THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL APPEAL NO 11 OF 2012

(ARISING FROM TAT NO. 9 OF 2010)

UGANDA REVENUE AUTHORITY}..... APPELLANT

VERSUS

TOTAL UGANDA LIMITED}..... RESPONDENT

BEFORE HONOURABLE MR JUSTICE CHRISTOPHER MADRAMA

JUDGMENT

The appellant lodged this appeal from the decision of the Tax Appeals Tribunal delivered the 24th of May 2011 seeking to set aside the ruling and orders of the Tax Appeals Tribunal and that the appellant's assessment of the respondent is upheld with interest on three grounds namely:

1. ***The Tribunal erred in law when it held that by the issuance of closed fuel cards and charging a management fee to dealers, the respondent makes one taxable supply namely fuel.***
2. ***The Tribunal erred in law when it held that no value added tax is chargeable on management fees charged by the respondent on the issuance of closed fuel cards.***
3. ***The Tribunal erred in law when they failed to evaluate the evidence and thereby reached a wrong conclusion.***

The parties opted to file written submissions. The appellant is represented by its Legal Services and Board Affairs Department while the respondent is represented by Kampala Associated Advocates.

Appellants Written Submissions

In the written submissions of the appellants, the brief facts of the appellant's case are that the respondent filed an application before the Tax Appeals Tribunal in application number 9 of 2011. The respondent is a supplier of fuel to dealer stations throughout the country with whom they have contracts. In addition to fuel supplied, the respondents supplied closed fuel cards to its customers. Customers use the cards to draw fuel at Total Dealer Stations. The respondent's case is that closed fuel cardholders are granted a discount under the dealership agreement between the

respondents and the dealer stations. The respondent charges the dealer stations management fees for every litre of petrol, kerosene and diesel consumed by the fuel cardholders. The appellants conducted a tax audit on fuel sales for the period April 2004 to April 2009 and the appellant assessed the respondent for VAT on the management fees paid by the dealer stations amounting to Uganda shillings 689,401,245/=.

The issue before the Tax Appeals Tribunal were two namely:

1. ***Whether the issuance of the closed fuel cards is ancillary to the supply of petroleum products.***
2. ***Whether VAT is payable in respect of the closed fuel cards.***

The honourable Tax Appeals Tribunal held that the applicant made one supply namely fuel and the closed fuel cards were but an integral part to the supply of fuel. The assessment by the appellant was set aside and costs were awarded to the applicants. The appellant appealed the ruling and the grounds of the appeal have been set out above.

The appellant proposed to argue one ground of appeal the second ground being what remedies were available in the circumstances. The appellant rephrased the ground of appeal as follows:

> ***"The Tribunal erred in law when it held that the supply of closed fuel cards by the respondent is part and integral to the supply of fuel and the respondent makes one supply which is fuel."***

The second ground is "what are the remedies in the circumstances?"

Counsel submitted that statutory provisions on how VAT is charged will guide the court in finding that management services charged by the respondent for the supply of the management information system is liable to tax. Counsel submitted that under section 4 of the Value Added Tax Act, a tax to be known as value added tax shall be charged in accordance with the Act. Secondly it is chargeable on every supply made in Uganda by a taxable person. Thirdly under regulation 3 (a) of the Value Added Tax (the Rate of Tax) Order 2006, the rate chargeable is 18%. Additionally under section 19 (1) of the Value Added Tax Act, a supply of goods or services is an exempt supply if it is specified in the second schedule. Fourthly section 24 (4) of the value added tax act imposes a zero tax rate on supplies specified in the third schedule. From the above provisions counsel submitted that any supplies not mentioned in the second or third schedule is standard rated. He contended that because management service is not mentioned in any of the above schedules, it meant that it is ordinarily a taxable supply and liable to VAT.

Counsel submitted that under section 12 of the VAT Act a supply of services incidental to supply of goods is part of the supply of goods. The appellant contends that the respondent made two different supplies namely; the supply of fuel and the supply of management information system to the fuel dealers.

