THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL APPEAL NO 24 OF 2011

WARID TELECOM UGANDA LIMITED}……..... APPELLANT

VERSUS

UGANDA REVENUE AUTHORITY}…..... RESPONDENT

BEFORE HON. JUSTICE CHRISTOPHER MADRAMA

JUDGMENT

The Appellant's appeal is from the decision of the Tax Appeals Tribunal delivered on 16th of December 2011 dismissing its application for review of an objection decision of the Respondent. The background to the appeal is that the applicant applied for the review of an objection decision for the determination of the following issues:

(a) Whether input tax on imported services should be claimed effective on the same date that output tax is assessed by the Commissioner General.
(b) Whether interest charged is properly imposed.
(c) What remedies are available to the Applicant?

The genesis of the objection decision was that in a letter dated 23rd of September, 2010 the Respondent Uganda Revenue Authority communicated an assessment of VAT of **Uganda shillings 11,021,513,660/**= on imported services arising out of the customs post clearance audit for the period January 2007 to December 2009. In a letter dated 26th of September, 2010 the Appellant objected to the assessment on 8 grounds which were listed as follows: "…

1. ***WARID Telecom was an "Investment Trader" up to January 2008.***
2. ***WARID ceased being an investment trader in February 2008, immediately when taxable supplies were made in the course of business.***
3. ***In December 2007, WARID imported services which would have attracted output VAT of Uganda shillings 1,086,179,091/= under the normal course of business.***
4. ***The aforementioned output VAT could not be included in the return since this would be a taxable supply that would have resulted into loss of investment trader status.***
5. ***Regulation 5 (5) of the Value Added Tax subsidiary legislation of 1996 provides that "A person shall cease to be an investment trader immediately after making a taxable***

supply in the course of business". Under section 18 (1) of the Value Added Tax Act, a taxable supply is defined as a 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.

6. ***Because the contents of (5) above, Warid did not declare the output VAT to avoid loss of the investment trader status since this would be a taxable supply. In the current e-tax VAT template, the moment you define your company as an investment trader, you are blocked from declaring any output VAT and we believe that this template was designed based on the provisions of the Value Added Tax Act.***
7. ***In December 2008, the company imported services and a self billed tax invoice was prepared for Uganda shillings 5,922,557,032/= output and input VAT on imported services was declared and claimed in our return of January 2009 as per the attachments for your ready reference. You seem not to have considered the input VAT and only considered the output VAT.***
8. ***For the one of November 2009, we are going to include in our return of August 2010. Kindly note that we requested for an extension to submit our return of August 2010 by 15th of October 2010.***

   In light of the above, we kindly request you to amend your assessment and let us know your revised position and should you require any further clarifications on any of the above, please do not hesitate to contact us at your earliest."

The objection decision of the Respondent is dated 14th of October 2010. The Respondent decides in it that under section 4 (c) of the Value Added Tax Act VAT is charged on the supply of any imported services by any person. Therefore being an investment trader was of no consequence. She further decided that by virtue of section 4 (c) of the Value Added Tax Act and regulation 13.1, 2 and 3 of the VAT regulations, obligation to account for the VAT fell due the moment the Appellant imported services. They noted that the e – tax was a system designed to facilitate compliance but was not a substitute for the law and cannot be invoked as a mitigating factor for failure account for tax payable under the law. In the objection decision the previous assessment was adjusted after confirming that imported services of **Uganda shillings 5,922,557,032/=** in December 2008 were duly accounted for. They revised the Appellant's tax assessment to **Uganda shillings 2,207,617,743/=**. The Respondent charged interest of **Uganda shillings 1,247,297,275/=** bringing the total tax assessed at **Uganda shillings 3,454,915,018/=**.

Pursuant to the objection decision the Appellant applied for a private ruling seeking for guidance, interpretation and application of regulation 5 (5) of the VAT regulations in a letter dated 18th of October 2010. The crux of the guidance sought from the Respondent was on the point that the Appellant had an Investment Trader status up to January 2008. The Appellants ceased being an Investment Trader in February 2008 immediately when taxable supplies were made in the course of business. When the Appellant was still under Investment Trader status, she imported services in December 2007 from Ericsson AB which would have attracted output VAT of **Uganda shillings 1,086,179,091/=** the services were paid for in three instalments with the first

one paid for while still under the Investment Trader Status. The Appellant indicated that it could not include the output VAT in the return based on the interpretation of regulation 5 (5) of the VAT regulations as this would be a taxable supply that would result into loss of "Investment Trader Status". The regulation provides that*: "a person shall cease to be an investment trader immediately after making a taxable supply in the course of business".* Upon losing its investment trader status in February 2008, the Appellant in January 2009 declared output VAT on the second instalment of **Uganda shillings 5,922,557,032/=** because it was applicable based on the provisions within the Value Added Tax Act.

