THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

COMMERCIAL DIVISION

HCT-00-CC-CA-12 -2011

(*On appeal from a decision of the Tax Appeals Tribunal in No. TAT 1 of 2010*)

UGANDA REVENUE AUTHORITY::::::::::::::::::::::::::::::::APPELLANT

VERSUS

RUGARAMA CONSTRUCTION COMPANY LIMITED:::::::RESPONDENT

BEFORE HON. LADY JUSTICE HELLEN OBURA

JUDGMENT

This is an appeal against part of the decision of the Tax Appeals Tribunal (hereinafter referred to as TAT) on the ground that TAT erred in law when having found that the appellant used the wrong valuation method, it failed to exercise powers vested in it under the Tax Appeals Tribunal Act Cap. 345 (hereinafter referred to as the TAT Act) to remit the matter to the appellant for reconsideration on the issue of the correct method to be used to establish an alternative value for the respondent's consignment.

The brief background of this appeal is that the respondent company imported galvanised steel culverts vide entries C7170 &C7171 of 3rd November 2009 and

C7185 and C7186 of 4th November 2009. This was done on a bill of lading MSCU GW 861079 dated 21st August 2009 under Invoice No. 148-C004 of 6th August 2009. The respondent declared the value of imports as Shs. 113,316,800/= and made a self assessed tax payment of Shs. 65,415,656/= using transaction valuation under method I.

The appellant disputed the import documents, value declared and the valuation method used by the respondent. Upon lodging the documents, the appellant raised queries regarding the consignment. The appellant was not satisfied with the explanations given to the queries raised. The respondent's consignment was not passed under method I and as a result not released. However, the consignment was later released upon the respondent's furnishing security for the top up taxes amounting to Shs. 118,342,742/=.

The respondent objected to the decision and lodged an application with TAT challenging a tax assessment of Shs. 118,342,742/= made by the appellant based on the value of similar goods under method III. Three issues were framed for determination by TAT, namely;

1. Whether the respondent lawfully rejected the values used by the applicant.
2. What is the proper method to be used?
3. What remedies are available to the parties?

On the first issue, TAT found that the customs documentation were not authentic and ruled that the appellant was justified in rejecting the transaction value provided by the respondent based on them. As regards the second issue, TAT found and ruled that there was no properly assessed custom value arrived at using the proper

sequential method provided by law. The applicant was given the benefit of the doubt and the application was allowed. The appellant now appeals to this court against part of that decision on the ground stated above.

When this appeal came up for hearing on 17th May 2012, Mr. Mugabi Mathew represented the appellant but there was no appearance for the respondent. Mr. Mugabi informed this court that he had had discussions with counsel for the respondent and agreed to file written submissions. Court gave them timelines for filing the written submissions and they did so.

In his written submissions, Mr. Mugabi contended that TAT correctly found that the wrong method had been used because having rejected method I the appellant opted to use Method III instead of Method II. He however submitted that TAT was wrong in not giving directions on what should be done having found that there was evasion of customs duty by the respondent. It was submitted that TAT's failure to give direction on the matter led to a loss of revenue to the Government of Uganda.

It was also submitted for the appellant that TAT did not remedy the mischief as mandated by Article 152(3) of the Constitution of the Republic of Uganda and as required by the TAT Act.

Counsel for the Appellant relied on the parameters for statutory interpretation as stated in the case of ***Attorney General v Carlton Bank (1989) 1 KB 64*** where Lord Russel held that the duty of the court is to give effect to the intention of the legislature as gathered from the language employed having regard to the context with which it is made.

He also cited **Heydon's case 76 ER 637** where it was held;

> ***"…the office of all the judges is always to make such construction as shall suppress the mischief and advance the remedy, and to suppress subtle inventions and evasions for the continuance of the mischief and…to add force and life to the cure and remedy according to the true intent of the makers of the Act for the public benefit…"***

It was further argued for the appellant that TAT erred in law when it did not remit the matter to the appellant to reconsider and use the proper method to assess the additional taxes to be paid by the respondent. This submission was based on section 19 of the TAT Act. He also cited the case *of* ***Uganda Revenue Authority vs Tembo Steels Ltd High Court Civil Appeal No. 9 of 2006*** on the implication of section 19(1) of the TAT Act.