The appellants are not concerned with the issue of the fuel cards since it does not make a difference whether it is issued or not. Discounts are granted to both cardholders and non-cardholders. Secondly all fuel cards are issued at a cost of Uganda shillings 11,800/= which is already value added tax inclusive. However the respondent supplies a management information system that operates the fuel cards and charges management fees on it. Dealers pay management fees to the respondent and VAT is chargeable. Referring to page 45 paragraphs 5 to 6 of the record of proceedings, counsel submitted that it is not in doubt that the management system operates both closed cards and open fuel cards. Sales involving sale of open cards was charged with VAT and this fact is not in dispute by the respondent. The respondent did not apportion the management fees between the two cards either. Counsel for the appellant submitted that the respondent paid VAT on transactions where open cards are involved without deducting any management fees. He contended that it would be tax avoidance for the respondent to turn around and lay a claim that management fees in respect of closed cards is exempt from tax because it is integral to the supply of fuel.

Additionally the appellants counsel submitted that it was not in contention that fuel cards per se pay VAT when it has been issued. The real problem is the respondents applying and maintaining a management information system to the dealer stations at a fee and not paying VAT on the management fees they charge. Essentially management information systems which support the operation of fuel cards whether closed or not are charged the same amount of fees and a similar discount applies whether closed cards or open cards are used. Consequently the appellant contends that the management information systems which operate both the closed and open fuel cards is a totally different supply from the supply of fuel. He submitted that the respondent does not supply fuel to dealer stations through these cards; neither does it market its products through the use of fuel cards. According to the testimony of PW1 fuel cards allow a customer to procure fuel.

As far as fuel cards are concerned counsel submitted that the facts are stated at paragraph 1 of page 11. The facts are that the respondent operates its business through mainly dealer stations. It enters into dealership agreements with dealer stations from which customers draw fuel, record the fuel at the ruling pump prices under the dealership agreements between Total Uganda Ltd and the dealers. Customers the respondent supplies with fuel cards are not typical customers of the respondents but typical customers of the dealer stations. The typical customers of the respondents are the dealer stations which cannot use the fuel cards for it to qualify as a mixed supply.

The appellants counsel submitted that the respondent does not deal with the typical customers but with the dealer stations. It is the dealer stations who deal with the typical customers and who have the right to claim that they are the suppliers of those customers. Counsel contended that the respondent was acting as if the dealer stations do not exist in the transaction trail. The transaction between the respondent and the dealer station and that between the dealer station and the fuel

customer cannot be said to be closely linked. There is a break in dealing in the transaction when the respondent introduced dealer stations in the chain of transactions. The progression of the transaction is that the respondent deals directly with the dealer stations. In time the dealer stations deal directly with the customers. There is no direct dealing between the respondent and the customers. The respondent cannot therefore say that the supply of management information system to customers through the dealer stations is a single supply. These two supplies are economically distinct. These two distinct supplies are namely; the supply of fuel to the dealer stations and secondly the supply of management information systems that run the fuel cards to the customers who deal with the dealer stations therefore making the supplies by the respondent separate.

Counsel relied on the case of **Barclays Mercantile versus Mawson [2005] STC 1** per Lord Nicholls stated at page 11 - 12. His Lordship concluded that the relevant question is always whether the relevant provisions of statute, upon its true construction, applies to the facts as found. Counsel submitted that the provision of management information systems was by the dealer stations and not by the respondent to the customers directly an inserted step in the transaction. It does not serve a commercial purpose for the respondent to supply the system to the dealers and charging the customers through the dealers. The dealers could have procured a separate system altogether from another company which company should ordinarily pay the required taxes for the supply of fuel cards and the management of Information Systems.

