THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL APPEAL NUMBER 08 OF 2010

UGANDA REVENUE AUTHORITY)…..... APPELLANT

VERSUS

TOTAL UGANDA LIMITED)…..... RESPONDENT

BEFORE HON MR JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

The Appellant, Uganda Revenue Authority, lodged this appeal against the ruling of the Tax Appeals Tax Appeals Tribunal in Application No. TAT 05 of 2009 delivered on 19 March 2010 on one ground namely:

That the honourable Tax Appeals Tax Appeals Tribunal erred in law when they held that the supply of jet fuel to international carriers is a zero rated supply under the Value Added Tax Act cap 349 laws of Uganda.

The appellant seeks for orders that the judgement of the Tax Appeals Tax Appeals Tribunal is set aside and judgement is entered in favour of the appellant. The appellant prays for costs of the appeal. The appellant is represented by its Legal Services and Board Affairs Department while the respondent is represented by Kampala Associated Advocates. Counsels for parties agreed to and filed written submissions.

Written submissions of the Appellant

The appellant contends that fuel supplied to international carriers is VAT exempt and not zero rated. They contended that the effect of categorising a supply as exempt is that no input tax credit is claimable by a supplier of any goods or services while zero rated supplies allow for refund of input tax credit to suppliers of such goods or services. The respondent sought interpretation of tax treatment of jet fuel under the VAT Act cap 349. The Tax Appeals Tribunal held that fuel supplied to flights of airplanes/carriers outside Uganda is zero rated. The appellant's counsel argued that the Tax Appeals Tribunal misdirected itself by applying the provisions of section 24 (4) of the VAT Act at paragraph 1 (a) of the third schedule to the Act, which schedules zero rated supplies. Counsel submitted that the Tax Appeals Tribunal held that under section 19 (1) of the VAT Act, jet fuel is a petroleum fuel which is automatically exempt as held by the Tax Appeals Tribunal. Having held that jet fuel is an exempt supply, the Tax Appeals Tribunal went ahead to

rule that it was also zero rated. The appellant contends that jet fuel does not fall under the third schedule of the VAT Act, which does not expressly provide for the supply of jet fuel as zero rated supplies.

Learned counsel contended that Parliament did not intend that the supply of fuel to international carriers should be zero rated. If legislature had wanted supply of jet fuel to international carriers to be zero rated, it would have stated so expressly. Learned counsel referred to schedule 2 of the Value Added Tax (Amendment) (number 2) Act of 2002 which schedules jet fuel and kerosene type jet fuel and which exempt the supply of jet fuel. Because it is an exempt supply, it cannot be categorised as a zero rated supply. The appellants counsel submitted that the supply of jet fuel is only mentioned in the second schedule of the VAT Act and not in the third schedule. It was therefore not the intention of Parliament to make a supply of fuel to international carriers a zero rated supply.

Learned counsel contended that in the interpretation of sections 24 (4) and paragraph 1 (A), the third schedule of the VAT Act vis a vis section 19 (1) (o) of the VAT Act, the court should be guided by the authority in **Attorney General versus Bugisu Coffee Marketing Association [1963**] EA 39 when it was held that in the construction of a taxing statutes, the court looks at what is said without any presumption, equity, nothing is to be read in and nothing is to be implied, and one can only look fairly at the language used. Learned counsel submitted that the tax appeals Tax Appeals Tribunal relied on the provisions of section 24 (4) and the third schedule and did not fully appreciate that fuel to international carriers fell within section 19 (1) of the VAT Act. Counsel referred to the ruling of the Tax Appeals Tribunal at page 5 paragraph 3 and quoting section 77 of the Act that the supply of jet fuel fell under both the second and third schedule. Section 77 provides that where supply of goods and services may be covered by both the second schedule and that schedule, the supplier shall be treated as being within the third schedule. Learned counsel submitted that the Tax Appeals Tribunal erred to rely on section 77 of the VAT Act when the issue in contention was clearly provided for by section 19 (1) of the VAT Act, the second schedule and not the third schedule.