Again in the letter dated 15th of November 2010 the Respondent confirmed its earlier decision in its private ruling. They noted that the provision for accountability for VAT applied to the Appellant. They concluded by saying that the omission to declare the output VAT on imported services from Ericsson AB as an investment trader was erroneous and amounted to an offence under the Value Added Tax Act. On 18 November 2010 the Respondent wrote to the Appellant a final reminder to pay a sum of **Uganda shillings 3,424,013,318/=** not later than 22 November 2010 failure for which enforcement measures would be undertaken. In an application lodged on 7 January 2011, the Appellant applied to file its application for review of the taxation decision to the Tax Appeals Tribunal out of time. When the appeal came for mention, the Respondents Counsel conceded to the fact that the Tax Appeals Tribunal allowed the application for extension of time by consent of the parties. The application for review was heard by the Tax Appeals Tribunal who delivered their decision on 16 December 2011 dismissing the applicants/Appellants application with costs. The Appellant then appealed to this court. The grounds of the appeal were initially six namely:

1. ***That the Tribunal erred in law when it held that the TAT application number 1 of 2011 of the applicant was filed out of time.***
2. ***That the Tribunal erred in law when it held that it was unclear what the applicant was challenging before the Tribunal, i.e. the objection decision, the private ruling or the refusal by the Respondent allow the amended returns.***
3. ***That the Tribunal erred in law when it held that the issues relating to the private ruling, principal tax and amended tax assessments were not tabled.***
4. ***That the Tribunal erred in law when it held that the amended assessments were not listed in the documents agreed during the scheduling and were therefore smuggled into evidence.***
5. ***That the Tribunal erred in law when it held that the "applicant apparently did not file a return for the first instalment".***
6. ***That the Tribunal erred in law when it failed to properly evaluate the evidence on record and thereby came to an erroneous decision.***

The grounds of appeal were reduced into the following issues by consent of both parties:

(i) Whether the Tax Appeals Tribunal erred in the ruling that the Appellants filed the application out of time.

(ii) Whether the Tribunal erred in evaluating the evidence before it.

(iii) Remedies and costs.

At the hearing the Appellant was represented by Cephas Birungye while Ms Angela N Mugisha represented the Respondent.

The first ground is **whether The Tax Appeals Tribunal erred in the ruling that the Appellants filed the application out of time**.

The ruling of the Tribunal on this issue is found at page 9 of the ruling and page 217 of the record of appeal paragraph 2 thereof. It is sufficient to quote the ruling of the Tax Appeals Tribunal on the question of time.

> ***"The applicant filed its application before the Tribunal on 11 January 2011 which may be outside the prescribed time in which he ought to have filed an application to the Tribunal, the objection decision having been made on 14th of October 2010. Instead the applicants applied for a private ruling. After obtaining the private ruling, the applicant submitted amended returns. So it is not clear whether the applicant is challenging the objection decision, the private ruling or the refusal by the Respondent to allow the amended returns. The issues raised in the private ruling and the amended returns were not and could not have been addressed by the objection and objection decision as they came after the decision was made. Under section 16 (4) of the Tax Appeals Tribunals Act the applicant is, unless the Tribunal orders otherwise limited to the grounds stated in the objection in which the decision relates. In this application there is only one substantive issue relating to interest. Issues relating to the private ruling and amended assessment were not tabled."***

Before filing their written submissions, learned Counsel for the Respondent conceded that the Appellant had applied for enlargement of time within which to file the application for review of the objection decision. In other words, time was enlarged for the Appellant to file its application for review before the Tax Appeals Tribunal out of time. It cannot therefore be held that the application before the Tribunal was out of time. This is based on two grounds. The first ground is that the Tribunal could not consider the application for review if it was time barred and ought to have dismissed the application on a preliminary point. If they hold that the application was time barred, the rest of the findings would be without jurisdiction. They however went ahead to make findings on the grounds of the application and their observations about the time within which the application was lodged was on a point of fact and not on law.

Secondly, time was enlarged after the period within which an application for review ought to have been filed had elapsed. The application could therefore not be out of time since leave had been given to the Appellant to file it out of time.

In arguing this ground the Appellants Counsel submitted that it filed miscellaneous application No. 1 of 2011 before the Tax Appeals Tribunal seeking leave from the Tribunal to challenge the objection decision out of time in accordance with section 16 (2) of the Tax Appeals Tribunal Act. The Tribunal allowed the application to extend time for filing and they had no further authority to rule on the matter after extending the time within which to file the application. In reply the Respondent defended the Tribunals ruling on the ground that they used the word "may" as opposed to "is". Consequently learned Counsel for the Respondent submitted that the Tribunal never ruled that the application was out of time. In rejoinder learned Counsel for the Appellant disagreed with the interpretation of the Respondents Counsel. He reasoned that by ruling that once an objection decision is not challenged, it crystallises, the time factor was material to that conclusion. Secondly the Tribunal's opinion was that instead of filing an application objecting to the objection decision, the Appellant instead sought a private ruling.