Counsel submitted that the dealer stations are not agents of the respondents within the purview of section 12 of the VAT Act. Section 12 (1) of the VAT Act provides:

> ***"… A supply of services incidental to the supply of goods is part of the supply of goods…"***

Counsel contended that there is no clear nexus between the supplies of fuel cards to customers and the supply of fuel to dealer stations. Counsel admitted that for fuel the respondent directly supplies through its separately owned retail outlets, where it uses the fuel cards, a management service for maintenance of the information system is treated as a supply of fuel. He contended that this was not the case and the respondent does not show how much of the management fees are attributable to sale through its own retail outlets. Counsel contended that the audit report revealed a block management sum without any categorisation.

Counsel concluded that the respondent supplies a different service to the dealer stations and not only fuel. Consequently learned counsel contended that the honourable Tax Appeals Tribunal erred in law in holding that there was only one supply, which was the supply of fuel. Learned counsel referred the court to the ruling of the tribunal at page 71 of the record of proceedings where reference is made to management fees. As far as the open card is concerned they held that the supply of convenience is incidental to the supply of fuel.

The appellant wonders why the respondent, who claims that the information technology system it runs is expensive, does not outsource the service. In such cases the dealer company would be paid management fees and withhold VAT payable to the appellant. Consequently the argument that the supply of fuel cards is incidental to the supply of fuel is misconceived. It ignores the critical issue that the respondents were not supplying fuel cards per se but supply management information systems that provide the fuel cards with the basis of operations. Counsel further submitted that automatic teller machines (ATMs) cards are an example used which do not give an accurate reflection of the principle of an ancillary service. The rationale being that the ATM cards are used by the banks that provide financial services directly to the banks customers. The respondent on the other hand does not deal directly with customers as is the case with the banks. In the banks case, the tax nexus is very clear since the banks serve its customers directly at identified points. The service charged for the provision of banking services through the use of ATM form part and parcel of the banking service. Counsel further posed a rhetorical question which is whether the supply of the management information systems that the respondents supplies to the dealer station can be likened to the supply of gas cylinders when gas is sold to customers by Shell Uganda limited. The answer is definitely no. Consequently counsel concluded that the respondent is artificially re characterising its income to its income to avoid taxes. Counsel prayed that the court finds that the honourable Tax Appeals Tribunal erred in law in holding that the supply of management information systems that run the fuel cards is a supply incidental to the supply of fuel but should hold that it is an independent and separate supply from the supply of fuel.

Respondents Submissions

The respondent is a limited liability company carrying on the business of supplying fuel products. In order to enable better service to its customers, the respondent issues fuel cards to its customers and they paid their bills at the end of the month at a discount. There are two kinds of cards issued to customer's namely open and closed cards. Open cards enabled the customer to obtain fuel at discounted prices and in addition they also enable the customer carry out shopping from various respondents outlets. Closed cards only allowed the respondents customers to obtain fuel at discounted prices.

The appellant assessed the respondent for tax of **Uganda shillings 689,401,245/=** for the period April 2004 to April 2009 for management fees on closed cards. The respondent disputed the amount assessed and appealed to the Tax Appeals Tribunal. The Tax Appeals Tribunal ruled that the management fees were incidental to the supply of fuel products and as a result since the supply of fuel is exempt from tax under the Act, the management fee would in turn be exempt.

The respondent argued grounds 1, 2 and 3 of the memorandum of appeal together.

Learned counsel for the respondent submitted that the court upholds the ruling of the tax appeals tribunal which held that the management fees ought to be exempted from tax because it was

incidental to the supply of fuel. Counsel submitted that the supply of fuel is exempt under section 19 and paragraph 1 (o) of the second schedule of the VAT Act. Counsel relied on section 12 (1) of the VAT Act which provides that: "***a supply of services incidental to the supply of goods is part of the supply of goods.***" Counsel submitted that in determining the appropriate criteria which should be taken to be said for VAT purposes whether a transaction which comprises of several elements is to be regarded as a single supply or as to or more distinct supplies, it is necessary to ascertain the essential features of the transaction. Counsel relied on **Dr. Beynon and partners versus customs and exercise commissioners [2004] 4 All ER** rep 1091 at 1097. Counsel submitted that the VAT Act does not state or explain when a service would be deemed to be incidental to the supply of goods. Various cases offer guidance on when services shall be deemed to be incidental to the supply of goods.

