THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT NO 117 OF 2013

MARGARET AKIIKI RWAHERU AND 13,945 OTHERS} .....PLAINTIFFS

VERSUS

UGANDA REVENUE AUTHORITY}.....DEFENDANT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

The action of the Plaintiffs is brought in a representative capacity for 13,945 others with the leave of court against Uganda Revenue Authority for declaration that Domestic Value Added Tax was charged on imported goods of the Plaintiffs with no legal basis. It is further for an order that the Defendant pays the sums of taxes illegally collected, together with interest from the date of accrual until final settlement at commercial rate, general damages, and costs of the suit.

The facts disclosed by the plaint are that the Plaintiffs imported goods and paid import duty on the importation of goods as provided for under the East African Customs Management Act, 2004. At the time of importation the Plaintiffs were charged "Domestic Value Added Tax" which is not provided for under the law. As a result of the conduct of the Defendant, the Plaintiffs have suffered loss, damages and inconvenience. The Plaintiff's case is that the Defendant acted unlawfully and therefore the Plaintiffs are entitled to the money collected as domestic value added tax.

In its written statement of defence the Defendant avers that some of the Plaintiffs have dissociated themselves from the suit. The Defendant denies the claims of the Plaintiffs and avers that the Defendant in line with the Value Added Tax Act is mandated to impose domestic Value Added Tax. Consequently domestic value

added tax was lawfully imposed on the Plaintiffs and the Plaintiffs are not entitled to any refunds. Thirdly the Value Added Tax Act prescribes the procedure for objecting to value added tax assessments which had not been explored by the Plaintiffs.

The Plaintiffs subsequently applied for judgment on admission under Order 13 rule 6 of the Civil Procedure Rules for the judgment to stipulate that the Defendant collects Domestic Value Added Tax and that the issue of whether the Defendant is lawfully mandated to collect Domestic Value Added Tax is referred to the judge for determination. Judgment on admission was entered by the registrar on 8 July 2013.

On 29 August 2013 Counsels appeared for pre-trial conferencing when Counsels Cephas Birungye represented the Plaintiff while Counsel Matthew Mugabi represented the Defendant.

The Plaintiff's Counsel submitted that the issue for determination by the court is whether domestic value added tax is being collected legally. Secondly that the judgment on admission dated 8th of July 2013 is set aside. By consent of Counsels the judgment on admission dated 8th of July 2013 was set aside. Secondly the court moved under Order 15 rules 2 of the Civil Procedure Rules for trial of a question of law as to whether the Defendant has mandate to collect "Domestic" Value Added Tax. Accordingly trial of questions of fact as to whether any domestic value added tax was collected and if so how much was postponed until trial of the agreed issue of law. Counsels addressed Court in written submissions on the issue of law set down for determination.

The Plaintiff's written submissions on the agreed issue of law

The written submissions of the Plaintiffs Counsel contain some material facts. However I will not make reference to questions of fact not agreed on and will only try to determine questions of law which is:

Whether the Defendant acts lawfully in charging Domestic Value Added Tax on imports?

The Plaintiff's case is that the Defendant acted unlawfully in charging both import VAT and domestic VAT at the same time on import of goods by the Plaintiffs. Under article 152 (1) of the Constitution of the Republic of Uganda it is provided that no tax shall be imposed except under the authority of an Act of Parliament. The Plaintiff's Counsel relied on the case of **Highway Trading Company Limited versus Attorney General and Another HCCS number 301 of 2005** where Honourable Justice Egonda-Ntende held that tax that is not known under any Act of Parliament is illegal. The Plaintiff's case is that for the Defendant to impose and collect any tax there must be a law authorising it.

Value added tax is imposed by section 4 of the Value Added Tax Act 349. Counsel submitted that the section explicitly mandates the collection of value added tax but does not in any way envisage collection of "domestic value added tax". There is no statutory order issued by the Minister and approved by Parliament specifying the rate of domestic value added tax. Under the law particularly section 78 (2) of the VAT Act the Minister may by statutory order specify the rates of tax payable and the Statutory Instrument shall be approved by Parliament within three months.

In the case of Rock **Petroleum (U) Ltd versus Uganda Revenue Authority High Court Originating Summons Number 9 of 2009** it was emphasised by Honourable Mr Justice Lameck Mukasa that it is a cardinal principle that a subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax on him or her. This principle had been applied in **Russell versus Scott (1948) 2 All ER at page 5** by Lord Simonds. In Uganda it has been applied in **Standard Chartered Bank (U) Ltd and 6 others versus Uganda Revenue Authority HCCS 63 of 2011** by Honourable Mr Justice Kiryabwire when he quoted the case of **Russell versus Scott** (supra) for the holding that it was a maxim of income tax law that "the subject is not to be taxed unless the words of the taxing statute unambiguously impose a tax on him." In the case of **Joint (Inspector of Taxes) versus Bracken Developments Ltd [1994] STC 300 at page 606** it was held that where Parliament has not imposed the tax, there is no tax.

The Plaintiff's Counsel submitted on evidence to the effect that the Plaintiff inter alia paid domestic VAT at the rate of 15% which was not provided anywhere in the VAT Act or the East African Customs Management Act. The total combined VAT paid by the Plaintiff was equal to 33%. The Plaintiff's Counsel further relies on a guideline obtained from the website of the Defendant on domestic VAT. In the guideline VAT is charged on goods whose value is 4 million shillings and above imported by non-VAT registered importers. Secondly domestic VAT is charged at the customs entry point together with other taxes.

On the basis of the evidence supplied by the Plaintiff's Counsel, the Plaintiff's Counsel submitted that the Value Added Tax Act cap 349 is clear on who is a taxable person for purposes of VAT. A taxable person is one who is registered under section 7 of the Act. Secondly section 7 sets out who is required to be registered. Furthermore the VAT Act provides the threshold for VAT registration purposes. It is only the person who fall under the category of "taxable persons" who are required to pay VAT. Secondly the VAT Act does not provide for two rates of VAT to be paid by registered and unregistered persons. Consequently the Defendant has no legal basis for charging both domestic VAT and import VAT on imports brought into the country.

In conclusion Domestic Value Added Tax is unknown under the laws of Uganda and its imposition and collection by the Defendant is contrary to article 152 (1) of the Constitution of the Republic of Uganda, the VAT Act and a cardinal principle that tax should be certain. It was therefore unlawful. Counsel prayed that the court finds that the Defendant unlawfully charges Domestic Value Added Tax and should refund what it has unlawfully collected from the Plaintiffs and for an order for the Defendant to pay the Plaintiffs costs of the suit.

