

THE REPUBLIC OF UGANDA

**IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL COURT DIVISION)**

HCT - 00 - CC - OS - 04 - 2008

In The Matter of an Application for Judicial Review

AON UGANDA LIMITED :::::::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

UGANDA REVENUE AUTHORITY :::::::::::::::::::::::::::::::::::::: DEFENDANT

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE.

JUDGMENT:

This is a suit brought by way of originating summons under order 46 A Rule 6(2) of the Civil Procedure Rules for the determination of the following question namely;

- 1- Whether the services of the Plaintiff as insurance brokers are “insurance services” within the meaning of the Value Added Tax Act (Cap 349 hereinafter referred to as the “VAT ACT”)? and
- 2- Whether the Plaintiff insurance brokerage services are standard rated or exempt supplies within Value Added Tax Act?

The facts of this dispute are fairly straightforward. The Plaintiff M/S Aon (U) Ltd is an insurance broking company (hereinafter referred to as “AON”) licensed by Uganda Insurance Commission (hereinafter referred to as “UIC”) to provide insurance brokerage services. The Defendant The Uganda Revenue Authority (hereinafter referred to as “URA”) carried out a special audit of AON in 2008 covering the periods January 2003 to December 2008. Following the special audit URA assessed and found that AON owed Ug.Shs.4,339,273,566/= (four billion three hundred thirty nine million two hundred seventy three thousand five hundred sixty six shillings only) in back unpaid VAT tax. This figure had been reduced from Ug.Shs.4,851,493,118/= (four billion eight hundred fifty one million four hundred four hundred eighteen shillings only). AON appealed the assessment to the Commissioner General that insurance brokerage services were tax exempt. However, the Commissioner General in her letter dated 22nd August 2008 upheld her officer’s findings that insurance brokerage services were not tax exempt. The decision the Commissioner General is the subject of this review.

Mr. Birungi and Mr. Barata appeared for the Plaintiff while Mr. Ali Ssekatawa appeared for the Defendant.

Question 1: **Whether the services of the Plaintiff as insurance brokers are “insurance services” within the meaning of the VAT Act?**

The VAT Act provides in Section 4(a) for the charging of VAT on every taxable supply made by a taxable person. Section 11(a) further provides that; a supply of services not being a supply of goods or money includes

“...performance of services for another person...”

Section 19 provides for the exemption from VAT of the supply of goods or services specified in the second schedule.

The second schedule to the VAT Act paragraph 1(d) provides for the supply of “*insurance services*”.

Counsel for the Plaintiffs submitted that the VAT Act does not further define or elaborate as to what insurance services are. He further submitted that in order to know what insurance services

are then one would have to draw an analogy from the insurance statutes. In this regard he referred court to The Insurance Act (Cap 213). Counsel for the Plaintiff submitted that Section 1 of the Insurance Act provides that it applied to

“...Insurance and Insurance broking companies, insurance and reinsurance brokers and agents...”

He further referred court to Section 2 of The Insurance Act that defines an Insurance Broker as a person.

- “ (i) *not being an agent*
 (ii) *acting as an independent contract or for commission or other remuneration, who solicits or negotiates insurance business on behalf of any insured or prospective insured other than himself or herself...”*

Counsel for the Plaintiff further submitted that insurance brokers in carrying out their duties or services to the insured are liable in damages for professional negligence. I was also referred to the case of

Stockton Vs Mason & The Vehicle & General Insurance Co. Ltd and Arthur Edwards Insurance Ltd [1978] 2 Llyods P. 430 at 431 where **Lord Diplock** held

“...so for as the brokers’ agency on behalf of the insurers is concerned. A broker in a non-marine insurance has implied authority to issue on behalf of the insurer or enter into as agent the insurers contracts of interim insurance...”

As to what brokers do, counsel for the Plaintiff referred me to the case of

Punjab National Bank V De Boinville and Others [1992] 2 Lloyds Reports [CA] P. 7 at 16

I was referred to the speech of **Lord Justice Hobitouse** who found as follows

“...professional services were being rendered by brokers for reward in the form of the right to receive brokerage and or commissions out of the gross premiums. The inclusion of those brokerage or commissions in the cost of insurance was built in the transaction as part of the cost of insurance which was being provided...”

The rule of a broker is that of a person who is employed to place insurance and obligations of indemnity are to be implied as a result of that employment...