Secondly learned counsel contended that the supply of fuel to an international carrier at Entebbe Airport is not an export of service. Consequently the Tax Appeals Tax Appeals Tribunal misinterpreted the provisions of the VAT regulations in relation to the export of goods and thereby arrived at a wrong conclusion. The three conditions provided for under the regulations by which a transaction qualifies to be an export of goods were not met by the respondents. Counsel proceeded to quote regulation 11 (1) of the VAT regulations. These conditions are:

a. The goods supplied by a registered taxpayer to a person in another country.
b. The goods are delivered by a registered taxpayer to a port of exit for export.
c. ***The taxpayer must obtain documentary proof and the goods are removed from Uganda within 30 days of delivery to a port of exit***.

Counsels contended that none of the tests are listed above were met by the respondents. Counsel contended that for any goods to be exported there must be an export entry as provided for under section 73 of the East African Customs Management Act. No such export entries exist or were furnished to the Tax Appeals Tribunal by the respondent to prove that the fuel was actually being exported.

The appellants counsel further contended that the Tax Appeals Tax Appeals Tribunal did not address itself on questions of fact in so far as the fuel in question was not for export and was locally consumed by the international carrier in Uganda and at Entebbe airport at the start of the journey. The appellants counsel further submitted that the international carriers such as the aeroplanes start consuming the fuel while on the runway and portions of it while in Uganda airspace. Counsel reasoned that the argument that the fuel is for export is akin to arguing that food supplied to customers at the airport while on transit is an export of goods because the plane will fly with them while food is in their stomachs. Counsel contended that such an argument is devoid of logic and legal sense.

The appellants counsel further submitted that the jet fuel was not delivered to a person in another country but at Entebbe which is in Uganda. The goods were delivered at the port of exit for consumption and not for export. Counsel contended that if the goods had been for export, it would reach its destination in the same quantity it was supplied which was not the case in the circumstances. Secondly there was no documentary proof that the goods were exported from Uganda. No export entries, or signed contracts with the foreign purchaser or transport documentation were exhibited by the respondents. Counsel concluded that the criteria spelt out by regulation 11 of the VAT regulations were not complied with, with respect to the requirement that the goods should be delivered to a person in another country. He concluded that there was no export of goods. Furthermore, the Tax Appeals Tax Appeals Tribunal erroneously relied on the letter of the Commissioner Large Taxpayers Office, which provided that fuel for international flights which make no business in Uganda is zero rated. Counsel contended that the letter was based on wrong interpretation of the law. The Tax Appeals Tribunal erred in not give due consideration to the provisions of the law of the export of goods under regulation 12 of the VAT regulations. Counsel contended that the disowned letter did not state the position of the law. Learned counsel relied on the case of Uganda Revenue Authority versus Golden Leafs Hotel and Resort Ltd and Apollo Hotel Corporation High Court civil appeal number 0012 of 2007 where it was hailed that the officials of the defendant not taxpayers in the combined agreement cannot substitute the statutory scheme for levying, collection and payment of taxes.

Lastly learned counsel submitted on the place for the supply of fuel to international carriers. He contended that this was crucial in determining whether there was an export of fuel or not. Under section 15 (1) of the VAT Act it is provided that the supply of goods takes place where the goods are delivered or made available by the supplier except as otherwise provided for under the Act. Counsel reiterated submissions that the supply of goods and consumption starts immediately and

at the same place where the plane engines begin to run. Leonard counsel referred to the case of **Peninsular Oriental Steam Navigation Company versus Customs and Excise Commissioners [2000] STC** 488 at 489 where it was held that in the absence of a stop in the third territory, where goods are supplied between the first point of passenger embarkation within the community and the last point of disembarkation within the community, the place of supply should be deemed to be the first point. Consequently counsel contended that the place of supply of fuel to international carriers is Entebbe and therefore there was no export of goods by the respondent. The supply of fuel was therefore exempt. Counsel defined export to mean the sale of goods or services to a foreign country or to a ship to a foreign country.

In any case there was no documentary proof in terms of regulation 11 of the VAT regulations. The Tax Appeals Tax Appeals Tribunal erred in law when they failed to consider what an export of goods entailed thereby arrived at a wrong conclusion that there was an export of goods. They did not call for unexamined export documentation in the possession of the respondent if at all it existed. This was a grave omission on the issue of whether goods were exported or not. Lastly learned counsel prayed that the appeal is appealed and the judgement of the Tax Appeals Tax Appeals Tribunal dated 19 March 2010 is set aside and costs of the appeal are provided for.