The Defendants written submissions in reply

The Defendants Counsel gave some specific facts about importation of certain goods by the Plaintiff. The Defendants Counsel agrees that the Plaintiff having been charged import VAT on the goods was also charged Domestic VAT by applying a 15% as the Mark up to the import VAT that had been assessed

representing output tax. 18% arisen VAT was then applied on the base of Uganda shillings 3,794,979/=. On 2 October 2012 the Plaintiff obtained a representative order from court on behalf of 13,945 others and filed this suit.

As far as the procedural history of this suit is concerned the Defendants Counsel claimed to have challenged the authenticity of the Plaintiff's list of claims and their respective claims/causes of actions. No evidence was adduced to provide that the Plaintiffs had paid domestic VAT, whether they had objected to the assessment, whether they had claimed for refunds, whether their claim for refunds were rejected and whether they had filed returns. Notwithstanding the court directed that only the point of law as to the legality of the tax was to be resolved and the factual issues relating to the dispute will be disposed off separately.

Counsel for the Defendant submitted on the issue of whether the Uganda Revenue Authority acts lawfully in charging "domestic" VAT on imports?

On this issue the Defendant's case is that "domestic" VAT of 18% is lawfully imposed on the Plaintiffs. The imposition of "domestic" VAT is covered under the provisions of the VAT Act cap 349. Counsel contended that the word "domestic" VAT is used on customs declaration forms for nomenclature but in substance refers to VAT. The Defendant's case is that under section 4 of the Value Added Tax Act, a tax to be known as value added tax is charged in accordance with the Act on every taxable supply made by a taxable person and on every import of goods other than an exempt import. Section 17 of the VAT Act further specifies when an import of goods takes place. Furthermore under section 6, a person registered under section 7 is a taxable person from the time the registration takes effect. Secondly a person who is not registered is required to be registered or to pay tax under the Act as a taxable person from the beginning of the tax period immediately following the period in which the duty to apply for registration or to pay tax arose.

Under section 5 (b) of the VAT Act, in the case of import of goods, VAT is to be paid by the importer. The Defendant's case is that the Plaintiff was dealing in

importation of goods other than exempt supplies and was a taxable person and therefore liable to pay tax under sections 5, 6 and 17 of the VAT Act.

Furthermore the Defendant's case is that no evidence has been adduced as to which of the Plaintiffs are registered or unregistered for purposes of VAT at the time of importation of the goods. However what is certain is that they were dealing in taxable supplies or imported goods other than exempt imports which not only made them chargeable for VAT but liable to pay tax. In the terminology of the Act they were taxable persons within the meaning of section 7 of the VAT Act and cannot claim that they were not persons envisaged by the Act.

The Defendant's case is that given the fact that there was no evidence led by the Plaintiffs to show that there were registered and furthermore considering the fact that many of the registered taxpayers were not keeping proper records while others did not have fixed places of abode and yet others had multiple registrations and some were outright not registered persons, it was imperative for the taxing body to collect both input and output VAT at the point of importation under the authority of section 32 of the VAT Act.

The Defendant's case is that the Commissioner General has powers upon reasonable grounds to believe that a person will become liable to pay tax but is unlikely to pay the amount due to make an assessment of the amount of tax payable by that person under section 32 (1) (c) of the VAT Act. An importer of taxable goods cannot escape liability merely because he or she is not registered and the test under section 32 of the VAT Act is whether that person is liable to pay tax. It was therefore lawful for the Commissioner General to estimate the tax payable. Furthermore it was factually incorrect for the Plaintiff to argue that "domestic" VAT is charged at 15% without examining the base on which the said percentage was applied.

Counsel further sought to disprove the assertion of the Plaintiff that 15% domestic VAT was charged by demonstrating how a Mark up of 15% was arrived at. By naming it "domestic VAT" it was an issue of nomenclature but in substance it was a Mark up. Mark up on the sale of imported goods ranged between 15%

and 30%. For locally manufactured goods it was between 15% up to 20%. The 15% Mark up was conceptualised as a fraction representing the expected value added on imports between the stage of importation and sale in the domestic market. It takes into account costs incurred as well as the profit margin. Defendants Counsel submitted that the Plaintiff is free to file returns and claim a refund or pay the tax depending on the input/output tax.

The Defendants Counsel illustrated the point that estimates were used by revenue authorities in other jurisdictions and relied on the case of **C and E Commissioners versus Pegasus Birds [2004] EWCA 1509 at 1514**. Furthermore the Defendants Counsel submitted that the cases of **Highway Trading Company Limited versus Attorney General and Another HCCS Number 301 of 2005; Rock Petroleum (U) Ltd versus Uganda Revenue Authority HCCS Number 9 of 2009; Standard Chartered Bank (U) Ltd and Six Others versus Uganda Revenue Authority HCCS Number 63 of 2011**; and **Joint (Inspector of Taxes) versus Bracken Developments Ltd [1994] STC 300** and relied on by the Plaintiff were distinguishable because in the current case there is an enabling law providing for "Domestic" VAT.

The domestic VAT that was paid has always been a mark up to the input VAT to cater for the output tax and was not a different tax with a different percentage and the legal basis for it is section 32 of the Value Added Tax Act.

Furthermore the Defendants Counsel contends that the logical end under the VAT mechanism is for a VAT registered taxpayer who has filed returns to pay VAT due if the output tax exceeds the input tax or to be entitled to a refund if the input tax exceeds output tax. Refunds are provided for under section 42 (3) of the VAT Act. Section 42 (5) of the VAT Act mandates the Commissioner General upon satisfaction that the taxpayer has paid excess tax, refund immediately the excess to the taxable person. Consequently the law has procedures and requirements for the refund of the taxpayer's money. None of the Plaintiffs followed the given procedure to claim for a refund neither have they filed any tax claims to clearly show the input/output position. Until that is done, the suit is premature.

The Defendants Counsel further contended that tax payable by a taxable person is calculated according to a set formula based on the total of tax payable in respect of taxable supplies made by the taxable person during the tax periods against the total credit allowed to the taxable person during the same period. The two elements are reflected in the output tax which is the tax payable in respect of taxable supplies and input tax which is the total tax credit allowed. Furthermore section 1 (I) of the VAT Act defines "input tax" to mean the tax paid or payable in respect of a taxable supply to or an import of goods or services by a taxable person. On the other hand section 1 (o) defines "output tax" to mean the tax chargeable under section 4 in respect of a taxable supply.