It is therefore the submission of Counsel of the Plaintiff that insurance brokers provide a professional service that is an insurance service.

Counsel for the Plaintiff challenged the Defendants letter of 22nd August 2008 which interprets Section 2(f) of the Insurance Act and reads in part

“...the insurance broker receives remuneration from the insurance for the business secured by them and therefore the services offered by the insurance company and the insurance broker are distinct and difference in nature.

Insurance brokers are not suppliers of insurance services since it is the insurance company that actually provides the insurance services (policy). For purposes of taxability, The Tax Act prevails over the provisions of the Insurance Act.

In view of the above, our position is that insurance brokerage services are distinct from insurance services and therefore not exempt from VAT...”

Counsel for the Plaintiff while agreeing that insurance companies are distinct from insurance brokers faults the interpretation that insurance services in the VAT Act only referred to insurance companies in respect of the policies they issue.

He submitted that the meaning of insurance services is wider. He further faults the drafting of insurance services in the first schedule because paragraph 2 of that same schedule provides a more detailed interpretation of matters like “*education services*”, “*financial services*”, “*passenger transport services*” and “*social welfare services*” which is not the case for insurance services.

He further submitted that if the meaning of “*insurance services*” as a result of this is ambiguous and therefore the ambiguity should be resolved in favour of the taxpayer. In this regard I was referred to in the case of

Mandavia V CIT EATC 426.

Counsel for the Plaintiff draws court's attention to various communications from different organisations attached to the affidavits in support of the application all of which agree that insurance brokers provide insurance services.

The first is a fairly detailed letter from the Ag. Commissioner for Insurance (the insurance industry's Statutory Regulator) to The Commissioner General of the Defendant (annex "B") to the affidavit of Mr. Maurice Amogola dated 24th November 2008. In paragraph 4 of the letter The Commissioner for Insurance writes by way of conclusion

"In our opinion insurance brokers provide a taxable supply which is exempt from VAT under Section 9(1) of the VAT Act..."

There is also the affidavit of Ms. Irene Kego Oloya (the Chairperson of the Uganda Association of Insurance Brokers) dated 10th December 2008 where she depones at para 5 and 8

"5. That, since the enactment of the Value Added Act Cap 349 twelve (12) years ago, none of the members of the Uganda Association of Insurance Brokers has been audited and charged Value Added Tax on their commission income..."

8. That, I genuinely believe that the services provides by insurance brokers constitute insurance services and nothing else..."

Lastly, counsel for the Plaintiff referred to the practice in United Kingdom and Kenya which would in different ways also suggest that insurance brokers are VAT exempt under their VAT Acts.

Counsel for the Defendant in reply by way of skeleton arguments, submits that the application is not properly before this court. During his address to court however Counsel for the Defendant did not expound on this challenge. As a result court did not seek further submissions other than that already in the skeleton arguments.

Counsel for the Defendant noted that this application for Judicial Review in addition to prayers for declarations, also seeks orders of certiorari quashing the decision of the Commissioner General of URA that services of insurance brokers are not insurance services. He also noted there was a prayer for certiorari to quash URA's assessment No. KC/VAT/272/06/08 of URA for the sum of Ug.Shs.4,339,272,566/=.

He submitted that the primary objective of certiorari is to prevent the excessive use of power, abuse of statutory authority or jurisdiction by public authorities and to keep the machinery of Government operating properly according to the law.

Counsel for the Defendant submitted that the Defendant has not abused its powers as it has in this matter at all times operated within the powers bestowed on it by The Uganda Revenue Authority Act and The VAT Act.

Counsel for the Defendant also submitted that where an Applicant had alternative remedies at law then the Applicant must show it is inappropriate to take the ordinary way (to obtain this remedy) and instead apply for of judicial review. In this regard he referred to the judgment of **Justice Egonda Ntende** in

Housing Finance Company of Uganda Ltd V The Commissioner General of Uganda Revenue Authority M.A. 722 of 2005 (unreported)

Counsel for the Defendant submitted that the Plaintiff had a clear alternative avenue to object to the assessment made against it under Section 33 of The VAT Act by way of appeal to The Tax Appeals Tribunal which, was not done and yet no good explanation was given for not doing so. He concluded that in any event the writ for certiorari was brought by way of Chamber Summons under Order 46 A rule 6 S.1 72-1 instead of Order 42 A of the CPR [as inserted by Rule 3 of The Civil Procedure (Amendment) (Judicial Review) Rules 2003] and therefore should be dismissed.