In the case of **Canadian National Railway Corporation versus Harris [1946] SCR 352** the court concluded that what is incidental is something

> "***which is usually or naturally associated with or arising out of work of transportation [supply of the good]...Something occurring or liable to occur in fortuitous or subordinate conjunction with something else." Learned counsel further relied on Black's law dictionary for the definition of the word "incidental" which means "subordinate to something of greater importance; having a minor role…"***

Counsel submitted that management fees are provided for as a subordinate to the supply of fuel. The respondents are primarily involved in the supply of fuel products. The provision of the closed cards is to enable the respondents customers easily access the fuel and obtain a discount thereof. Counsel submitted that without the provision of fuel, management fees would be an illusion.

Learned counsel submitted that the court should acknowledge that there is a single supply if one or more elements of the transaction constituted the principal service and the others were merely ancillary or incidental. They were not an end in themselves but a means to the better enjoyment of the principal service. Counsel relied on the case of **Card Protection Plan Ltd vs. Customs and Exercise Commissioners [1999] STC 270.** In that case it was held that a service must be regarded as ancillary or incidental to a principal service if he does not constitute an aim in itself, but a means of better enjoyment of the principal service supplied.

Learned counsel submitted that the principal service that the respondent provides is the supply of fuel products to its customers. In an effort to have its customers enjoy better services, the respondent introduced cards that offer its customers a discount each time they purchased the respondents products. Cards make it easier for customers to purchase fuel without cash. The respondents customers can enjoy the principal service without the use of cards and hence no management fees, they cannot enjoy the use of the cards without the principal service being the supply of fuel. Consequently the provision of the fuel is the principal good while the

management service is ancillary. Counsel referred to the ruling of the tribunal at page 10 in which it stated that the supply of the convenience service provided by the closed card is incidental to the supply of fuel. He contended that the tribunal rightly addressed its mind to the nature of the service provided by the respondent in arriving at its decision.

Counsel further relied on the case of **College of Estate Management versus Customs and Exercise Commissioners [2004] STC 235** were Lord Lightman J held that the fact that there was a single supply of services was reflected in the single price paid for all of them. He held that a supply which comprises a single supply from an economic point of view should not be artificially split. Counsel further quoted from **Levod Verzekering BV and another v Staatssecretaris Van Financien [2006] STC 766** and the ruling of the tribunal at page 7 that the price of the fuel was the same whether a customer had the card or not though at times a discount could be negotiated. Consequently counsel submitted that the respondent charges a management fee because it incurs costs like IT costs, communication costs, maintenance fees, licensing fees related to software. The management fee is not charged separate from the cost of the fuel. Because the management fee is embedded in the cost of fuel, counsel prayed that the court should rule that it is incidental to the supply of fuel and exempt from tax. The court should refrain from artificially splitting the management fee from the cost of fuel for purposes of making two separate supplies.

Counsel submitted that the card protection case was as submitted by the appellants counsel. The case of **Dr Beynon and Partners Versus Customs and Excise Commissioners [2004] 4 All ER** only offers caution when deciding whether there is a single supply or not. The court should consider each case on its own facts.

The submissions of the appellant as to whether the management fee was economically viable or not was not an issue before the tribunal. Counsel argued without prejudice that the management fee was meant to be of convenience to the customers according to the testimony of RW1 Mr Dickens in that customers to not have to carry cash in order to access fuel. Secondly customers may obtain fuel on credit. Consequently the management fee was commercially viable to the respondent's customers and not a step merely inserted into the transaction. Counsel therefore prayed that the court dismisses the appeal with costs.

Judgment

I have duly examined the pleadings of the parties before the Tax Appeals Tribunal, the testimony of the witnesses, the submissions of counsel before the Tax Appeals Tribunal, the ruling of the Tribunal and submissions of counsel on appeal.