It was argued that since TAT exercised its mandate and found that the appellant had used the wrong method to determine the value of the consignment, it should have either substituted that decision with its own or remitted the matter to the appellant for reconsideration.

The appellant prayed that this court exercises its powers given by section 27(3) of the TAT Act to remit the matter to TAT or the appellant for reconsideration using the alternative method in hierarchical order to value the respondent's consignment so as to arrive at the proper outstanding taxes to be paid.

In his written submissions in support of the respondent's case, Mr. Akile Sunday Igu Rocks referred to section 19(1) of the TAT Act and submitted that TAT having set aside the appellant's decision proceeded to substitute the decision with its own as empowered under section 19(1) (c) (ii). According to him, the decision was for the appellant to be content with the respondent's tax payment of Shs. 65,415,656/= as the appellant had failed to justify its decision for the up lift of Shs. 118,342,742/=. According to him TAT upon viewing the strength of the evidence before it saw no reason to remit the matter to the decision maker (appellant).

Counsel for the respondent also criticised the appellant for faulting TAT for failure to grant an order that was never sought. He argued that the appellant had not sought for the remittal of the matter to it as the decision maker but rather sought for payment of the tax up lift of Shs. 118,342,742/= by the tax payer with an interest of 2% per month and dismissal of the application with costs.

He argued that the case of ***Uganda Revenue Authority vs Tembo Steels Ltd*** (supra) is distinguishable from this one because unlike in this case where the applicant has already paid taxes, in that case the tax payer had not. In his view, TAT acted properly under the law and rightly arrived at its decision over the matter. He concluded that the appellant was not entitled to the remedy of having the matter remitted to it or to TAT for reconsideration.

Although Mr. Mugabi had asked court and was allowed to file a rejoinder to the respondent's submissions, I did not find a copy of the same on the court record implying that it was never filed.

I have carefully considered the submissions of both parties and critically analysed the relevant provisions of the East African Community Customs Management Act, 2004 (hereinafter referred to as EACCM Act) and the TAT Act.

Under the EACCM Act, it is required that the valuation of goods for tax purposes is based on the transaction value stipulated under Method I of the General Agreement on Tariffs and Trade (1994). The transaction value is based on the actual price of the goods to be valued. The Fourth Schedule of the EACCM Act lays down methods for the determination of the value of imported goods liable to import duty. For the purpose of determining this appeal the first three methods are considered here below.

Method I – The Transaction Value

Paragraph 2 of the Fourth Schedule to the EACCM Act provides that;

> ***"The customs value of the imported goods shall be the transaction value, which is the price actually paid for those goods (as per the invoice) or payable for the goods when sold for export to a partner state."***

Method II – The Transaction Value of Identical Goods

Paragraph 3 of the Fourth Schedule to the EACCM Act provides that;

> ***"Where the customs value of the imported goods cannot be determined under the provisions of paragraph 2, the customs value shall be the transaction value of the identical goods sold for export***

to the partner state and exported at or about the same time as the goods being valued."

Method III – The Transaction Value of Similar Goods

Paragraph 4 of the Fourth Schedule to the EACCM Act provides that;

"Where the customs value of the imported goods cannot be determined under the provisions of paragraphs 2 and 3, the customs value shall be the transaction value of similar goods sold for export to a partner state and exported at or about the same time as the goods being valued."

The appellant, after disputing the transaction value as per the invoice which was arrived at using method I proceeded to apply Method III instead of Method II. This culminated into a tax dispute between the parties. TAT in determining the dispute took note of Article 2 and 3 of the World Trade Organization (WTO) Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 called the Agreement on Customs Valuation. I will not reproduce those articles because they basically make up paragraphs 3 and 4 of the fourth schedule abovementioned.

Meanwhile section 19(1) of the TAT Act provides that*:*

For the purpose of reviewing the taxation decision, the tribunal may exercise all the powers and discretions that are conferred by the relevant taxing Act on the decision maker and shall make a decision in writing-

(a) Affirming the decision under review;

(b) Varying the decision under review; or

(c) Setting aside the decision under review and either –

(i) making a decision in substitution for the decision so set aside; or

(ii) remitting the matter to the decision maker for reconsideration in accordance with any directions or recommendations of the tribunal.