Reply by Respondent

In reply the respondents counsel's submitted that the respondent is a supplier of fuel to international carriers at Entebbe International airport.

The respondent’s case is that sometime in 1999 the respondent sought the appellants interpretation on what the tax treatment of would apply for the supply of jet fuel to international carriers. On 23 December 1989 the appellants replied that stated that jet fuel was zero rated. In 2008, in total disregard of its earlier position the appellants wrote to the respondent and stated that the supply of jet fuel is an exempt supply. Consequently the respondents appealed to the Tax Appeals Tax Appeals Tribunal for interpretation. The contention before the Tax Appeals Tribunal was whether the supply of jet fuel was zero rated or an exempt supply. The Tax Appeals Tribunal agreed with the respondent’s submissions that the supply of jet fuel to international carriers was zero rated rather than exempted.

Learned counsel for the respondent prayed that this honourable court upholds the ruling/judgement of the Tax Appeals Tax Appeals Tribunal on the issue. Counsel submitted that section 24 (4) provides that items listed in the third schedule to the Act shall be zero rated for tax purposes. This included a supply of goods and services where the goods or services are exported from Uganda as part of the supply. Counsel further relied on regulation 11 (1) of the VAT regulations. The respondents counsel submitted that the respondent is involved in the supply of fuel to airlines carrying on the business of both international and national travel. As far as international travel is concerned, learned counsel contended that the fuel is meant for export purposes and as a result ought to be zero rated. In the case of airlines involved in national travel,

the fuel is consumed in Uganda and is exempted from tax. Leonard counsel contended that the Tax Appeals Tribunal was right to hold that the fuel companies deliver fuel to international carriers at Entebbe which is a port of exit. Secondly the appellant cannot ascertain what portion of fuel an international carrier consumes in Uganda; the taxpayer is given the benefit of doubt. Counsel relied on the case of **Clifford versus IRC** [1896] 2 QB 187, at 193 where it was held that where destitute is so indefinite and uncertain that it can be treated in two ways and it true construction of it is open to confuse, the one more favourable to the Crown and the other to the subject, the construction favourable to the subject should be adopted. Counsel contended that the argument that the consumption of fuel starts in Uganda is an illusion because if a small part of the fuel is consumed while the aircraft is in Uganda and a large chunk of the fuel is used as the aircraft is in international territory. He contended that it is tedious and impractical to determine what percentage of the jet fuel is actually consumed while the aircraft is in Uganda. Therefore the courts have held that where there is an ambiguity, the court should decide the matter in favour of the taxpayer and hold that the feud is consumed outside Uganda and that it is an export.

The argument of the appellants that the goods were not meant for export since they were delivered to a port of exit was never an issue to be decided by the Tax Appeals Tribunal. Counsel submitted that delivery of goods at the port of exit is likely to have them exported out of the country. In light of the above discussion, the respondent prayed that the court finds that the supply of fuel the port of exit because it is a later flown out of the country amounts to exportation.

As far as documented proof is concerned, this was not an issue before the Tax Appeals Tribunal. Secondly whether there was documentation of note is that the administrative issue that can be addressed when the respondent is seeking a refund from the appellants. The respondents counsel noted that the appellant is unnecessarily splitting up the transaction. He relied on the case of **Virgin Atlantic Airways Ltd versus Customs and Exercise Commissioners** [1995] STC 341 where the court held that the question of whether the supply of a limousine on request was an integral part of the supply of the flight when no extra charges were payable should be considered on a common sense basis. While the limousine service was physically separate from the flight, it was not, without great difficulty, economically capable of being disassociated from the price paid from the package offered by the appellants to their first class passengers. It would be unrealistic to split the provision of the limousine service from the flight service itself and find it two separate supplies.

In the alternative counsel contended that under section 19 (1) of the VAT Act, the supply of goods or services is an exempt supply if it is specified in the second schedule. The respondent is involved in the supply of jet fuel to international Carriers in Uganda. Under the Act, the supply of jet fuels could be considered to be an exempt supply. The supply of jet fuel brings the court to a cross road because it is both an exempt and zero rated supply. Contrary to the appellants submission that Parliament would not have intended a supply to be both zero rated and exempt,

by enacting section 77 of the Act, which provides that where a supply of goods or services may be covered by both the second schedule and the third schedule, this supply shall be treated as being within the third schedule. Counsel therefore prayed that the court finds what the Tax Appeals Tribunal ruled that the supply ought to be zero rated.