The facts relevant to the appeal are not in dispute. The respondent is a limited liability company dealing in the supply of petroleum products and related services. The respondent issues open and closed cards to access products from Total sale outlets. Closed cards access kerosene, petrol and

diesel which are VAT exempt under section 19 of the VAT Act. Customers access products from dealers and pay 11,800/= shillings for the cards. 1800/= is VAT and the actual cost of the cards is Uganda shillings 10,000/=. The respondent charges management fees on every litre of fuel sold by dealers using the cards.

The controversy before the tribunal was whether the supply of cards and the charging of management fees therefore was incidental to the supply of fuel in terms of section 12 of the VAT Act. The appellant submitted that the charging of management fees is related to the provision of Internet and other services which are not incidental to the supply of fuel. The respondent on the other hand contended that fuel was the principal service provided and the cards were used to access fuel and therefore were incidental to the supply of fuel. The arguments revolved around interpretation of section 12 of the VAT Act.

The tribunal ruled that under section 1 (f) of the VAT Act, an exempt supply means a supply of goods or services to which section 19 applies and section 19 provides that a supply of goods and services is an exempt supply if it is specified in the second schedule. Under paragraph 1 (o) of the second schedule, the supply of the petroleum fuels namely petrol, diesel and paraffin subject to excise duty are exempt. The Tax Appeals Tribunal summarised the facts and established that there were two types of cards namely open and closed cards. Open cards are used to purchase fuel and groceries. Closed fuel cards allow customers to only purchase fuel. While the applicant contended that open cards were not VAT exempt the closed cards are exempt. Consequently the tribunal found that the VAT element of the closed cards was the bone of contention between the parties. Furthermore they found that the application involved the supply of fuel on the one hand and the supply of management services to dealers in respect of issuing fuel cards on the other hand. There was a supply of goods on the one hand and the supply of services on the other hand. They held that the VAT Act did not define what an incidental supply under section 12 of the VAT Act was. The tribunal relied on the Oxford Advanced Learners Dictionary 6th edition for a definition of the word “incidental” and therefore the main controversy was whether the management services provided in connection with the issuing of fuel cards were incidental supplies to the supply of fuel.

After reviewing several authorities on what amounts to a service that is ancillary to a principal service, and the evidence on record, they found that the price of fuel was the same whether a customer had a card or not though at times a discount could be negotiated. Apart from the amount a customer paid for the card, no amount on the card could be expressly attributed to the convenience the customer was enjoying. The applicant was charging the dealers a management fee for the costs of making the cards. However the dealers were not the end users and were not the beneficiary of the convenience the card provided. Consequently the tribunal ruled that the supply of the conveniences were integral to the supply of fuel and accordingly the applicant/respondent makes one supply namely fuel.

The evidence on record is that of Mr. Mamadou Ngoma MD of the respondent who testified that the closed cards are only for petroleum products. The customer does not have to carry large amounts of hard cash. A management fee is charged because the respondent incurs costs like obligation costs, maintenance fees, licensing fees related to software. The costs are shared between the dealers and the respondent and the respondent and the dealers benefit from the sale of large volumes of fuel. The appellants witness Mr Dickens Kateshumba did not contradict this evidence. He testified that the card enables the customer to purchase fuel without hard cash and in return the customer becomes regular or a permanent customer of the respondent. The audit revealed that the respondent charges fees on every litre of fuel the customer buys and this was what they called a management fee and they were informed that it was meant to recover charges related to the card such as maintenance costs etc. It is the management fee which was subjected to VAT and which became the bone of contention. The tax in dispute is **689,401,254/= Uganda shillings**. On cross examination he testified that the card was relevant because it facilitated the purchase of fuel. The customer can use it to purchase fuel at its own convenience and on Credit. He admitted that if there was no fuel the card would be irrelevant. A customer could buy fuel without a card.