As to procedure counsel for the Plaintiff submitted that leave to apply for judicial review was granted on the 21st November, 2008 by Hon. Justice Lameck N. Mukasa and that it was late in the

day to contest it as it would amount to one Judge of the High Court sitting on appeal on a ruling made by another High Court Judge.

He further submitted that the alternative remedy of The Tax Appeals Tribunal does not divest the court of its original and inherent jurisdiction for a litigant to go directly to the High Court as was decided by the Court of Appeal in

Raso Enterprises (U) Ltd V The Commissioner General of Uganda Revenue Authority CACA 55 of 2003

and reaffirmed in

The Commissioner General of Uganda Revenue Authority V Meera Investments Ltd CACA 03 of 2007.

As to citation of the law, Counsel for the Plaintiff submits that if there was any improper citation of the law which is denied, then it is a curable irregularity that ought to be remedied and justice done.

In this regard I was referred to the court of Appeal decision in

Sagu V. Road Master Cycles (U) Ltd (2002) 1 EA 256 at 262.

I find it necessary to first deal with this challenge before I proceed any further in this matter. There is no doubt in my mind that the application as brought before me has a procedural mix up between Order 46 A rule 6 and Order 42 A of The Civil Procedure Rules. Clearly the correct citation should have been Order 42 A rule (6).

So in this respect, the observation made by Counsel for the Defendant is correct. That notwithstanding given the issues involved and the understanding by both parties that this was an action for judicial review, I find that the challenge by the Defendant based purely on a citation of a law to be too technical. It is an error that does not go to the root of the application.

In my view it does not cause any prejudice to the Defendant nor abuse to the court process. I therefore find it is curable and the court shall proceed as if the correct citation was made. Article 126(1) of The Constitution of Uganda 1995, directs courts to apply substantive justice without due regard to technicalities and that is exactly how I shall treat this matter regarding a wrong citation.

Counsel for the Defendants submitted insurance brokers do not provide insurance services.

He however conceded in his submissions that neither the Insurance Act nor the VAT Act defined what insurance services are. He then made the interesting submission that before one could define insurance business and insurance services; one had to understand what insurance and a contract of insurance means.

Counsel for the Defendant then reviewed what insurance and a contract of insurance means based on the authorities. I shall not replicate that review here but I shall address myself to the conclusions he found.

Counsel for the Defendant submitted that unlike an insurance company, an insurance broker does not

- 1- enter into a legally binding insurance contract because it is only an intermediary.
- 2- bear any risk for event the policy is taken out for
- 3- have a legal interest in the premium paid to an insurer save for commission.

As a result of the above therefore, an insurance broker does not provide insurance services.

Secondly, Counsel for Defendant relies on a legal opinion from the Solicitor General presumably made on behalf of the Attorney General dated 16th October, 2008.

In that opinion the Solicitor General writes

“...one can rightly say that an insurance broker is only a middleman connecting the insurer to the insurer(d) (sic) on

condition that he will be paid a commission. He is independent of the insurance company unlike an insurance agent who is tied to the insurance company and whose actions are those of the company he represents... He does not qualify to be a supplier of insurance services within the meaning of S.19(1) and the second schedule to the VAT Act... therefore, URA was right in assessing AON for the sum mentioned above...”

Clearly from the above opinion the Solicitor General does not believe that insurance brokers provide insurance services.

Counsel for the Defendant then referred me to the case of

Cape Brady Syndicate V IRC [1921] 1 KB 403.

for the proposition that in a taxing statute one can only look at what is clearly said as there is no room for any intendments, there is no equity about a tax and there is no presumption as to a tax. Further more nothing is to be read in and nothing is to be implied, one can only look fairly at the language used.

I suppose based on the above authorities Counsel for the Defendant is stating that, tax statutes should be given a strict and literal interpretation.

Counsel for the Defendant referred me to how exemptions have been handled in other jurisdictions.

The first illustration comes from the European Union. Under Article 13 B (a) of the European Community Council Directive 77/388 it is provided that member states provide uniform exemptions in respect of

“(a) Insurance and reinsurance transactions, including related services performed by insurance brokers and insurance agents...”