There was value addition to the import of goods of the Plaintiffs. Consequently the amount paid as input VAT automatically becomes input VAT for which the Plaintiff is entitled to credit. After the value addition VAT is paid according to the price at which the product is sold and it becomes output tax. It is only after offsetting the input tax against the output tax that it can be determined whether the Plaintiff is to be refunded money or not.

The Defendants Counsel contends that because the entire mechanism for collecting and refunding VAT is based on a business person/taxpayer having a fixed place of abode, keeping proper accounts and records and submitting regular and reliable tax returns, there were a number of challenges facing tax administration. There was a problem of the use of multiple names, VAT registration number and Tins by the same person with the intention of circumventing compulsory registration for VAT. There is no evidence as to how many of the Plaintiff's filed reliable tax returns as required by section 8 of the VAT Act and therefore there was no way output tax could be ascertained. The Commissioner General therefore invoked the provisions of section 32 to make an assessment of tax payable by adding a mark-up of 15% to the import value (total value at importation) payable to cater for the value added in between the point of importation and final sale of the product. Each case was quoted on its own merits and therefore there was a need to examine the special circumstances of each taxpayer.

The Defendants Counsel also contends that there is no evidence to show that the Plaintiffs objected to the assessments made by the Commissioner General. He contends that the VAT Act does not provide for an omnibus objection by taxpayers dissatisfied with an assessment. Each individual taxpayer is to be treated separately because the causes of action are different. The VAT Act provides the procedure for any aggrieved taxpayer to object to any assessment issued by the Defendant under section 33B. Furthermore section 33C prescribes a further right of appeal to the Tax Appeals Tribunal and then for a further appeal to the High Court under section 33D. The first Plaintiff never lodged any objection against assessment issued by the Defendant and is barred in law for failure to follow a legally provided for procedure.

Finally the Defendants Counsel contends that the Plaintiffs action is time barred. Any taxpayer who is dissatisfied with an assessment has to lodge an objection within 45 days after receipt of the assessment. Where no objection against any assessment is lodged, the assessment crystallises and become final. None of the Plaintiffs objected to any assessments complained about and the claims are time barred under the law. Furthermore under section 42 (4) of the VAT Act, claims for refund have to be made within three years after the end of the tax period within which the tax was overpaid. Consequently even if there were any taxes which are due for overpayment, the claim is therefore would be statute barred.

In those circumstances the Defendant's case is that the suit lacks merit and should be dismissed with costs.

The Plaintiff's Rejoinder

In rejoinder and on the point of whether the Plaintiffs were registered or unregistered and that they were dealing in imported goods other than an exempt import making them liable to pay tax, the Plaintiff's Counsel submitted that there is no evidence proving that the Plaintiffs did not have fixed places of abode, which Plaintiffs have multiple registration numbers and which Plaintiffs are not registered. The Defendant has authority to deregister taxpayers who are not

required to register. There is no authority under the Act to levy a tax on the Plaintiffs for being nonregistered.

Secondly the Defendant has not demanded to compulsorily register the taxpayer for VAT purposes if the taxpayer qualifies for registration. There are penalties under section 51 for failure to register when required to do so. Section 55 of the VAT Act also prescribes penalties for a person who fails to keep proper books of accounts. Section 58 of the VAT Act further prescribes penalties for improper use of tax identification numbers. The Act does not prescribe that any defaulting persons under the above quoted laws should be charged with a different tax not prescribed. Thirdly if the Defendant registers a tax payer, it ought to know who is registered and not registered and cannot claim that the Plaintiffs have not adduced evidence as to their registration status. The evidence is in possession of the Defendant.

On the question of whether the Defendant assessed tax under section 32 (1) (c) of the VAT Act, the Plaintiff's Counsel submits that for one to be liable to pay tax, the Act must clearly provide for it. For section 32 of the VAT Act to be invoked, the question of who is liable to pay tax and when must be answered. The Plaintiff's Counsel argues that the Plaintiffs cleared the goods imported and paid VAT tax at the customs entry point and it was absurd for the Defendant to claim that the Plaintiffs belong to a category of persons unlikely to pay tax. Furthermore upon entry of goods into the country, the goods cannot be released until tax is paid.

Secondly the VAT Act provides for one VAT charge on the import of goods and not two. The rate of VAT is 18%. It does not state that this rate should be charged twice on the import of goods. There was no basis for invoking section 32 of the VAT Act as import VAT has been paid. Thereafter there is no other charge prescribed by the law under the VAT Act. There is no basis for estimation of an assessment of tax where the tax is already paid and section 32 of the VAT Act does not apply to the Plaintiff's case.

On the question of the Defendant charging 18% VAT on an estimated mark-up of 15%, the Plaintiff disagrees with the Defendant firstly because the Defendant has

not submitted evidence about the alleged market survey report. It is secondly not indicated that the Plaintiffs fell into the category of the population surveyed and the submission was based on speculation.

The proper course of action would have been to establish if the importers are registered. If not, then it would be determined if they ought to be compulsorily registered and to carry out compulsory registration for importers who should be registered and penalise them for contravening the Act.

Thirdly by charging 18% under section 5 (a) on taxable supplies and under section 5 (B) on import of goods, the Defendant created tax that is not provided for by the law. The Plaintiff relies on the case of **Warid Telecom (U) Ltd versus Uganda Revenue Authority HCCA number 24 of 2011** which discusses the formula provided by the VAT Act under section 25 of the Value Added Tax Act. The Plaintiff's Counsel submits that the formula in the VAT Act does not envisage a situation where both input VAT and output VAT arise at the point of importation. Consequently the Plaintiff's Counsel argues that the Defendant's formula has no lawful basis under the law.

Furthermore the Plaintiff's argument is that Parliament is presumed to have been aware of the possibility that imported goods could be sold on the domestic market but decided to only have VAT charged at the point of importation for VAT purposes. The Plaintiffs are aware that imported goods are sold on the domestic market and they may attract tax under section 5 (a) of the VAT Act. The Plaintiff argues that no supply takes place at the point of importation. The Defendant is trying to force section 5 (a) and section 5 (b) of the VAT Act to apply at the same time. If Parliament had wanted to prescribe a double charge on imports for unregistered persons, it would specifically provide for it.