As far as the letter of the Commissioner large taxpayers office is, Samba, at page 6 of the ruling, the Tax Appeals Tribunal referred to the letter at page 5 by did not rely on it to arrive at its conclusion on whether the supplier was zero rated or not.

Judgment

I have carefully considered the written submissions of the appellant and the respondent Counsels and the provisions of law referred to. The question before the court is a question of law as to whether jet fuel supplied by the respondents to international carriers at Entebbe is a zero rated supply under the Value Added Tax Act as held by the Tax Appeals Tribunal

The ruling of the Tax Appeals Tax Appeals Tribunal can be found at page 10 of the record of appeal. The issue before the Tax Appeals Tribunal was whether supply of jet fuel to international carriers is exempt or zero rated for VAT purposes. Both parties did not call witnesses and relied on written submissions. The Tax Appeals Tribunal considered section 1 of the Value Added Tax Act which defines an exempt supply to mean the supply of goods and services to which section 19 of the Act applies. The Tax Appeals Tribunal further considered section 19 (1) of the VAT Act for supplies which are exempt for purposes of section 19. Secondly they considered clause 1 (o) of the second schedule to the Act which includes the supply of petroleum fuel oils (petrol, diesel and paraffin) subject to excise duty as exempt from VAT. Consequently they held that since jet fuel is a petroleum fuel it automatically qualifies to be exempt. On the other hand the Tax Appeals Tribunal considered zero rated supplies provided for under section 24 (4) of the VAT Act which provides that the rate of tax imposed on taxable supplies specified in the third schedule is zero. Furthermore paragraph 1 (a) provides that the supply of goods and services where the goods or services are exported from Uganda as part of the supply is zero rated supplies for purposes of section 24 of the Act. The Tax Appeals Tribunal further observed that under clause 2 of the third schedule it is provided that the goods are treated as exported from Uganda if they are delivered to or made available to an address outside Uganda as evidenced by documentary proof acceptable to the Commissioner General. The Tax Appeals Tribunal agreed with the submission of the respondent to this appeal that the supply is zero rated because it is the supply to an international carrier at Entebbe which is a point of exit for international carriers. They agreed that most of the consumption of fuel by an international carrier may occur outside Uganda. The Tax Appeals Tribunal further observed that in the letter of the appellants Commissioner Large Taxpayers Department, the appellant had stated that the fuel for international flights which make no business in Uganda can therefore be supplied zero rated. The Commissioner acknowledged that international carriers have no business in Uganda. The Tax Appeals Tribunal was of the considered opinion that the supply of

jet fuel also falls under section 24 (4) and the third schedule of the Act because most of the fuel is consumed outside Uganda.