This directive was tested regarding the application of VAT exemption in the case of

Card protection Plan Ltd V Customs and Excise Commissioner [1999] STC 270 at pages 291 – 292

In that case it was held

“...the essentials of an insurance transaction are, as generally understood that the insurer undertakes, in return for prior payment of a premium, to provide the insured, in the event of materialization of the risk covered, with the service agreed when the contract was concluded...”

I was further referred to the case of

Re: **Forsakringsaktiebolaget Skandia (Publ)** [2001] STC 754 which followed the findings in the **Card Protection Plan Case (supra)**

Counsel for the Defendant submitted that the cases show that an exemption can only be granted if it is specifically provided for.

In this regard he referred me The United Kingdom where the provision by an insurance broker or an insurance agent of any of the services of an insurance agent is an exempt supply for purposes of VAT under their S. 31(1) read together with schedule of part 2 Group 2 of The VAT Act 1994.

I was also referred to the third schedule of the VAT Act of Kenya Item 13 which expressly provides for insurance agency and insurance brokerage services as insurance services.

Counsel concluded that the Uganda VAT Act on the other hand makes no specific exemption.

Before I make my findings on this question it has been drawn to my attention by the Defendants that a new VAT (Amendment) Bill 2009 is to be placed before parliament where one of its five objectives is to include brokerage services in the definition of insurance services by amending the second schedule of the Act by inserting a new paragraph 2(f) to that effect. It is the Defendant's submission that the amendment is to provide a cure to a position that did not exist or was not specifically provided for and therefore such a change can only take place when the amended Act

comes into force. This information came by letter after the submissions had closed and was protested by the Defendants as it was copied to them. I however take the view that this is important new information after careful consideration counsel for the Defendant was right to bring it to my attention as an officer of the Court. I shall however take into account the fact that it is a late submission.

I have considered the submissions made before court and the wealth of authorities supplied. I must thank both parties for their assistance.

Both were very spirited as to their arguments. Clearly their issues here related to the law and the absence of definitions on the one hand and insurance practice on the other.

It is important to comment on how the parties got themselves in to this dispute in the first place. A lot of insight is given from the affidavit of Mr. Daniel Omara an officer of the Defendant dated 12th December 2008. In paragraph 5 of that affidavit he depones as follows:-

“5. That the Defendant between 15th May 2008 and 24th June 2008 conducted a comprehensive audit of the Plaintiff’s transactions and tax affairs for the tax period January 2003 to December 2007. A copy of the Audit report is attached and marked “B”.

Page 4 of that report which deals with VAT has this observation.

“The output VAT declared in the returns was adjusted for insurance brokerage commissions for the period under audit as such commissions have always been assumed to be tax exempt...” (emphasis mine).

This to my mind seems to tie in with the affidavit evidence of Ms. Irene Kego Oloya (supra) that the practice since the enactment of the VAT Act (Cap 349) is that insurance broking has been treated as an exempt service. At least no evidence has been adduced by the Defendant that the Plaintiff is simply refusing to pay VAT while other insurance brokers are paying. This appears to have been the market wide practice.

In this regard, this application can be regarded as a test case. Both parties agree that the term “Insurance Services” is not defined by The Insurance Act or by The VAT Act.

Both parties agree as a practical matter that insurance companies provide insurance services based on what they do; regardless of the inadequacies of the definition. It is important to note that the schedule does not specifically say that insurance companies provide insurance services either. What they do not agree on is whether insurance brokers and insurance companies provide insurance services. I shall not repeat the arguments here nor would I wish to be labour the difference between an insurance company and an insurance broker. To my mind the two are not the same. Under our Insurance Act (Cap 213) an insurance company is one which underwrites insurance business for a remuneration called a premium being life or non life insurance within the meaning of Section 5(b) of the said Act. On the other hand an insurance broker is an intermediary who solicits or negotiates insurance business on behalf of an insured with a view to entering into a contract of insurance for a commission or other remuneration with an insurer within the meaning Sections 2(f) and (g) of the Insurance Act.

This to my mind this is the summary of the arguments by both parties. The issue now to be determined is whether what an insurance company does and what an insurance broker does can collectively be referred to as insurance services as the Plaintiffs insist?

There are two interesting but divergent third party opinions on this question one by the Solicitor General (as legal advisor to Government) dated 16th October, 2008 and another by The Uganda Insurance Commission dated 29th July, 2008 (as Statutory Regulator of the Insurance Industry in Uganda).

