not a facility under Sec. 11(i)(b).

4. The final issue before the court was whether the supply of service was an export of service from Uganda and whether tax prior to 2006 was payable at standard rate.

I have no reason to disagree with the reasons given by the Tribunal or by Respondent's Counsel before this Court.

The services as stated by Respondent's Counsel were clearly akin to services provided by DHL when no tax was payable. Similar services abroad particularly in the UK enjoy zero rate taxation.

Counsel for the Appellant raised an important matter that had not been covered by the parties or the Tribunal before. This was Sec 14(i) 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.

In this case the performance of service was completed in Holland and not in Uganda. Sec. 14(1)(iii): Any tax payable was in Holland.

Secondly, under Sec 14(i) (ii) until a tax invoice is issued there can be no tax liability. Whether there was export of service or a taxable supply there is no tax liability to pay VAT until tax invoice is raised. The tax invoice is the tax point at which the tax liability arises.

The evidence before this court shows that Respondents never raised any tax invoices under Sec. 14(1)(iii) and they did not become liable to pay any VAT because the export of service was zero-rated.

Even if it was not zero-rated, and assuming in favour of the Appellants that prior to 2006 the supply was standard-rated, the issue becomes academic as the tax liability did not arise because there were no invoices raised and thus there was no tax point giving rise to any VAT liability.

The Appeal is dismissed with costs.

Anup Singh Choudry
Judge
22/09/2008