Lastly the Defendant cannot exercise its discretionary powers under section 32 of the VAT Act in an arbitrary manner. The Defendant cannot justify requiring an importer to account for VAT at the point of importation and VAT at the point of making a taxable supply unless it can be proved that the importer is the same person who makes the taxable supply. Even then the point of taxation would not

be at the point of importation but the point where the goods are made available by the supplier to the consumer. It is an erroneous assumption that every import of goods worth over Uganda shillings 4,000,000/= always makes the goods available for sale and therefore has output tax exceeding input tax and are always in a VAT payable position and not a VAT refundable position.

As far as the case of **C and E Commissioners versus Pegasus Birds [2004] 1509** and 1514 is concerned, the argument that the Commissioner General uses the best judgement to assess tax is distinguishable from the Plaintiffs case. This is because in that case the taxpayer had pleaded guilty to various offences under the VAT Act such as failure to keep records, evasion of tax. The tax payer also challenged an assessment of the tax authority and submitted information to that effect. However in the current case no admissions have been made by the Plaintiffs and no evidence of such offences is before the court. The question before the court is one of legality of the tax charged and not the quantum of the tax assessed. Secondly the VAT Act gives the circumstances under which the Commissioner would estimate VAT on imports if no records are available to assess the proper amount of VAT. Furthermore the Commissioner cannot estimate output VAT unless a taxable supply has been made by the taxpayer. The importer has not made a taxable supply at the point of importation and cannot be liable to output VAT at that point. There was therefore no basis for estimation of output VAT.

On the arguments of the Defendant about refund, it was not one of the issues framed for submission at this stage of the proceedings. In any case the Defendant's argument assumes that the Plaintiffs are registered. A person not registered for VAT is not required to file VAT returns. That is a matter of evidence. Secondly if the Defendant's argument is to stand, it has to be assumed that it is a requirement to register all importers for VAT so that they can account for VAT output. It was wrong to assume that all imports of goods are for sale on the domestic market. The guidelines issued by the Defendant in respect of Domestic VAT provides that it is paid only by persons who are not VAT registered and with goods whose value is Uganda shillings 4,000,000/= and above. It provides that the

Domestic VAT came into effect on 1 March 2002. The guideline is a misrepresentation of the law because there has been no amendment to the VAT Act. There is no provision for "Domestic VAT" and it is not mere nomenclature. The guideline indicates that it is a separate tax under the VAT Act. Furthermore to require all importers to register for VAT would be to compulsorily register eligible persons under the VAT Act when they have an option whether to register or not if the statutory threshold is not met. Thirdly if the Plaintiffs were to file returns without registering, the Defendant would not refund the amount to them because an unregistered taxpayer cannot claim a VAT refund. Section 28 (3) of the Value Added Tax Act clearly provides that credit is allowed to a person on become registered for input tax.

On the question of the formula for the calculation of VAT, there was no legal basis for charging VAT on the presumed output tax when goods are not being sold or where no value has been added as yet. The challenges faced by the Defendant in the administration of VAT tax does not justify levy of an unlawful tax. Section 79 and 80 of the VAT Act allow the Commissioner to issue private rulings and practice notes which is how the question of administrative challenges ought to have been tackled. Alternatively the Defendant ought to have moved Parliament to pass amendments to the VAT Act to permit imposition of the tax.

On the question of whether the Plaintiffs objected to assessments and whether the claim is time barred, the Plaintiff submits that the matter is not about any assessments but this suit challenges the administrative action of the Defendant. On that basis the submissions on procedure cannot apply on the issue of legality. The Plaintiff's challenge is to the legality of the Defendant's action. The Plaintiff alleges that the actions are illegal and still ongoing and ought to be stopped. The doctrine of limitations cannot prevail against the Plaintiff where there is a continuing illegality by the Defendant. Counsel relied on the case of **Vita Foam (U) Ltd versus Euro Flex Ltd HCCS number 438 of 2009**. Secondly at this stage of the proceedings, no claims for refund have been made and the question before the court is about illegality of the Defendant's action and not the quantum of VAT assessed by the Defendant.

Judgment

The issue before the court is a point of law which the Court was of opinion that it would substantially dispose of the suit and was set down for hearing under Order 15 rule 2 of the Civil Procedure Rules before trial of issues of fact. On 29 August 2013 the direction of the court on the matter is that the point of law did not require factual evidence and the trial of questions of fact was postponed until trial of the point of law. The point of law is whether the charging of Domestic VAT is unlawful.

I have carefully considered the written submissions filed by Counsels for the parties. I have also considered the authorities. The Defendants Counsel raised several points of law in objection to this suit at the end of his submissions. The objections include submission to the effect that there is no evidence that the Plaintiffs objected to any assessments made on the subject matter of the suit and were time barred from raising the objections now. The objections also relate to the procedure for challenging assessments under the Value Added Tax Act. The Plaintiff's Counsel on the other hand submitted that objections could not be made on the basis of the point of law set up for hearing. His contention is that the alleged illegal practice of charging VAT for imports as well as domestic VAT at the same time was an illegality that was a continuing illegality and could not be time barred.

The issue as framed is whether the practice (admitted by the Defendant) of charging "domestic" VAT after charging VAT on imports was an illegality. The question of illegality can be determined without prejudice to the objections of the Defendants Counsel on the competence of the suit on questions of time bar and procedure. Furthermore the objections of the Defendants Counsel require resolution of questions of fact as to when assessments were made, and whether in actual fact VAT was charged on factual matters. The point of law of whether the practice of the Defendant to charge "domestic VAT" is unlawful or not however can be tried without reference to matters of fact on the basis of the admission that it is being charged. In the premises the objections relating to the fact that the Plaintiffs have brought an omnibus objection on assessments of

various taxpayers, the procedure for objecting to assessments, and the question of time bar is stayed pending determination of the point of law under order 15 rule 2 of the Civil Procedure Rules.

It is an admitted statement of fact on the basis of the pleadings of the Defendant in the written statement of defence particularly paragraph 7 thereof that the Defendant imposes Domestic Value Added Tax. Paragraphs 6 and 7 of the Defendants' written statement of defence avers as follows:

> "6. Paragraphs 6 and 7 of the plaint are denied and the Plaintiff shall be put to strict proof thereof.
>
> 7. In answer thereto, the Defendant shall contend that:
>
> (i) The Defendant in line with Value Added Tax Act is mandated to impose Domestic Value Added Tax.
>
> (ii) The Defendants shall contend that as a result domestic value added tax was lawfully imposed on the Plaintiffs and consequently are not entitled to any refunds...."