I have carefully considered the question of time bar. It's a given fact that time was enlarged within which the Appellant filed its application before the Tax Appeals Tribunal. It is my considered opinion that both Counsels took the ruling of the Tribunal out of its context. The ruling of the Tribunal on the question of time within which to file an application for review of an objection decision is meant to determine what was properly before the Tribunal for consideration. The Tribunal found following its finding that the application for review was made after the prescribed time that the applicant submitted amended returns after obtaining a private ruling. Put in its proper context, it meant that the objection decision had crystallised. Strangely this is supported by the Appellant in submitting on the question of *functus officio* in the next ground of appeal. Following its finding that the appeal may have been filed outside the prescribed time as a question of fact, it went on to observe that it was not clear whether the applicant was challenging the objection decision, the private ruling or the refusal by the Respondent to allow the amended returns. They go on to show that the issues raised in the private ruling and amended returns could not have been addressed by the objection decision which came earlier. Within the context in which they considered the point the conclusion was that the Tax Appeals Tribunal could not address anything else other than what was addressed in the objection decision. In other words, the Tax Appeals Tribunal clearly held that the Appellant was restricted in the grounds stated in the objection to which the decision relates. Implicitly the Tribunal had held that they could hear the application which is consistent with their earlier decision on enlargement of time. To conclude this point; the Tribunal did not rule that they could not hear the application on the ground of time bar. No prejudice whatsoever was occasioned to the Appellant by the observation on the point of fact that the application was filed outside the prescribed time. This was the truth. After all time had been enlarged within which to file the application outside the prescribed time. In the premises the question of the time within which to

file the application addresses a separate point and not time bar. To challenge the ruling of the Tax Appeals Tribunal on their observations that the appeal was filed outside the prescribed time was of no value to the Appellant because the Tax Appeals Tribunal did not rule that the application was time barred. The ground of appeal on this point has no merit and is dismissed with no order as to costs.

The second issue agreed upon is "**Whether the Tribunal erred in the evaluation of the evidence before it."**

On this ground the Appellant firstly submits at page 8 of the ruling were it held that the applicant did not object to the second assessment. He did not refer the matter to the Respondent to address new concerns and it was not clear whether it had abandoned challenging the assessment of **Uganda shillings 3,454,915,018/=** raised in the objection decision. Learned Counsel for the Appellants challenged this ruling on the ground that under section 33C of the Value Added Tax Act cap 349 any person dissatisfied with an objection decision may apply to the Tax Appeals Tribunal for a review of the objection decision within 30 days. In the applicants application for review of the objection decision the issues raised are whether input tax on imported services should be claimed effective on the same date that output taxes are assessed by the Commissioner General. Secondly whether interest charged is properly imposed and finally the remedies available to the applicant. Learned Counsel submitted that the first and second issue is related to the question of interest or assessment raised which comprised of the principal tax and interest. The Tribunal erred to state that they were not sure what was being challenged before them. The only issue before them was in regard to interest that was assessed as part of the objection decision and this is clearly reflected on the record. He submitted that the private ruling and amended returns all are part and parcel of the dispute whether interest arises and the question of the interest could not be properly dealt with without considering the two.

Secondly the Appellants Counsel submitted that the Tribunal wrongly concluded that the issues relating to the private ruling, principal tax and amended assessments were not tabled. The ruling of the Tribunal is at page 9 of the ruling paragraph 2 thereof found at page 217 of the record of appeal. The Tribunal held as follows:

> ***"So it is not clear whether the applicant is challenging the objection decision, the private ruling or the refusal by the Respondent to allow the amended returns. The issue raised in the private ruling and amended returns were not and could not have been addressed by the objection and objection decision as they came after the decision was made. Under section 16 (4) of the Tax Appeals Tribunals Act an applicant is, unless the Tribunal orders otherwise limited to the grounds stated in the objection in which the decision relates. In this application there is only one substantive issue relating to interest. Issues relating to the private ruling and amended assessments were not tabled."***

Learned Counsel for the Appellant further submitted that at page 9 paragraphs 3 of their ruling the Tribunal further held that the interest or penalty arose from the principal tax and the applicant ought to have first challenged the principal tax in order to challenge the interest. There should have been an issue of whether the principal tax properly accrued and evidence adduced to show it was affected by the reverse charge on the self billed invoice. The issue of principal only came up in the submission and there is no evidence adduced to show how if the applicant applied the reverse charge it would come to nil.

Firstly, the Tribunal cited S. 16(4) of the TAT Act and stated that the only issue before them was that of interest and that issues relating to the private ruling and amended assessments were not tabled. That the Tribunal would only confine itself to matters arising out of the objection decision. Learned Counsel submitted that the Appellant had already accounted for the principal tax due under the assessments. Secondly, that the Respondent wished to recover interest and not the principal tax. Because interest stems from the principal tax, settlement on the principal tax had already been established. Furthermore that there was agreement on the principal tax from both parties, so there was no reason to challenge it. The only real issue is interest, which is part of the objection decision and necessarily part of the assessment comprised of both principal and interest. Learned Counsel submitted that the Tribunal failed to address the issue of interest and principal tax as though these issues are only preliminary points of law to make a decision. In actuality this is central to the controversy. As no principal tax was ever paid, the Respondent's argument stating that the Appellant paid and therefore agreed to the principal tax is moot because the principal tax was accounted for. Learned Counsel submitted that the reverse charge was applicable to the case and that the sale of the invoices prepared by the Appellant cancelled the principal VAT charges. Therefore no actual cash money for principal tax was ever paid.