Section 12 of the VAT Act has a head note which reads “Mixed supplies” and the section reads as follows:

> "***12. (1) a supply of services incidental to the supply of goods is part of the supply of goods.***
>
> ***(2) A supply of goods incidental to the supply of services is part of the supply of services.***
>
> ***(3) A supply of services incidental to the import of goods is part of the import of goods.***
>
> ***(4) Regulations made under section 78 may provide that the supply is a supply of goods or services."***

The controversy in this appeal is based on the interpretation of section 12 (1) of the VAT Act. The begging question is whether the provision of management services for fuel cards is incidental to the supply of goods. The Tribunal relied on the definition of the word ‘incidental’ by the Oxford Advanced Learners Dictionary. I have additionally compared that definition with that in the **Cambridge International Dictionary of English, Cambridge University press 1995** in which it defines the word to mean:

> ***"Happening in connection with something of greater importance***."

Chambers 21st Century Dictionary revised edition is more detailed in its definition of the word "incidental". At page 683 a word "incidental" is defined as follows:

The first meaning is "happening, et cetera by chance in connection with something else, and of secondary or minor importance. An illustration given is that of incidental expenses. The second meaning is usually about something incidental to something. It means occurring on likely to occur as minor consequence of it. The third meaning is usually incidental or upon something. It means following or depending upon it, or caused by it, as minor consequence.

The common connection between these three dictionary definitions is the occurrence or happening of something as a consequence of something bigger or greater. The incidental something is a minor occurrence to something bigger. The honourable Tribunal considered several other authorities from the European Union. The main authority is that of **Card Protection Plan Ltd versus Customs and Exercise Commissioners [1999] STC 270 which** has been followed in subsequent cases both by the European Court of Justice of the Communities and the English courts. The above case was a reference to European Court of Justice of the Communities (Sixth Chamber) by the House of Lords and dealt with the criteria to be applied when a single transaction comprised of a supply of several distinguishable services. The Court of Justice of the European Communities (Sixth Chamber) was advised by the Advocate General that the United Kingdom emphasise the common sense approach so that the character of the whole transaction is identified. A supplier who undertakes to perform a particular obligation for a single price should be regarded at first sight to make a single supply. The supply of what comprises for economic purposes a single service should not be artificially divided into individual components which are not economically dependent. That it is generally accepted that the segregation of elements of the single supply would not be warranted if the service was purely incidental to the main supply. It was proposed by the Advocate General to the Court of Justice of the European Communities (Sixth Chamber) that interpretation should be that a single supply should be considered to have been given for a single price unless the exempt elements are clearly distinguishable in the price. The court held that a supply which comprises a single service from an economic point of view should not be artificially split. What should be established are the essential features of the transaction to determine whether the taxable person is supplying the customer with several distinct principal services or with a single service. There is a single supply in particular cases where one or more elements are to be regarded as constituting the principal service whilst one or more elements are to be regarded, by contrast as ancillary services which shared the tax treatment of the principal service. They noted that the charging of a single price is not decisive. It should be determined whether the customer intended to purchase two distinct services.

The criteria formulated in the case of **Card Protection Services Ltd versus Customs and Excise Commissioners [1999] STC 270** was followed and applied in the UK in the case of **College of Estate Management versus Customs and Excise Commissioners [2004] STC 235.** The college was involved in long distance learning courses and the operating revenues of the college where the fees for the distance learning courses. Production and distribution of printed matter made up the largest single direct costs out of expenditure. A supply of education and