The Tax Appeals Tribunal further observed that under regulation 12 of the VAT regulations, where goods are supplied by a registered taxpayer to a person in another country the goods are delivered by such a taxpayer to a point of exit and may be invoiced as zero rated if the tax payer has documentary proof that they are exported and the goods are removed from Uganda within 30 days of delivery. The Tax Appeals Tribunal held that fuel companies deliver fuel to international carriers at Entebbe which is a point of exit. That fuel is consumed by the international carriers en route to another country. Secondly the appellant cannot ascertain what portion of fuel an international carrier consumes in Uganda and the tax payer is therefore given the benefit of doubt. They held that where the meaning of a statutory provision is ambiguous or its application would create ambiguity the taxpayer must be given the benefit of doubt. They further held that it is not the intention of legislature to charge VAT on a person who uses the goods outside the country. All in all they ruled that the supply of jet fuel falls under both the second and third schedule. Section 77 of the VAT Act provides that where a supply of goods may be covered by both the second and third schedule, the supply shall be treated as within the third schedule. As far as the need for documentary evidence is concerned, the Tax Appeals Tribunal held that it does not go to the substance but is a question of formality. The appellant can always work out the procedure to enable international carriers meet the requirements of the law. Asa Mugenyi chairperson of the Tax Appeals Tribunal did not agree with the majority decision. In his dissenting minority opinion, he held that VAT is not a consumption tax. It does not depend on where a taxpayer consumes the subject goods. It is more concerned with transactions involved in producing the unit rather than consumption. It is about value added to a product. At the time the fuel is supplied to a carrier at the airport, there is already value added. He further held that it is irrelevant whether carriers on international flights have business in Uganda. Under section 15 of the VAT Act, goods are made available to the international carrier at Entebbe airport. The fuel is pumped into the fuel tank of the international carrier and is not put in the cargo section of the carrier. It is not a supply outside Uganda and by the time the carrier reaches its destination there is no fuel available to be passed on. Therefore there is no export. Secondly, the chairman of the Tax Appeals Tribunal observed that where fuel is pumped into a tank, there's nothing for the carrier to deliver to an address outside Uganda. This is because the fuel is consumed when the carrier is in flight. Consequently there is no documentary evidence that can be availed to the Commissioner General as regards a non-existent cargo delivered outside Uganda. He considered clause 3 of the second schedule and held that it is very specific because it provides that goods must be delivered at an address outside Uganda. For services it states that it must be supplied for use or consumption outside Uganda. The fuel is therefore supplied for use. He held that fuel pumped into a carrier that is on an international flight is not an export. This is because it does not fulfil the export requirement put in place by the government. Jet fuel does not qualify to be an export of Uganda in the real sense. He held that fuel supplied to carriers on international flights does not fall within the third schedule and it is not a supply that is zero rated. He further held that

under section 19 of the VAT Act, petroleum is an exempt supply. Lastly section 77 of the Act cannot be invoked because fuel supply to an international carrier is not zero rated. In the circumstances he held that the fuel supply to an international carrier is an exempt supply. As far as the letter of the Commissioner General dated 23rd of December 1999 is concerned, the doctrine of estoppels cannot be used to by the appellant from asserting the correct position of the law.

I have considered the ruling of the Tax Appeals Tribunal, the dissenting opinion, the submissions of counsels and the provisions of law sought to be interpreted. The question of whether supply of jet fuel to international carriers is a zero rated supply or an exempt supply is a question of law. Its resolution depends on interpretation of sections 19, 24 (4), the second and third schedules to the Value Added Tax Act.

I will start by an examination of the various provisions of law starting with section 24 (4). First of all I agree with the principles of interpretation of tax law submitted on by counsels that a tax statute is to be construed as it is without presumptions, implications or trying to ascertain the intention of parliament outside the wording of the statute. Firstly section 24 of the VAT Act is found in Part VII of the Act. This part of the Act specifically provides in the heading thereof that deals with "Calculation of Tax Payable". Section 24 has a head note which reads "Calculation of Tax Payable on a Taxable Transaction". It is therefore abundantly clear that the section deals with calculation of tax payable on a taxable transaction. It does not purport to define what a taxable transaction is. Section 24 (4) provides that "the rate of tax imposed upon taxable supplies specified in the third schedule is zero." The subsection 4 to section 24 only specifies the rates to be applied to taxable supplies specified in the third schedule. Before proceeding to the third schedule of the Act, we must first deal with the provisions of section 19 of the statute.

Section 19 deals with exempt supplies. The head note of the provision reads as follows: "Exempt Supply". Section 19 (1) provides that: "A supply of goods or services is an exempt supply if it is specified in the second schedule". This is the relevant provision relied on by the parties and the Tax Appeals Tribunal in the resolution of the dispute. It is apparent from the wording of the provision quoted above that the supply of services would qualify to be an exempt supply if the goods or services are specified in the second schedule. Consequently and logically in order to establish whether the provision of any good or service is an exempt supply, the parties perused the provisions of the second schedule to the Act. Before proceeding to the second schedule it must be emphasised that section 19 (1) is very clear and there is no ambiguity whatsoever in the provision. To find out whether the supply of services or goods is exempt, the parties referred to the second schedule of the Act. The parties relied on clause 1 (o) which reads as follows:

> ***"the supply of petroleum fuel is subject to excise duty, (motor spirit, kerosene and gas oil), spirit type jet fuel, [and] kerosene type jet fuel or residual oils for use in thermal power generation to the national grid;"***

Both parties and the Tax Appeals Tribunal were in agreement that jet fuel supplied to international carriers is catered for by the second schedule to the Act. Consequently, the conclusion of the Tax Appeals Tribunal and the appellant agree that the supply of fuel by the respondent to international carriers is an exempt supply. As I have noted above this is because of the explicit wording of section 19 of the Value Added Tax Act. Because section 19 provided for what is an exempt supply, is there any reason to establish whether it is also zero rated? This is the crux of the appeal.