Learned Counsel further submitted that the Appellant did not object to the private ruling and had no reason to do so. The private ruling was included in evidence as it is central to the issue. It will be very difficult for the Tribunal to answer the issue of interest without looking at the private ruling discussing the operation of the reverse charge tax and amended returns. The private ruling provided guidance for the Respondent concerning the decision of the Respondent and cannot be separated from the dispute between the parties as they pertain to the assessment of interest.

The Appellants Counsel further submitted that the Appellant presented evidence through submitted documents showing how the reverse charge works. Learned Counsel submitted that in the circumstances it was not necessary to call witnesses to prove the Appellants case. Under section 133 of the Evidence Act it is provided that subject to the provisions of any other law in force, no particular number of witnesses shall in any case be required for the proof of any fact. Learned Counsel emphasised that the issue of interest is a matter of law as the root of the problem is the application of the reverse charge and the right of the Appellant to amend its returns to take advantage of the reverse charge procedure. Therefore as both parties agreed to the

documents presented, the only purpose for a witness would be to explain the procedure of how a reverse charge is applied.

Learned Counsel submitted that the Tribunal wrongly decided that evidence was smuggled into court. He contended that the amended assessments were not smuggled as they were attached to the Respondent's objection decision and are therefore a part of the record, and agreed upon by both parties. These documents were referred to in the written submissions of the parties before the Tribunal. No new grounds of appeal were brought into court as the Appellant originally had six grounds for appeal and limited those grounds to a mutually agreed upon three grounds at the scheduling conference. Finally because the Appellant applied the reverse charge to cancel the outstanding VAT not accounted for at the proper time, the Appellant had no interest chargeable. Learned Counsel submitted that under section 32 (4) and (5) of the Value Added Tax Act a person is allowed to apply to the Commissioner General to make alterations to their returns.

Learned Counsel contended further that the Tribunal wrongly decided that the applicant did not file a return for the first instalment and also did not first apply. None of the parties had submitted that the Appellant did not file returns. Because the Appellant was still an Investment Trader, the Appellant did not include output VAT on imported services nor did they apply the reverse charge on those services to claim the input VAT cancelling the VAT due for the tax period. The Appellant made an application for amendment on 13 December 2010 and this was a sufficient application because the Value Added Tax Act does not require a particular form of application.

The Tribunal failed to properly evaluate the evidence on record and thereby came to an erroneous decision when they concluded that the applicant failed to present self billed invoices to account for the tax due on that supply. Learned Counsel submitted that the applicants listed its self billed invoices as appendix 6 and those invoices are part of the record. The Appellant reversed its VAT output charge through self billed invoices bringing the principal tax assessed to zero thereby leaving only the interest outstanding. Once the principal tax is zero interest cannot accrue.

Learned Counsel submitted that the applicant statement that the reverse charge would have cancelled any outstanding VAT living no principal tax is a question of excessive assessment within the purview of section 18 (3) of the Value Added Tax Act and as decided in the case of **Uganda Revenue Authority versus TEMBO steels Ltd** civil appeal number 9 of 2006. Consequently the Respondents decision that the interest was a penalty `for non-payment and must be paid even if not tax was not paid is a question of proper assessment. Learned Counsel submitted that the amendment of the taxpayers self assessed return was made within the statutory limit. To reject the amendment would be to deny the Appellant a right provided under the law to correct errors in its declarations.

In reply the Respondent submitted as follows:

The Tribunal never erred when it held that it was unclear what the Appellant was challenging. The Appellant was assessed for a VAT giving a total of **Uganda shillings 11,021,513,660/=** to which the Appellant objected on 28 September 2010. The Appellant made no objection to the Respondents subsequent amended assessment of **Uganda shillings 3,454,915,018/=** in its objection decision. Instead they sought a private ruling. Accordingly once an objection decision is not challenged within the prescribed time of 30 days, it crystallises according to section 33 (c) (1) of the Value Added Tax Act. It is only after making an application for a private ruling that the Appellant chose to apply to the Tribunal to amend its returns after the 30 day limit.

At the scheduling conference learned Counsel submitted that the parties agreed that the only matter in contention was whether interest charged was properly charged. Consequently the Respondent supported the ruling of the Tribunal that it is not clear what the applicant is challenging whether it is the objection decision, the private ruling, or the refusal by the Respondent to allow the amended returns. Citing the case of **Standard Chartered Bank Uganda Ltd versus Grand Hotel Ltd** civil appeal number 13 of 1999 learned Counsel submitted that cases have to be decided on the issues on record and not any other issues.