examination services was an exempt supply for purposes of VAT. The Value Added Tax Act 1994 of the UK group 6 schedule 9 provided that the supply of any goods or services which are closely related to a supply of education and examination services was also an exempt supply. The supply of books was a zero rated supply. Where a supply was a zero rated supply, the supplier was entitled to credit from the Commissioners in respect of the input tax paid. The commissioners ruled that the supply of printed matter provided by the college was ancillary to the exempt supply by the college to its students of the education and examination services and was classed for VAT purposes as part of the education services supplied by the college and therefore not a zero rated supply of goods. The college appeal and argued that it was entitled to credit on input tax attributable to printed matter because it made a separate and distinct zero rated supply of goods. The tribunal dismissed the college appeal and the college further appealed. Lightman J applied the criteria in the **Card Protection Plan Ltd v Customs and Excise Commissioners case (supra).** The guiding principles in the case were firstly that where the transaction in question comprises a bundle of features or acts, regard must first be hard to all the circumstances in which the transaction took place. Secondly every supply of a service must normally be regarded as distinct and independent. Thirdly a supply which comprises a single supply from an economic point of view should not be artificially split. Fourthly the essential features of the transaction must be ascertained in order to determine whether the taxable person is to supply the consumer, being a typical consumer, with several distinct principal services or with a single service. Fifthly there is a single supply where one or more elements are to be regarded as constituting the principal services and one or more elements are to be regarded by way of contrast as ancillary services which shared the tax treatment of the principal service. Sixthly a service must be regarded as ancillary to the principal service if it does not constitute for customers an aim in itself, but a means of a better enjoying the principal service supplied. Seventhly the fact that a single price is charged may be indicative of a single service, but is not decisive. And last but not least if the circumstances indicate that the parties intended two distinct services, it is necessary to identify the parts of the single price which relate to each of those two services. The authority relied on by the Appellant namely the case of **Levob Verzekeringen BV and another v Staatssecretaris van Financien [2006] STC 766**, a judgement of the Court of Justice of the European Communities (first chamber), does not detract from the criteria in the **Card Protection Plan Ltd versus Customs and Excise Commissioners** case. At page 788 paragraph 19 they hold that according to the court's case law:

> ***"Where a transaction comprises a bundle of features and acts, regard must be hard to all the circumstances in which the transaction in question takes place in order to determine, firstly, if they were two or more distinct supplies or one supply and, secondly whether in the latter case, the single supply is to be regarded as a supply of services.…"***

The court then went on to generally reproduce the principles in the Card Protection Plan [1999] case which I have set out above and need not repeat here.

The tribunal as noted above relied on the dictionary definition of what is "incidental" supply of services as stipulated by section 12 of the VAT Act and held that the supply of management services was incidental to the supply of fuel.

I agree with the Tribunal that incidental services are not defined by section 12 of the VAT Act. Consequently it is the duty of the Tax Appeals Tribunal or the Court to determine whether a supply of services is incidental to the supply of goods in terms of section 12 of the VAT Act. I agree with the criteria formulated in the cases quoted above which are useful in guiding the court to establish whether a service is incidental or ancillary or whether it is separate and severable. The court examines the circumstances within which the transaction took place. The intention of the guiding criteria is to establish the characteristics of the transaction to establish whether it was separate or severable or ancillary to the main supply so as to share the same tax treatment. The characteristics of the transaction can be obtained from the evidence before the law is applied. What then was the evidence before the tribunal?

The evidence on record is that the respondent runs a program of fuel cards to boost its sales and business. More fuel is sold because customers can get fuel on credit. Secondly customers can get a discount which is negotiable. Thirdly, consumers do not have to carry cash to access the fuel. It was admitted by the appellants witness that if there was no sale of fuel in the first place, the cards would be irrelevant. This is in reference to the closed cards. In ordinary English therefore the supply of cards for purposes of accessing fuel by customers is incidental to the supply of fuel. The same fuel can be accessed without the cards. Further evidence shows that the cost of production of the cards and maintenance of the management system is borne by the dealer's and the respondent. The anticipated benefit of using cards to the dealers and the respondent is the boosting of its sales. The cards are used to boost the sales of the fuel dealers and the respondent as a consequence thereof. Secondly there is no dispute that fuel supplies accessed by the closed cards are exempt supplies for purposes of VAT under section 19 of the VAT Act and schedule 2 thereof. The question therefore is whether the tribunal erred in law in ruling that the management fees and the supply of cards to customers to access fuel were incidental supplies to the main supply of fuel. In other words was the supply of management services incidental to the supply of fuel?