This section has been subjected to judicial interpretation. In the case of ***Uganda Revenue Authority v Tembo Steels Ltd*** (supra) Madrama, J held that Section 19 of the TAT Act does not permit the quashing of a decision without making additional orders. The court found that where TAT sets aside a decision under review it has to proceed under section 19 (1) (c) to either substitute the decision with their own or remit that matter back to the decision maker with direction or recommendations on how to handle it.

In this case TAT found that there was no proper custom value arrived at by using the proper sequential method provided by law. For that reason TAT allowed the application thereby quashing the assessment that the appellant had made. It neither varied nor affirmed the decision under review. It simply set it aside.

I must observe with due respect that if TAT had indeed properly addressed its mind to the second issue as framed before it, it would have in answer to that issue stated the correct method to be used in this case. TAT would have on that basis and in exercise of the power given by section 19 (1) (c) either assessed the proper custom value and the tax payable or remitted the matter back to the appellant with direction

that it should use that method to assess the proper custom value and the tax payable. That in my view would have offered a logical conclusion to the dispute between the parties in this appeal.

To my mind, the second issue was deliberately framed to provide an answer on the method to be used which is the real dispute in this case. TAT only glossed over that issue and failed to provide an answer thereby leading to this appeal. It only answered the first part of that issue by criticising the method used by the appellant and missed out on the core part of it that required stating the correct method to be used. That decision left the appellant which has the statutory mandate to collect tax at a loss on how to recover tax from the respondent, hence this appeal.

With respect, I disagree with the submission of counsel for the respondent that TAT substituted the appellant's decision with its own. I find no such order substituting the appellant's decision. The substituted decision would have clearly shown the proper method to be used, the proper custom value arrived at using that method and the tax payable by the respondent assessed basing on that custom value. A perusal of the ruling appealed against does not show any of those.

Even if TAT had found that the self assessed tax payment of Shs. 65,415,656/= was the correct amount to be paid, it had a duty to state so in its decision. This was not done clearly showing that TAT did not substitute the appellant's decision with its own.

As regards the submission of counsel for the respondent that the case of ***Uganda Revenue Authority v Tembo Steels Ltd*** (supra) was distinguishable from this one owing to the fact that in this appeal the respondent had paid taxes, I disagree with

that position. This is because in both cases TAT did not affirm or vary the decision under review but set it aside and did not comply with the requirements of section 19(1) (c) of the TAT Act. To that extent, the principle in that case is applicable to the instant appeal.

I am also not persuaded by the respondent's submission that because the appellant never sought for remittal of the matter to them as the decision maker the same could not be done. Section 19(1) clothes TAT with a lot of discretion in the determination of the matters under review. I believe in a bid to ascertain the amount of tax payable, TAT would have invoked any of its powers under section 19(1) (c) of the TAT Act. This was necessary especially in light of TAT's finding that the customs documentation were not authentic and conclusion as stated at page 13 of its ruling in the last paragraph that; *"**The applicant as profit making entity sought to increase its profit by under-declaring the items it imported**"*.

It would have been in the spirit of the TAT Act for TAT to either determine the tax payable or remit the matter to the appellant as the decision maker with direction on how to determine it so that the respondent would not be allowed to escape its tax liability. For those reasons, I agree with the submission of the appellant's counsel that TAT did not cure the mischief as was mandated by the TAT Act.

In the circumstances, I find that TAT erred in setting aside the decision of the appellant and not substituting it with its own or remitting the matter to the decision maker for reconsideration. I therefore find merit in the sole ground on which this appeal was premised and it must succeed.

Having found as I have done above, section 27(3) of the TAT Act gives this court power to make such order as it thinks appropriate by reason of its decision, including an order affirming or setting aside the decision of TAT or an order remitting the case to TAT for reconsideration. In exercise of that power, I order that this case be remitted to TAT for reconsideration of the appropriate method to be used in determining the custom value and assessment of the tax payable based on that value.

Costs of this appeal are awarded to the appellant.

I so order.

Dated this 28th day of November 2012

Hellen Obura
JUDGE

Judgment delivered in chambers at 2.00 pm in the presence of Ms. Bakanasa Hilda who was holding brief for Mr. Mathew Mugabi for the appellant and Mr. Norman Siywat who was holding brief for Mr. Akile Sunday Igu Rocks for the respondent.

JUDGE
28/11/12