Learned Counsel further submitted that the Appellant had the burden of proving that the assessment is erroneous but failed to discharge that burden. Learned Counsel submitted that under section 28 of the Tax Appeals Tribunal Act, in cases of review of a taxation decision the applicant has the burden of proving in the case of an objection decision in relation to an assessment that the assessment is excessive or in any other case that the taxation decision should not have been made or should have been made differently. Learned Counsel submitted that rather than submit as to why the Tribunal was erroneous in law the Appellant is smuggling in new issues not specified in the grounds of appeal.

Learned Counsel for the Respondent contended that the rules of evidence submitted by the Appellants Counsel are not applicable to proceedings before the Tax Appeals Tribunal under section 24 of the Tax Appeals Tribunal Act. She contended that the Appellant should be bound by the facts of the case and issues to be determined are established at the scheduling conference. Learned Counsel relied on the case of **DFCU Ltd vs. Beg Mohammad Ltd CACA 65 of 2005**.

I have duly considered the submissions of both counsel and perused the record of Appeal. I have also tried my best to analyse ground two on evaluation of evidence. The question stems from the root of the dispute. The root of the dispute is clearly indicated in the letters of the Appellant and particularly the objection letter dated 28th of September 2010. This is found at page 23 of the record. It is admitted in that letter that in December 2007 the Appellant imported services which would have attracted output VAT of **Uganda shillings 1,086,179,091/=** in the normal course of business. The output VAT was not included in the returns of the Appellant as it would be a taxable supply and under regulation 5 (5) of the Value Tax Act Regulations because the Appellant who had the status of an "Investment Trader" would lose that status. In December 2008 the Appellant company imported services and a self billed tax invoice was prepared for

Uganda shillings 5,922,557,032/=. The output and input VAT on imported services was declared and claimed in the returns of January 2009. The Appellant wrote to the Respondent that returns for November 2009 would be included in the returns of August 2010.

The response of the Respondent is in a letter dated 14th of October 2010 and was unequivocal. It stated that the Appellant was liable like any other person to account for VAT. The objection decision revised the principal tax to **Uganda shillings 2,207,617,743/=** together with interest assessed at **Uganda shillings 1,247,297,275/=**. The Respondent's decision penalises the Appellant with interest for failure to declare the VAT on the excuse that they had an "investment trader status" which they would lose if they declared the output VAT mentioned in the objection letter dated 28th of September 2010. Thereafter the applicant/Appellant applied for a private ruling on the same question of investor status and the potential loss of that status by declaration of the output VAT.

In the application for extension of time to file an application for review of the objection decision ground 10 of the notice of motion spells out clearly that the applicant's circumstances pose a question of law that should be handled by the honourable Tribunal. Subsequently and after leave was granted for the applicant/Appellant to file its application for review of the objection decision out of time the Appellant proposed three issues for determination by the Tribunal. These issues were:

1. ***Whether input tax on imported services should be claimed effective on the same date that output tax is assessed by the Commissioner General.***
2. ***Whether the interest charged is properly imposed.***
3. ***What remedies are available to the applicant?***

In the list of documents or things to be produced before the Tribunal, the applicant included the assessment issued by the Respondent; the objection of the applicant/Appellant; the objection decision; the application for a private ruling, the private ruling; self billed tax invoices; correspondence between the parties and indicated that it would adduce any other documents with leave of court.

It is clear from the applicant's application for review that the matter before the Tribunal revolved on interpretation of the law and the proposed documents give the facts upon which such an interpretation could be based. The issues of law are implicit in the proposed issues for the review. The first issue of "Whether input tax on imported services should be claimed effective on the same date that output tax is assessed by the Commissioner General", is clearly meant to determine whether interest would accrue on a particular date. In determining that question the objective of the Appellant was to show that if it claimed output tax which reversed the principal tax, there would be zero tax or a particular tax before interest could be assessed on the sum if any. It could also determine whether the assessed amount could be cancelled out at a later stage. The second issue of "Whether the interest charged is properly imposed" was not meant to

challenge the principal as such but determine the issue as to whether any interest would accrue if that principal had been reversed. Because this seems to be the principal intention of the Appellant, the issue was reduced to one.

Subsequently in their own scheduling memorandum and as indicated in the ruling of the Tribunal at page 2 thereof the parties agreed to determine the question of whether interest was properly imposed. The Tribunal properly summarised the issues as follows:

1. ***Whether the interest charged is properly imposed?***
2. ***Whether there are any remedies available?***

What was required of the Tribunal was to determine a point of law. The facts were clear from the documents submitted for determination of the review. The Appellant clearly indicated that it had not declared output VAT on certain imported services on the ground of its investment status. This was based on the fear to lose its "investment trader status". They sought a private ruling on the same question. The Tribunal found that the Appellant did not object to the principal tax of over 2 billion Uganda shillings and that what was in contention was the charging of interest. Both parties submitted at length on this point.