Order 15 rule 2 of the Civil Procedure Rules provides as follows:

> "Where issues both of law and fact arise in the same suit, and the court is of opinion that the case or any part of it may be disposed of on issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined."

In this suit the court was of opinion that a substantial part of it may be disposed of on issues of law only. Consequently a direction was issued that the agreed issue of law would be tried first. In their written submissions however, the Plaintiff and the Defendants relied on certain facts asserted in the submissions of its Counsel. An issue of law envisaged by the direction of the court was meant to be determined on the basis of interpretation of the law. Indeed the issue of law that was framed for consideration and upon which Counsel submitted is:

"**Whether the Defendant acts lawfully in charging domestic value added tax on imports?"**

I will accordingly confine my judgment to the issue of law which is whether the Defendants are mandated by the Value Added Tax Act to charge Domestic Value Added Tax on imports and avoid determination of any questions of fact not agreed upon.

The contention of the Plaintiff simply is that the Plaintiffs are required by the Defendant and the law to pay 18% VAT on imports of goods. There seems to be no controversy on the charging of VAT on imports. However the Defendant charged VAT on an estimated mark-up of about 15% above the 18% VAT chargeable on the value of goods imported and termed by the Defendant as "Domestic Value Added Tax". Section 1 (j) of the Value Added Tax Act defines "import" to mean to bring, or cause to be brought, into Uganda from a foreign country or place. Secondly "input tax" is defined by section 1 (l) to mean tax paid or payable in respect of a taxable supply to or an import of goods by a taxable person. Thirdly "output tax" is defined by section 1 (o) of the Value Added Tax Act to mean the tax chargeable under section 4 in respect of a taxable supply.

Section 4 of the VAT Act provides that a tax to be known as value added tax, shall be charged in accordance with the Act on every taxable supply in Uganda made by a taxable person; secondly on every import of goods other than an exempt import; and thirdly on the supply of any imported services by any person. There is no controversy before the court on the charging of VAT on the value of imported goods other than exempt imports or that such goods would be liable to VAT according to section 4 of the Value Added Tax Act Cap 349. In other words it is established by section 4 (b) of the Value Added Tax Act that VAT of 18% is payable on every import of goods other than an exempt import.

The first observation to be made is that the admission on a question of fact in the written statement of defence quoted above under paragraphs 6 and 7 thereof admit the charging of domestic VAT by the Defendant. The admission seems to contradistinguish domestic VAT from imports VAT. The Defendants Counsel

suggested that this was a question of nomenclature and that the naming of the tax as domestic VAT does not detract from the substance of the tax which is VAT on a mark-up. The mark-up has been defined by the Defendants Counsel as an estimation of the profits to be made on the imported goods after it is sold in the domestic market.

Strangely enough the entire submission of the Plaintiff's Counsel does not dispute the fact that VAT may be charged on the supply of the goods in the domestic market. The effect of this narrowed down the question to one of when or at which point the additional VAT after the VAT on imports is to be charged. The Plaintiff's Counsel grounded his arguments on several points. His contention is that the only tax that is chargeable is VAT on the import of goods. VAT charged on the import of goods is chargeable at the point of entry and is based on the value of the goods at the point of entry into the country. Yet according to the Plaintiff's Counsel it cannot be assumed first of all that the goods would be put on the domestic market and sold at a profit. Secondly it cannot be assumed that the goods would be sold by the Plaintiffs. A strict interpretation of the law does not have a tax called domestic VAT.

I must confess that the issue is far narrower and in many respects would require resolution or determination of questions of fact. The question of whether any particular importer subsequently puts the goods on the domestic market is in each case a question of fact. The charging of VAT on the supply of goods in the domestic market cannot be a controversial point because it is conceded by both parties that VAT is chargeable on taxable supplies. The controversy seems to be narrowed to the point at which VAT is chargeable and secondly as to which person is to be charged. Is this not a question of administration of VAT tax? It would appear an obvious answer upon perusal of section 5 of the Value Added Tax Act that the controversy is also about who is to pay the VAT in terms of the terminologies employed by the Value Added Tax Act and in terms of whether it is the importer or supplier of a taxable supply. This is apparent from a reading of section 5 of the VAT Act. I will set out section 5 to emphasise this point. Section 5 of the VAT act provides as follows:

"5. Except as otherwise provided in this Act, the tax payable –

(a) in the case of a taxable supply, is to be paid by the taxable person making the supply;

(b) in the case of an import of goods, is to be paid by the importer;

(c) in the case of an import of services, is to be paid by the recipient of the imported services."

The section makes it clear that VAT on an import of goods is to be paid by the importer of the goods. Secondly in the case of a taxable supply, it is to be paid by the taxable person making the supply. Because the issue before the court does not apparently involve import of services, we shall confine ourselves to the first two variables which deal either with import of goods or supply of taxable supplies by a taxable person.

From the above point, the question of who is the importer of the goods is not in dispute. It is the Plaintiff or the Plaintiffs. The law is clear that an import of goods attracts VAT and therefore the VAT payable on the import at the point at which it charged as an import is 18% of the value of the good/s. The VAT is charged on verifiable transactions based on each imported category of goods within the knowledge of customs authorities and is not controversial. The controversy relates to the addition of a mark-up on the value of the import good based on an alleged research/market survey on the basis of which the Defendant added a mark-up of 15% on top of the value of the imported goods. This is meant to reflect the value of the goods to cater for sale in the domestic market at a profit. There are certain questions of fact that are implicit in the above statement. The first question of fact is whether indeed there was a survey in which the Defendant decided to put a value of 15% above the import value on every import for purposes of what it has termed a “mark-up” value. The second is whether VAT of 18% is payable on the mark-up of 15%. The court will not dwell on the questions of fact and must rely on the hypothesis generated by the admitted fact that domestic value added tax is charged. It is improper to decide a point of law whose

basis are facts which have not been proved in court or agreed upon by the parties.

As far as the hypothesis is concerned, it is an agreed position that VAT is charged on top of the VAT on imported goods. As to whether it is on 15% of the value of imported goods is not important for resolving the question of law as to whether charging such "domestic" VAT is lawful. My conclusion however is that the Defendant's terminology of calling the tax "domestic" VAT is important for purposes of distinguishing it from VAT on imported goods as prescribed by section 4 of the Value Added Tax Act. Therefore by a process of exclusion, the additional tax is not and cannot be VAT on imported goods. It is VAT after goods have been imported into the country and taxes paid thereon.