Going back to section 24 (4) of the Value Added Tax Act, it clearly deals with calculation of tax payable on any taxable transaction. Consequently it provides that the tax imposed on taxable supplies specified in the third schedule is zero. To find out what is specified in the third schedule, the parties rightly read the third schedule. The third schedule is headed "Zero Rated Supplies". It sets out the supplies specified for purposes of section 24 (4) of the Value Added Tax Act. In other words it defines or specifies goods or services to which section 24 applies. Again the parties relied on clause 1 (a) of the third schedule which provides as follows: "a supply of goods or services where the goods or services are exported from Uganda as part of the supply;" additionally paragraph 2 qualifies what is meant by the goods or services which are exported from Uganda. It provides in paragraph 2 (a) as follows:

> ***"in case of goods, the goods are delivered to, or made available at, an address outside Uganda as evidenced by documentary proof acceptable to the Commissioner general; or"***

I have reviewed the pleadings and submissions of the parties and will show that the submissions proceeded on wrong premises. The wrong premise was the dwelling on the question of whether supply of jet fuel to international carriers is an export. The applicant's application is found at pages 70 to 73 of the record of appeal. The issue in the application of the respondent for trial before the Tax Appeals Tribunal was "**whether the supply of jet fuel to international carriers/airlines is an export and therefore zero rated.**" This explains the emphasis of the parties in submission as to whether the supply of fuel was an export. The applicant made reference to paragraph 2 (a) of the third schedule at page 61 of the record of appeal which is also pages 3 of the applicant's written submission. On the other hand the submissions of the respondents/Uganda Revenue Authority before the Tax Appeals Tribunal is found at pages 66 to 69 of the record. Uganda Revenue Authority does not make reference to paragraph 2 (a) of the third schedule. In their written submissions on appeal, counsels for both parties make reference to paragraph 2 (a) of the third schedule in relation to the requirement for documentary proof acceptable to the Commissioner General that goods were made available to an address outside Uganda. The Tax Appeals Tribunal specifically referred to paragraph 2 of the third schedule at page 4 of their ruling.

In their written submissions on appeal the appellant relied on regulation 11 of the VAT regulations which deals with export of goods for purposes of establishing whether the supply in

question was an export and whether it was zero rated or not. Furthermore the appellant relied on section 15 (1) of the VAT Act to define where a supply of goods is deemed to have taken place to answer the same question of whether there was export of goods. Section 15 (1) of the Value Added Tax Act provides that "except as otherwise provided under this Act, a supply of goods takes place where the goods are delivered or made available by the supplier." A strict construction of the provision is that goods are delivered in the case of the appellant when fuel is loaded in the international carrier at Entebbe airport. That could have been the end of the matter. However because of the expression "except as otherwise provided under this Act", the parties proceeded to examine provisions related to zero rated supplies. A further definition of where goods are supplied was considered under the provisions for the third schedule paragraph 2 thereof. This as noted above is founded on the provisions of section 24 (4) of the Act which deals with the calculation of VAT. It provides that the supplies specified in the third schedule shall be zero rated. However counsel for the appellant put his finger on the crux of the interpretative question when he submitted that once a good is exempted as provided for by section 19, there is no need to consider whether it is also zero rated. He contended that when the tribunal found that the relevant goods were an exempt supply, they should have ended there.

I have carefully considered this submission. The resolution of the controversy as to whether it is necessary to proceed to examine whether an exempt supply is also zero rated depends on the purpose of the provision for exempt supply as defined. Section 1 of the Act defines an exempt supply as the supply of goods or services to which section 19 applies.