To my mind the only question of fact to be determined is whether the reverse self bills cancelled out the principal tax even if the returns were made subsequent to the due date. The Tribunal has powers to order for the establishment of this fact under section 19 of the Tax Appeals Tribunal Act. Section 19 provides that the Tribunal may remit the matter to the decision maker for reconsideration in accordance with any directions or recommendations of the Tribunal. The purpose for such remission would be to establish the true tax position. I will further elaborated on this point in the subsequent discussion.

As an objective question of fact, and for the relevant tax period, whether billed or not the question remains whether any tax is due. The question of whether the Appellant committed an offence by not declaring the VAT cannot by itself bar the determination of this question. The objective of the penal provision is to ensure compliance with law to show the tax position to the authority. The question of whether the tax was due is a question of mathematics or arithmetic. It is the input versus output which would determine whether the principal was due. The fact that it was not disclosed in due time but subsequently cannot take away the mathematical equation. Either the Appellant had zero tax in VAT as far as the objective question for the relevant tax period is concerned or not. The second question which would be a point of law is whether if after the due date it is subsequently established that there was a zero tax position for VAT for the specific tax period, would the interest charged stand? Further matters to be considered is the question of the commission of an offence by failure to disclose the output VAT. Would the commission of an offence by failure to account for the tax due for a tax period when subsequently established that it is not due bar the Appellant from arguing for the actual tax position for the relevant tax period? Cannot the offence be prosecuted on its own merits as a

failure to account for VAT in due time without affecting the objective question of whether such tax was due for a specific tax period? Finally it is a question of constitutional importance as to whether a taxable person can be made to pay a tax which is not due, save for being time barred, to raise the question with the Commissioner.

The Respondent relied on section 4 (c) of the Value Added Tax Act which imposes VAT on the supply of any imported services by any person. This is a point of law and there is no need to belabour it. The Respondent also quoted regulation 5 (4) of the VAT regulations. It provides as follows: "An Investment Trader shall abide by all the duties and obligations of a registered person, including the keeping of proper books of accounts and the filing of regular returns." By this provision the Respondent ruled that the Appellant by failing to account for VAT for the taxable period had committed an offence. In this case the VAT was on imported services. The taxable value of the imported services seems not to be in dispute. Under section 5 (c) the person liable to pay tax in case of an import of services is the recipient of the imported services. In this case the Appellant was liable to pay tax and therefore account for the tax. It is also the position of the law that this tax is imposed by the service provider. Under section 4 the tax is charged on any imported services by any person. The ruling of the Tribunal being challenged is the holding that after the objection decision was made on 14 October 2010, the revised assessment or revised amount crystallised. By allowing the Appellant to apply for review out of time, the decision of the Commissioner General was subject to challenge and could be reversed. The crystallisation of the assessment would only occur when a final decision has been made.

The Tribunal further materially found that the interest that was charged in the revised assessments arose from the principal tax. They found that the principal tax was not in issue and what was in issue was the interest. The honourable Tribunal further found that it was evidence from the bar for learned Counsel for the Appellant to submit that the principal tax ought to have been nil. They held that the audited reports and returns ought to have been adduced by a competent witness to clarify on the matter to the Tribunal. The Tribunal held that Counsel could not hold that the principle is nil when in the agreed facts it was stated to have been reduced to **Uganda shillings 2,207,617,743/=**.

The Tribunal did not interpret the law as such but based their decision on what the perceived to be the requirements of evidence. Without going into the lengthy submissions of Counsels for both parties, the Tribunal clearly erred not to consider whether the late return or the returns which had not been made pursuant to the erroneous position of the Appellant that it would lose its investor trader status if it declared the output VAT could not be applied. Input tax has been defined by the Act as tax paid or payable in respect of a taxable supply to or an import of goods by a taxable person. "Output tax" on the other hand means the tax chargeable under section 4 in respect of a taxable supply. Section 18 defines a taxable supply as a supply of goods and services other than an exempt supply made by a taxable person for consideration as part of his or her business activities. The self billed invoice in this appeal is an exception to the general rule that

VAT is charged on the supply made by the taxable person. With regard to the imported services VAT is charged by the importer of services and not the supplier of services. Section 25 of the Value Added Tax Act gives the formula for calculation of VAT. It is the total of the tax payable in respect of taxable supplies made by the taxable person during the tax period less the total credit allowed to the taxable person in the tax period under the Act. It is a statutory formula that is applied to a tax period. Save for limitations to bring the matter before the Commissioner General the formula is a statutory formula and must apply objective criteria based on the actual facts which are availed to the Commissioner General. If the objective facts are available to the Commissioner General then the application of the statutory formula to establish the tax position of the taxable person is an imperative.