It is logical and I agree with the Plaintiff's Counsel's submission that there has to be a supply of the goods to a consumer for the tax to be imposed. At the very least the tax is imposed on the assumption of the supply of a taxable supply to a consumer. That brings into sharp focus the provisions of section 5 of the Value Added Tax Act which clearly prescribes who is to pay the tax in each category. A person making a taxable supply is the person to pay VAT on the taxable supply. On the other hand in the case of import of goods, VAT is to be paid by the importer.

The first important point to be made is that Parliament has deemed it fit to make a clear distinction between import of goods and taxable supplies for purposes of VAT. This distinction need not be taken for granted and can be established from the VAT Act.

Section 1 (y) provides that the term "taxable supply" has the meaning ascribed to it under section 18 of the Value Added Tax Act. Secondly the term "importer" has a separate definition under section 1 (j) and means to bring or to cause to be brought, into Uganda from a foreign country or place. Importing into Uganda does not have to be part of a business transaction. On the other hand the definition of a "taxable supply" makes it a business oriented activity.

Section 18 (1) of the Value Added Tax Act defines a taxable supply 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. The first evident point to be made is that a taxable supply has to be made as part of a business activity and for a consideration. On the other hand there is no stipulation that an import of goods has to be part of a business activity. To drive the point further home, VAT is payable on import of goods without reference to or consideration as to whether it is part of a business activity or not. Under the definition of an "import", importing a personal car from another country for own use in Uganda is still an "import" as defined by section 1 (j) of the Value Added Tax Act. Therefore any person who imports goods into the country is liable to pay VAT on the goods irrespective of whether it is for final consumption or part of a business activity.

The second point that is apparent is that the supply of taxable supplies has to be made as part of a business activity. The fact that the taxable supply has to be part of a business activity is further clarified by the sub sections to section 18 of the VAT Act for purposes of making clear what the definition in the section specifically applies to.

Subsection 2 clearly provides that a taxable supply has to be part of or incidental to any independent economic activity the taxable person conducts whatever the purpose or results of the activity. In other words the result of the business activity is immaterial and in fact does not have to culminate in the making of profit. A vehicle imported for own use in a business activity is a taxable supply (See s.18 (5) VAT Act). Section 18 (3) of the VAT Act further clarifies that the business activities of an individual do not include activities carried on as part of his or her hobby or leisure activities. Furthermore section 18 (4) further clarifies the term "consideration" which is found under section 18 (1) of the Act. Consideration means that payment is received for the supply whether in money or kind. It may not be necessary to go through all the subsections of section 18. What it brings out clearly is that a taxable supply means trading in the goods or using the supply in a business activity. Parliament has deemed it fit to omit use of the phrase "for profit".

Going back to section 5 the person making the taxable supply does not have to be the importer of the goods. The law treats a person making a taxable supply and a person importing goods as separate and distinct categories even if they are the same persons in instances established by fact. It can therefore be safely concluded on the basis of a reading of sections 4, 5 and 18 of the Value Added Tax Act that every importer of goods has to pay VAT the imports, and the only exception being exempt imports. Secondly tax is chargeable on every taxable supply in Uganda. By introducing the phrase "supply in Uganda", it is clearly distinguishable from importation as a distinct category for tax purposes. Therefore any taxable supply in Uganda as defined by section 18 attracts VAT which VAT is separate from VAT paid on any import of goods other than an exempt import. In other words VAT may be paid on imported goods at the point of importation of the goods into Uganda and secondly an additional VAT may be paid on the same goods if it is part of taxable supply and as part of a business activity in Uganda and as clearly defined by section 18 of the VAT Act. The definition of the term "import" puts the issue beyond doubt. Section 1 (j) defines "import" as to bring, or cause to be brought, into Uganda from a foreign country or place. The point at which VAT is charged on imports is the point at which the goods enter Uganda for customs purposes. Consequently taxable supplies are contradistinguished by calling them taxable supplies in Uganda. A taxable supply is a transaction in the goods as defined by section 18 within Uganda for consideration. For emphasis, how the additional VAT on a taxable supply is calculated after payment of VAT on imports is a question of tax administration expressly guided by the statutory provisions on how to make the calculation. It is however not yet necessary to refer to the statutory formula for ascertaining the taxable value of a taxable supply. The taxable value is ascertained under the provisions of section 21 of the Value Added Tax Act which value is subject to adjustments allowed by section 22 of the same Act. A taxable supply in Uganda made by a taxable person is clearly not an import and has its own distinct category. Furthermore there are separate provisions for establishing the taxable value of an import of goods which is different from the provisions dealing with ascertainment of the taxable value of a taxable supply. The taxable value of an

import of goods is ascertained under section 23 of the Value Added Tax Act. For purposes of clarity I will only make reference to section 23 which specifically provides that the taxable value of an import of goods is the sum of the value of goods ascertained for purposes of customs duty under laws relating to customs. It includes the amount of customs duty, excise tax, and any other fiscal charge other than tax payable on the goods. Last but not least on the same point the taxable value of a taxable supply excludes tax paid or payable on the goods or the supply and is the total amount of the consideration paid.

On the face of it, the charging of VAT on a taxable supply by a taxable person is prescribed by sections 4, 5 and 18 of the Value Added Tax Act. The controversy in this suit cannot be about the charging of VAT on a taxable supply even if the supply was originally an import and VAT had been charged on the import. The VAT Act clearly imposes a tax on every taxable supply by a taxable person. The question of how VAT is calculated for a taxable supply comprised of an imported good is a question of mathematics and specifically guided by statutory provisions. However the terminology makes it important to distinguish between an importer of goods who pays VAT on the imports irrespective of whether it is part of a business activity or not from the supplier of a taxable supply (the supplier being a taxable person as well). A supply for all intents and purposes is a supply made in Uganda by a taxable person in terms of section 4 (a) of the VAT Act. If the goods were initially imported, they may be supplied to a consumer in Uganda as part of a business activity by a taxable person and the transaction would be defined as a taxable supply. The taxable person is liable to pay VAT as prescribed on the taxable supply.