The question remains as to why the Act specifically defines an exempt supply. Section 4 of the Value Added Tax Act creates VAT tax to be charged in accordance with the Act. It provides that VAT is chargeable on every taxable supply in Uganda made by a taxable person. The question of exemption of a supply addresses the question of whether goods are chargeable or taxable with VAT or not. A taxable supply is defined by section 18 of the VAT Act. Section 18 (1) provides as follows:

> ***"A taxable supply is the supply of goods or services, other than an exempt supply, made by a taxable person for consideration as part of his or her business activities." (Emphasis added).***

Section 18 excludes exempt supplies from what may be defined as taxable supplies. Put in context, section 19 of the VAT Act which follows immediately after the definition of a taxable supply of goods and services, defines what an exempt supply is. An exempt supply is provided for or specified in the second schedule. As we have noted above, the fuel provided to international carriers is an exempt supply. The parties are in agreement that paragraph 1 (o) of the second schedule includes the fuel supplied to international carriers the subject matter for interpretation by the Tax Appeals Tribunal For emphasis, paragraph 1 (o) provides as follows:

"The supply of petroleum fuels subject to excise duty, (motor spirit, kerosene and gas oil), spirit type jet fuel, [and] kerosene type jet fuel and residual oils for use in the thermal power generation to the national grid;"

All the goods specified in paragraph 1 (o) are not taxable supplies in terms of the definition of a taxable supply under section 18 of the VAT Act. Consequently my conclusion is very simple and is based on the need to harmonise sections 19 and 24 (4) of the Value Added Tax Act. Section 19 of the VAT Act deals with exempt supplies by defining what they are. On the other hand section 24 deals with the calculation of VAT on taxable supplies. It follows that a reference under section 24 (4) of the VAT Act to zero rated supplies and the third schedule is inapplicable to exempt supplies. That reference only applies to taxable supplies as the head note of section 24 suggests.

On the basis of the above simple analysis, the Tax Appeals Tribunal erred in law to find that fuel supplied by the respondent to international carriers is an exempt supply as well as a zero rated supply. A supply can only be zero rated if it is a taxable supply. This is because section 24 expressly deals only with and applies only to calculation of VAT on taxable transactions. To put the point in a question form, why calculate VAT on a supply which is not taxable or an exempt supply? In other words why apply the provisions of section 24 of the VAT Act? Once the supply of goods are excluded by section 19 as exempt supplies, it follows that such supplies are not taxable supplies and therefore there it is no need to establish how much VAT is calculable on it. An exempt supply cannot be subjected to zero rates or otherwise subjected to calculation for purposes of tax as specified by the Part VII of the VAT Act. Part VII of the Act deals with calculation of VAT. It may be suggested that the result of a zero rate tax or exemption of supply is nil VAT payable. That may well be true. However, sections 19 and 24 deal with two different categories. Exemption stands on its own and a taxpayer only need to plead that the goods or services supplied are included in the second schedule and therefore are no taxable supplies as defined by section 18 of the VAT Act. Zero rating also deals with the second category. Because section 19 expressly specifies in the second schedule the goods which are exempt, the third schedule which deals with zero rating for purposes of calculation of VAT deals with a separate category exclusive of goods which are exempt. In any case the parties proceeded under paragraph 1 (a) which deals with the supply of goods or services where the goods or services are exported from Uganda as part of the supply. The category of goods exported from Uganda as part of the supply is a wider category than the goods listed in the second schedule which specified goods that are exempt from VAT. Paragraph 1 (a) of the third schedule deals with any goods or services which are exported from Uganda as part of the supply. Upon reaching the above conclusion, there is no need for me to consider the rest of the arguments of counsels.

Fuel supplied by the respondent to international carriers falls under section 19 as exempt supplies and therefore are not taxable supplies subject to calculation under section 24 (4) of the Value Added Tax Act. An exempt supply cannot be zero rated because it is not a taxable supply for

purposes of VAT. Consequently section 77 of the Value Added Tax Act is inapplicable because a supply of goods cannot be an exempt supply and therefore not a taxable transaction and at the same time be a 'zero rated' supply. The wording of section 77 is important. The head note of section 77 provides that it is on "Priority of Schedules". The provision uses the words "may" be covered. It deals with the possibility where a supply of goods or services may be covered by both the second schedule and third schedule. I shall quote the provision for clarity. Section 77 provides as follows:

> ***"Where a supply of goods or services may be covered by both the second schedule and third schedule, the supply shall be treated as being within the third schedule."***