The undisputed evidence is that the cards are used to boost the sales of the respondent through the dealers. Secondly there is no evidence to suggest that the fees charged did not cater for the costs for supply of the services but generated profits. The appellants submitted strongly that if the cards had been provided by another service provider, they would be liable to pay VAT. We need to stretch the analogy a little further. Is the service of a pump attendant an incidental service to the supply of fuel to customers? What about the use of vending machines? Supposing the fuel can be accessed by using cards without the need for a pump attendant would the analysis of the appellants change? Is the sale of airtime cards incidental to the provision of telephone services by mobile telephone service providers? The appellants submitted that the management

information system provided by the respondent was an inserted step in the transaction. That it does not serve the commercial purpose for the respondent. The dealers could procure services from other independent companies who would be able to pay VAT on the services. The dealer stations were not agents of the respondent. The appellant further contended that there was no clear nexus between the supply of cards to customers and the supply of fuel to dealer stations. The audit report revealed a block sum without categorisation.

I have carefully reviewed the evidence. First of all a single price is paid for the supply of goods as found by the tribunal. The price does not vary whether a fuel card is used or not. Secondly, the VAT assessed according to the evidence and the finding of the tribunal was in relation to closed cards only which were used to access fuel only. The respondent had paid VAT in relation to the open card by which customers could access groceries and fuel. The respondent does not dispute its liability to pay VAT for this element and it was not the subject matter of adjudication by the Tribunal. The fact that the fuel element in the open card cannot easily be segregated from other goods supplied is an audit problem and should not trouble the court. It is not material that a discount could be negotiated with regard to the closed card as it does not affect the tax treatment of the supply generated by the card. Secondly the only evidence on record is that the charges for management were meant to defray the costs of providing the closed cards and the information system for running the program. The primary intention of the supply of cards is the convenience of customers not to carry hard cash. Credit facilities were also built into the system. The rationale for the provision of the services by the respondent from the evidence is not to profit from the sale of cards but to gain from the boost of its sales because of the popular use of cards by its customers who enjoy a convenience. The customers do not enjoy the cards per se but its ability to permit them enjoy the supply of fuel on favourable terms. The cards only give them the convenience of accessing fuel and paying at the end of the month. They do not have to carry hard cash. The fact that station dealers were the ones directly dealing with the customers does not take away the benefit that the respondent would enjoy if sales of fuel are boosted. Fuel cards are used to access the principal service which is the provision of fuel to customers or consumers. The cards act as a medium to access the principal service on favourable terms. The management information system is the media through which the cards can be used to access specified amounts of fuel. The nature of the transaction therefore shows that the cards are used to access fuel and the information system is used to make the management of the card system possible. The aim of the respondent in the provision of the card services is to boost its sales and attract more customers. The appellants witness actually testified that the card enable respondent to retain customers. Consequently the service by provision of cards is incidental to the provision of fuel to customers. The respondent is the principal supplier of the dealer stations. The more fuel is sold by the dealer stations, the more supplies the respondent has to supply to the dealer stations. In those circumstances the test of whether the card and the management system therefore is ancillary to the supply of fuel which is the principal supply has been met. The supply of cards and the management system for the cards is ancillary to the supply of fuel which is the principal supply. There would be no ancillary services if there was no supply of fuel. The submission that

the independent companies could do the job of management services and therefore would be able to pay VAT on the services does not address the question of whether those companies would make a profit.

The first significant point is that the pump price of fuel does not change whether one uses a closed card or not. Logically there is no economic benefit over all in making the cards to the respondent. The cards cost 11,800 Uganda shillings each out of which 1800 is VAT. On the service itself the charges are shared between the dealer and the respondent. There is no evidence that there is a profit to be made from the provision of management services per se. The evidence shows that the profit is in the anticipated increase in sales of fuel through the provision of management services and closed cards to customers. The very fact that the fuel price does not change leads to a deduction that there is no profit per se in the provision of management services.

I therefore agree with the tribunal that the management services are incidental to the supply of goods as envisaged by section 12 of the VAT Act. The tribunal arrived at the correct decision and applied the correct tests to establish whether the services were ancillary or incidental to the supply of goods.

In the premises, the appellants appeal lacks merit and is dismissed with costs.

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