There are two relevant formulas as far as imports and taxable supplies are concerned which have been prescribed for the calculation of VAT further making the point that the two categories are distinct categories. The first calculation is based on the taxable transaction and is prescribed by section 24 of the Value Added Tax Act. Section 24 (1) provides subject to a proviso catering for calculations made under sections 21 (2) or (3) of the Value Added Tax Act that the tax payable on a taxable transaction is calculated by applying the rate of tax to

the taxable value of the transaction. Again ascertaining the taxable value of the transaction is done using a prescribed formula. A calculation based on the taxable transaction is done irrespective of whether a person is a registered person for purposes of VAT or not. On the other hand calculation of tax by a taxable person for a tax period is prescribed by section 25 and the formula specified by section 1 (b) of the fourth schedule subject to the proviso catered for by section 26 of the Value Added Tax Act. Different accounting procedures may be involved in making the calculation. The calculation may be based on a transaction (assuming that it is a single transaction or a few transactions) or it may be based on a taxing period involving a series of transactions within that period. What should be kept in mind are the limitation period for assessments and the payment of VAT. Furthermore the question as to whether any taxable person ought to be registered cannot impact on whether an import is subject to VAT and the supply of the imported item subsequently subject to VAT on taxable supplies. Furthermore, the difficulty of tracking whether an imported good will eventually be supplied as a taxable supply is an administrative problem. The Defendant's Counsel has associated the charging of VAT on imports as well as the charging of VAT as "domestic VAT" on an alleged non-registered status of the Plaintiffs. The apparent rationale is the difficulty the Defendant faced or faces in following up an imported good as to whether it would be supplied as a taxable supply after import VAT has duly been paid at the point of entry of the goods or at the point of payment of customs duties. In other words the Defendant is dealing with the issue of collection of VAT on taxable supplies of imported goods.

I have carefully considered the arguments involved on the question of the registered status of the Plaintiffs. Registration for purposes of VAT is catered for under Part 3 of the Value Added Tax Act. Section 6 there under defines a taxable person as a registered person under section 7 from the time the registration takes effect. Critical in their arguments is the provision of section 6 (2) which provide that a person who is not registered but who is required to be registered or to pay tax under the Act is a taxable person. By using the disjunctive "or" in the sentence "A person who is not registered, but who is required to be registered *or* to pay tax under this Act,..." is a taxable person, the law clearly makes no distinction for tax

purposes between a registered person and someone liable to pay VAT on a transaction such as an import or taxable supply. Section 7 of the Act gives the threshold by the quantum of the value of the taxable item of persons who are taxable persons. An item imported by a person below the specified quantum by an unregistered person disqualifies the person from being a taxable person. The conclusion is therefore that the question of the status of the Plaintiffs is not a relevant fact in determination of the point of law as to whether the charging of domestic VAT is lawful or unlawful.

The Defendants Counsel argues that the Plaintiffs are not registered persons and it was difficult for the Defendant to assess them for purposes of charging VAT. He argued that they did not have places of abode, some had multiple registration numbers and names to avoid been registered, they did not keep proper records etc. As a result the Commissioner General assessed them under the provisions of section 32 of the Value Added Tax Act for the additional tax (Domestic VAT) and what has been defined as a mark-up. However, the arguments cannot be determined on the basis of the issue agreed to be determined as a point of law. Furthermore the questions of whether the Plaintiffs are registered persons or not are questions of fact whose determination have no impact on the point of law. This is because irrespective of whether a person is registered or not, section 6 of the VAT Act permits a person who is required to pay tax to be registered or to pay the tax. Consequently the question of whether the charging of VAT (domestic VAT) is lawful can be determined without establishing questions of fact on the registration status of the Plaintiffs. The only aspect of the argument is the question of reconciliation of input VAT and output VAT which I shall handle separately on the ground that VAT on an import is input tax which generates credit in favour of the taxpayer while the mark-up and VAT on it constitutes output tax in favour of the Defendant. However reconciliation of input tax and output tax occurs in respect of registered and taxable persons while calculation of tax on the mark-up is done exclusively of previously paid tax giving a net taxable position as will be demonstrated below. Where a net taxable position is given in respect of VAT payable on the import and VAT payable on the supply of the imported good as a taxable supply, there would be no need to reconcile the input

and output position as it is already done in calculating VAT on a taxable supply of an imported good. Reconciliation is more relevant for registered persons for VAT purposes who have records and for taxable periods.

To continue with the point on the distinction between imports and taxable supplies, further clarity on supply of goods is made by section 15 of the VAT Act which provides that a supply of goods takes place where the goods are delivered or made available by the supplier. On the other hand section 17 of the VAT Act provides that an import of goods takes place where the customs duty is payable on the date on which the duty is payable or in any other case on the date the goods are brought into Uganda.

The distinction between import of goods and supply of taxable supplies by a taxable person requires the two items to be treated as separate categories for tax purposes. As I said earlier this would be irrespective of whether the same person who imports the goods also supplies it as a taxable supply in Uganda.

The conclusion on the point is generated inter alia by section 4 of the Value Added Tax Act which provides that VAT is charged according to the Act and in subsection (a) thereof on every taxable supply made in Uganda by a taxable person. As far as taxable supplies are concerned, this situation is further clarified as noted by stipulations on the place of supply and the time of supply.

The place of supply is provided for by section 15 (1) in the case of goods as where the goods are delivered or made available by the supplier. Secondly section 14 of the VAT Act prescribes as far as supply of goods or services is concerned the time of supply. Where the goods are applied to the use of the owner, the date on which the goods or services are applied to own use. Where goods are supplied by way of the gift, the date on which ownership in the goods passes or the performance of the service is completed. In any other case on the earliest date on which the goods are delivered or made available or the performance of the service is completed. Or on payment for the imported goods or services or when a tax invoice is issued.

Last but not least section 10 (1) of the VAT Act provides that the supply of goods means any arrangement under which the owner of the goods parts or will part with possession of the goods. Consequently a supply occurs when the owner of the goods is bound to part with possession of the goods or actually parts with possession of the goods. The supply of taxable goods attracts VAT and has to be determined in accordance with provisions reviewed above relating to the supply of taxable services by a taxable person. The provision cannot be mixed with importation of goods. For emphasis a taxable supply has to be part of a business activity whereas an import does not have to be.

On the other hand we noted that section 17 of the Value Added Tax Act makes it clear that import of goods takes place where customs duty is payable on the date on which the duty is payable or in any other case on the date the goods are brought into Uganda.