The provision makes it clear that where there is possibility that a supply is covered by both schedules, then the third schedule takes priority and the supply shall be treated as falling within the third schedule. Can there be uncertainty about the express provisions of section 19 and the second schedule in terms of its inclusion of jet fuel? Jet fuel has not been duplicated by the third schedule. Section 19 deals with exempt supplies. Section 24 on the other hand deals with taxable supplies. These are the foundations of both provisions and they should not be mixed. However, section 77 leaves it open where there is doubt as to which schedule to use where a supply of goods or services may be covered by both, that is when the provision is applicable. I have indicated that the provision is not covered by both because jet fuel is expressly exempt from the definition of taxable supplies. Consequently, section 24 (4) only specifies the rate of tax applicable to supplies mentioned in the third schedule and is not applicable. This is because the subsection expressly deals with taxable supplies. For emphasis an exempt supply is not a taxable supply. The parties further relied on the complex argument generated by paragraph 1 (a) of the third schedule which provides as follows: "a supply of goods or services where the goods or services are exported from Uganda as part of the supply;"

I agree with the ruling of the chairperson of the tribunal that VAT deals with value added and not consumption. The fuel is supplied at Entebbe airport and is not exported. This is based on the wording of section 15 (1) which provides that the supply of goods takes place where the goods are delivered or made available by the supplier. In this case the goods are consumed at the airport by refuelling. Secondly section 14 of the VAT Act specifies the time of supply. Section 14 (1) (c) (i) is relevant. It provides as follows:

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

The goods were made available at Entebbe airport. The burning of the fuel is irrelevant as the transaction was completed at the airport. A vehicle which is on transit to another country and

refuels near a border point cannot be said to be exporting the fuel for consumption in another country. The vehicle is merely on transit and consumes whatever fuel it needs for the journey. It consumes what it needs and later on burns it to move until it needs more. The consumption transaction is complete upon the vehicle being fuelled with the supply i.e. diesel. The same analogy applies to jet fuel. The transaction is completed with the filling of fuel in the consumption tank of the craft. I also agree that for it to qualify to be an export, it has to be loaded in a fuel tanker or in the cargo hold of a plane for delivery to another country. Last but not least the parties referred to in regulation 11 (2) of the Value Added Tax Regulations 1996. The regulation gives the qualifications for an export transaction to qualify for zero rating under the third schedule. The goods have to be covered by export documents such as airway Bill for goods exported by air. Again I agree with the chairman of the tribunal that there is no need for documentation where a plane is fuelling at Entebbe airport. This is because it is not an export but a supply of goods to an international carrier and the consumption is complete upon filling what the plane needs. What it uses to fly is not consumption in another country but burning what has been consumed. The analogy that it is an export would be absurd if the plane flies to Mozambique and flies back on the same fuel consumed at Entebbe to Uganda.

Last but not least, as I have held above only taxable supplies can be zero rated. Jet fuel is not a taxable supply but an exempt supply. The third schedule deals with taxable supplies. In the premises the judgement and orders of the Tax Appeals Tribunal are set aside as they proceeded on an erroneous premise that a supply of jet fuel to international carriers is an export. They further erred to hold that the supply of jet fuel fell both under the second schedule as exempt supplies and under the third schedule as zero rated supplies. They on the basis of the erroneous premises proceeded to determine what amounts to export of goods and also applied section 77 of the VAT Act which resolves under which schedule between schedule 2 and 3, the goods should belong.

In the premises, judgement is entered for the appellant in terms of the finding of the court on questions of interpretation. Costs of the appeal in the High Court are awarded to the appellant. Because the appellant is partly to blame for previously giving an erroneous opinion on the interpretative question as to whether fuel supplied to international careers is an exempt supply or zero rated supply, the order of the Tax Appeals Tribunal on costs shall be substituted with an order that each party shall bear its own costs before the Tax Appeals Tribunal

Judgment delivered in open court this that day of 21st of December 2012.

Hon. Christopher Madrama Izama

Judge

Judgment delivered in the presence of:

Oscar Kambona for the respondent

Barnard Olok for the Applicant

Charles Okuni: Court Clerk

Hon. Christopher Madrama Izama

Judge

21st December 2012