Input tax in respect to the import of services is paid by the taxable person and accounted for by the taxable person. Section 4 of the Act complicates the meaning of output tax by imposing VAT on the supply of any imported services by any person. This is however made clearer by regulation 13 (1) of the Value Added Tax Regulations 1996 which provides:

> ***"A registered taxpayer who receives a supply of services from a foreign supplier shall account for the tax due on the supply and the taxpayer shall account for that tax when performance of the service is completed, or when payment for the service is made, or when the service is received from the foreign supplier, whichever is the earliest."***

Regulation 13 (3) provides:

> ***"Tax accounted for on imported services may be claimed as a credit under the provisions of section 28 of the Act, provided the recipient of the service prepares a self billed tax invoice to account for tax due on the supply; the claim for credit is subject to the conditions specified in section 28 of the Act".***

Tax on imported services is called "output tax". Section 28 allows a credit on all taxable supplies made to the taxable person during the tax period provided the supply or import is for use in the business of the taxable person. The provisions of section 28 clearly indicate when an input tax credit arises. Section 28 is very elaborate as to when the tax may be claimed as a credit. Since it is very detailed there is no need for the moment to specify its provision for purposes of this judgment. It is the applicable provision which the Commissioner General has to apply to establish whether the Appellant had a nil tax position for the tax period.

The facts of this application are clear in that it is disclosed in the application for a private ruling that the Appellant ceased to be an investment Trader in February 2008 and in January 2009 declared output VAT on the second instalment of **Uganda shillings 5,922,557,032/=** the same information is found in paragraph 7 of the objection to assessment on imported services in the objection letter dated 28 September 2010. The objection decision takes into account the output VAT on the second instalment of **Uganda shillings 5,922,557,032/=** as it was duly accounted

for. It is glaring that this amount relates to the payment of the second instalment for the services. The amount which was not declared by the Appellant is **Shs 1,086,179,091/=** in paragraph 3 of the objection letter dated 28th of September 2010. This amount is presumably within the knowledge of the Commissioner General. At page 218 of the record and page 10 of the ruling the Tribunal properly directs itself and finds that the Value Added Tax Act allows an importer to apply a reverse charge under regulation 13. They conclude that the applicant was still required to adduce evidence to show that the tax on the imported services is equivalent to the amount that would have been paid to the Respondent in order for the tax liability to be nil. This should have been done by the applicant presenting self billed invoices to account for the tax due on the supply. The Tribunal also found that the Appellant did not do the right thing at the right time. They therefore wondered whether the application was about the refusal of the Commissioner General to allow the amended returns or about the private ruling or the objection decision. They however did not seek to establish what this tax position was. It could have been established by the Commissioner General under the direction of the Tribunal. The purpose of such a direction would be to establish the truth provided that the Appellant was not out of time.

What is very strange in this matter is the fact that under section 28 of the Value Added Tax Act and regulation 13 of the VAT regulations 1996 output VAT on imported services may be claimed as a credit. The Tribunal did not consider whether the Appellant was entitled to any credit under the provisions of section 28 of the Act and regulation 13 mentioned above. For purposes of such a consideration, the issue of the private ruling would not be material as the private ruling only gives the opinion of the Commissioner General though subsequent to the objection decision challenged in the review. The question would be whether the Appellant is barred from claiming any credit from the output VAT. As earlier mentioned the other question is whether failure to account for the output VAT for the taxable period specified barred the Appellant from claiming any credit from that output VAT which had not been declared. It is clearly indicated that the Respondent by its letter dated 28th of December 2010 rejected the applicant's amended returns on grounds that the amendment had already been taken care of by the Respondent's action. These facts are specified in the joint scheduling memorandum of the parties. The formula for determining the liability for tax under the Value Added Tax Act is statutory. As indicated earlier section 25 provides the formula for establishment of the liability of a taxable person under the Act. The specific question is therefore whether the formula provided for under this provision can be waived by the Appellant's failure to account for output VAT at the due time. The provisions for determining tax liability are directed by an Act of Parliament. An objective test should be used in assessing tax. For the taxable person to lose a benefit provided for by the statute has to be made in the penal provisions which penalise failure to account. According to Halsbury's laws of England 4th edition reissue volume 44 (1) paragraph 1372 it is a Cardinal principle of taxation that a tax system must be based on solid foundations. Revenue law is a creature of statute and therefore the approach to the interpretation of statutes is required to be fully consistent and based on certain guidelines. Tax statutes are a special type of statute demanding a predictable and hence strict form of interpretation. A strict construction of

section 25 of the Value Added Tax Act gives the only acceptable formula for establishing the tax position for any tax period**. In Ormond Investment Co. Ltd vs. Betts (Inspector of Taxes [1928] AC 143 at 162** Lord Atkinson said:

> ***"It is well established that one is bound, in construing the revenue Acts, to give a fair and reasonable construction to the language without leaning to one side or the other, that no tax can be imposed on the subject by an Act of Parliament without the words in it clearly showing an intention to leave the burden upon him, that the words of the statute must be adhered to, and the so-called equitable construction of them are not permissible."***