The opinion of the Solicitor General is fairly straightforward and is that unlike an insurance agent an insurance broker does not qualify to be a supplier of insurance services.

The opinion of The Commissioner for Insurance differs and states that insurance brokers provide insurance services. The Commissioner in paragraph 2(iii) of her letter states that brokers provide a specialized service by soliciting and negotiating insurance business and writes

“...thus an insurance broker provides only those insurance services that are offered by insurance companies (refer to Section 5 of the Act)...”

In paragraph 2(iv) of her letter she lists the services as

- 1) Sourcing for insurance policies
- 2) Completing proposal forms
- 3) Advising clients as to the meaning of the policies
- 4) Advising and warning clients on material changes in the insurance policies
- 5) Forwarding notices of claims.

The Commissioner in para 3 of her letter by way of conclusion writes

“...since the broker is a go-between through whom an insurance service is provided by an insurance company, the service they provide can only be described as an insurance service...”

Personally, I find the opinion of the Commissioner for Insurance to be more persuasive than that of the learned Solicitor – General. It is more detailed, technical and is grounded in the law. I think that is why Section 1 of Insurance Act states that it applies to both insurance and brokerage companies. I am unable to understand the difference that the learned Solicitor-General makes in the service that an insurance agent does and that of an insurance broker; as both are insurance intermediaries.

I am inclined to agree with counsel for the Defendant that because of the definitional lacuna as to what insurance services are, one has to derive the definition from how insurance and insurance contracts operate. In other words what amounts to insurance services is a technical and practical matter. This is the approach that **Lord Diplock** took in the case of **Stockton** (supra) when he observed that in certain cases an insurance broker may even issue contracts of interim insurance on behalf of insurers as their agents. This as a matter of law and practice makes the insurer and the insurance broker provide the same service.

Counsel for the Defendant suggested Tax Statutes should be given a strict and literal interpretation. That may well be a generally stated position but there is an important qualification that is made in the case of

Cape Brandy Syndicate V IRC (supra) and that is

“...one can only look fairly at the language used...”

It is my finding that looking at the language of the S. 19 (1) of the VAT Act and para 1 (d) of its second schedule, it would be fair to say that insurance services inter alia includes services provided by both insurance and brokerage companies.

Based on the authorities cited to me from position in other countries where the term insurance services have been more specifically defined, the definition covers insurance brokers as well. Even the case cited by counsel for the Defendant Card Protection Plan Ltd (supra) upholds the position of the European Community Directive 77/388 [Art 13 B (a)] which makes insurance brokerage tax exempt like insurance companies. The position is the same in England and Kenya.

Indeed it is fair to say the above practice in outside jurisdictions may also account for the practice in Uganda as well before the Defendant carried out its special audit in 2008.

The Government has actually put out a bill namely; the VAT (Amendment) Bill, 2009 which will now clearly add brokerage services to the definition of insurances. Does that cure something or change a previous position? I think not, it simply, I find that it simply makes good what has always been the “*de facto*” position on the ground. In my view looking at the proposed amendment and comparing it with the best legislative practices in the European Union, England and Kenya, the said amendment does not go far enough. In view of the interpretation issues this case has shown, I would suggest that insurance companies, re-insurance companies and insurance agents also be specifically mentioned in the amendment like it has been done in the other jurisdictions.

As to the second question in the originating summons as to whether insurance brokerage services are standard rated or exempt supplies within the Value Added Tax Act; based on my findings above I find that they are exempt.

As to the prayers based on my findings above, I grant the following

- 1) A declaration that the services offered by insurance brokers are services within the meaning of the Value Added Tax Act Cap 349.
- 2) A declaration that insurance brokerage services are exempt supplies within the meaning of the Value Added Tax Act Cap 349.
- 3) Since I have already made a declaration as to what insurance services are, I need not issue an order of certiorari to the same effect.
- 4) An order of certiorari quashing the decision the assessment No. KC/VAT/272/06/08 of the URA in so far as the VAT relates to insurance and not other services.

In light of the finding that this dispute can be regarded as a test case for insurance industry and tax law, I order each party bear its own costs.

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Geoffrey Kiryabwire

JUDGE

Dated: 24/09/2009

24/09/09

10:20am

Judgment read and signed in open court in the presence of:

- C. Birungyi for Plaintiff
- Mugabi for Defendant

- Rose Emeru – Court Clerk

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Geoffrey Kiryabwire
JUDGE

Date: 24/09/2009