Section 25 of the Value Added Tax Act should be read as it is to establish the actual tax position of the taxable person according to all available materials. If the output tax position permits a credit to be given to the Appellant and this is not time barred, so be it. On the other hand provisions for offences are provided for under sections 51 to 75 of the Value Added Tax Act. Careful perusals of the various provisions show that they prescribe the penalty that the taxpayer may face upon being prosecuted for the offence. The penalties vary from sentences of imprisonment to the imposition of fines. The penalty prescribed is not forfeiture of the credit that may be allowed under section 25 of the Value Added Tax Act. The provisions do not give the Commissioner General jurisdiction to impose interest as a penalty. Penal provisions likewise have to be strictly construed and must conform to the intention and wording of the tax statute. If it is the agreed position that the principal tax was cancelled by accounting of the appellant, then there was a nil tax position as a question of fact. This should however be established.

In the circumstances I agree with the Appellant that the Tribunal erred in law by not considering the relevant provisions and therefore avoiding the responsibility of determining the actual tax position or remitting the matter to the Commissioner General to take into account relevant output tax for the relevant tax period. The rationale for this is to only impose tax properly imposed under the authority of an Act of Parliament. Article 152 (1) of the Constitution of the Republic of Uganda provides that "No tax shall be imposed except under the authority of an Act of Parliament". If the provisions of section 25 of the Value Added Tax Act are applied, and leads to a nil tax position or any other tax position other than that assessed, the interest on the principal of such tax without applying the statutory formula of allowing credits would be imposed in a manner not authorised by an Act of Parliament contrary to the constitutional principles for the imposition of tax.

The Tribunal did not address its mind adequately on interpretative questions and therefore came to a wrong conclusion about being unclear as to what the Appellant was challenging. The task of the Tribunal was to interpret points of law from the facts availed in the documents supplied by the parties. The power of remission of the matter back to the decision maker permits the Tribunal to refer the question back after interpretation of law for establishing the actual tax position according to clear guidelines. This is one of the objectives of review under section 19 (1) (c) (ii)

of the Tax Appeals Tribunals Act. Last but not least the Honourable Tribunal erred in law when they held that the grievance of the Appellant was outside the points raised in the objection decision under section 16 (4) of the Tax Appeals Tribunals Act. The applicant in the review and the Appellant in this appeal all along sought interpretation of law as the facts were not in dispute. The Appellant may not have been very clear about the principal but in the letter addressed to the Respondent clearly indicated that they had not filed the return for a particular tax period. It was sufficient for them to establish whether that output tax for which returns are not been filed could be claimed as a credit after failure to disclose the same to the Commissioner in time.

In the premises ground two of the issues agreed in this appeal succeeds.

Ground 3: what remedies are available to the Appellant?

Learned Counsel for the Appellant submitted that S. 27 (3) of the Tax Appeals Tribunal cap 345 states that "the High Court shall hear and determine the appeal and shall make such order as it thinks appropriate by reason of its decision, including an order affirming or setting aside the decision of the Tribunal or an order remitting the case to the Tribunal for reconsideration". He also relied on the powers of a first appellate Court in the case of **Peters v. Sunday Post, [1958] E.A. 424 at 429** and **Selle v. Associated Motor Boat Co. Ltd., [1968] E.A. 123 at 126.** The Appellant prayed that this Honourable Court re-evaluates the evidence and finds that TAT Application No. 1 of 2011 of the Applicant was filed in time; that the Tribunal did not properly evaluate the evidence before it and therefore came to a wrong conclusion. He sought orders that interest demanded of **Ushs 1, 247, 297, 275** is not due to the Respondent on the transaction in question and that the Appellants be granted the costs of this Appeal. The Respondent prayed that the appeal be dismissed with costs.

Pursuant to my findings on ground 1 of the agreed issues in this appeal, the first issue/ground on the question of time is dismissed with no order as to costs. The Tribunal never ruled that the application of the Appellant was time barred.

As far as the second issue is concerned the decision of the Tribunal dismissing the applicant's application for review is set aside. An order is substituted therefore to the effect that the Commissioner General shall take into account the previously undeclared output tax in assessing the tax due by applying regulation 13 of the VAT regulations 1996, sections 25 and 28 of the Value Added Tax Act to reassess the applicant's tax liability if any. The objection decision of the Commissioner General dated 24th of October 2010 is set aside. The applicant shall be entitled to present the relevant materials afresh for consideration of the Commissioner General. This should deal with a question of mathematics. The Appellant is awarded costs of the appeal in the High Court and the Tax Appeals Tribunal.

Judgment delivered this 15th day of June 2012 in open court

Hon. Mr. Justice Christopher Madrama

Ruling delivered in the presence of

Belinda Nakiganda holding brief for Cephas Birungye for the Appellant

Angela Nairuba for the respondent

Ojambo Makoha: Court Clerk

Hon. Mr. Justice Christopher Madrama

15th June 2012