From the above statutory provisions and discussion, it is clear that there no express statutory category of VAT described under the Value Added Tax Act as "domestic" VAT. The categories of VAT as defined are VAT on imported goods and services and VAT on taxable supplies. From the above premises the following conclusions can be advanced namely:

- VAT on imported goods is defined as input tax payable by an importer. Whereas VAT on taxable supplies is tax included in the cost of or of part payment for a taxable supply and is passed on to the consumer and it is also by definition under VAT Act, output tax.
- Input tax is a cost to the importer or taxable person and generates a credit in favour of the taxable person while output tax by its nature is part of the cost of a taxable supply and where as defined as part of a business activity, is ultimately paid for by the final consumer though remitted by the supplier of the taxable supply.
- Secondly VAT on the value of imported goods is paid by the importer of the goods. On the other hand VAT in respect of taxable supplies is paid by the person making the supply (see section 15). The law does not presume that

the importer of goods will also be the supplier of the imported goods as a taxable supply.

- VAT on imports is paid where the customs duty on imports is payable or on the date the goods are brought into Uganda.
- VAT on taxable supplies is made on the supply of goods. It is assumed by the law that it is payable where there has been a supply of taxable goods. This is made apparent by the several instances defined by the law as to when and where a supply of taxable goods is deemed to have occurred by the law and include statutory provisions which show that:
  - Supply of goods takes place where goods are delivered or made available by the supplier (see section 15 VAT Act)
  - Supply occurs when goods are for own use and is deemed to have occurred when applied for use.
  - Supply of taxable goods occurs when payment is made or when a tax invoice is issued to the consumer. Where a tax invoice has been issued, the goods do not need to have been actually delivered to the consumer before the supplier becomes liable to pay VAT. If eventually the goods are not supplied after issuance of the invoice, the taxable person can claim a refund on any payments of VAT made on the invoice. Implementation would of course depend on the keeping of proper records.
- VAT is chargeable on every taxable supply in Uganda which may include supply of goods initially imported into Uganda. The analysis is made without reference to the importation of goods and therefore is transactional. Under section 18 of the VAT Act a taxable supply is further refined to include supply for consideration as part of a business activity. Whereas the definition of supply per se includes both taxable supplies and other supplies which are not taxable or subject to tax. Section 18 specifically restricts its definition to taxable supplies. Sections 10, 11, 12, 13, 14, and 16 of the Value Added Tax Act specifically deals with supplies generally and for purposes of VAT are qualified by section 18 which is restricted to what a taxable supplies.

Before concluding on the agreed issue of whether the charging of "domestic" VAT is unlawful, I need to conclude that there is no provision of a tax called "domestic VAT" by specific description or definition of law. I agree with the Defendant's Counsel that the terminology used which is in any case not provided for under the Value Added Tax Act may not be fatal if the tax is imposed in accordance with the law with the only issue being whether giving it a wrong name would be fatal. Imposition of tax is based on how it is calculated as far as the substance of the tax is concerned. If it is calculated on the basis of valuation prescribed by the law and according to the formula stipulated under the Act, then in substance giving it a wrong name would be an irregularity and not an illegality.

Consequently it is necessary to consider the argument of the Defendants Counsel to the effect that the so-called "domestic" VAT was imposed pursuant to assessments made under section 32 (1) by the Commissioner General. Before taking leave of the matter however it should be noted that for VAT on "taxable supplies" with reference to supplies made in Uganda to be referred to it as "domestic VAT" would be a question of the description of the category of supply distinguishing it from VAT on imports. If the calculation is lawful, the wrong terminology may not be fatal but would be a description of the kind of VAT peculiar to the professionals or persons dealing in the implementation of VAT law. The definition or description is not statutory but maybe explanatory for purposes of distinguishing VAT on imports from VAT on supplies of imported goods supplied in Uganda and properly defined by the law as "taxable supplies" (other than an exempt supply).

I have duly considered the provisions of section 32 of the Value Added Tax Act and the submissions of both Counsels. I do not agree with the Defendants submission that the charging of "domestic" VAT after the Plaintiffs has paid VAT on the imported goods can be determined by the court on the issue of whether charging of Domestic Vat was lawful or authorised by the Act. Particularly whether the court can conclusively determine an alleged assessment by the Commissioner General under section 32 of the Value Added Tax Act in the manner suggested by Counsel without adducing evidence. In any case, any

particular assessment would be considered on the basis of facts which cannot be decided at this stage of the proceedings and in light of the objections raised by the Defendants Counsel touching on the merits of the assessment and the claim for refund by the Plaintiffs. What can be determined however is whether such an assessment can be made in the manner suggested by the Defendant's Counsel and based on a general market survey and estimation of a mark-up on imported goods imported by an alleged category of non registered Plaintiffs. The basis of my rejection of the Defendants Counsel's submission on a general assessment by the Commissioner General is founded on a reading of section 31 and 32 of the Value Added Tax Act. The Defendant's Counsel however conceded in submission that every assessment is specific to a transaction or taxable person and is severable from other assessments.

Section 31 of the VAT Act provides that a taxable person shall lodge a tax return for each tax period with the Commissioner General within 15 days after the end of the period (See section 31 (1). Secondly under section 31 (3) of the Value Added Tax Act the Commissioner General may require any person, whether a taxable person or not to lodge with the Commissioner General such further or other return in the prescribed form as and when required by the Commissioner General for purposes of the Act. Any other person other than a taxable person may be required to file returns in the prescribed form for purposes of the Act. It is in light of the provisions of section 31 that the assessments made under section 32 of the VAT Act have to be made. Under section 32 (1) an estimated assessment is made by the Commissioner in specific circumstances namely where a person fails to lodge a return as required by section 31. Secondly an assessment may be made where the Commissioner General is not satisfied with a return lodged by a person. Thirdly where the Commissioner General has reasonable grounds to believe that a person will become liable to pay tax but is unlikely to pay the amount due. In the above circumstances the Commissioner General may make an estimated assessment of the amount of tax payable by that person.

The Defendants Counsel relied on section 32 (1) (c) which provides that the Commissioner General may on the basis of reasonable grounds leading to belief

that a person will become liable to pay tax but is unlikely to pay the amount due assess the tax due on the basis of an estimation based on available materials. The argument relies on some assumptions or conclusions based on alleged facts. The first ground relied upon by the Defendant to assess the Plaintiffs is the alleged non-registered status of the Plaintiffs. The second ground is the allegation that the Plaintiffs have no fixed place of abode for purposes of follow-up on whether the imported goods will be supplied as part of a taxable supply in Uganda. The third ground is the allegation that the Plaintiff's did not keep proper records of accounts. Lastly there is an allegation that some Plaintiffs put in multiple Tin numbers and names for purposes of avoiding registration for VAT.

I agree with the Plaintiff's Counsel and in fact the Defendant's submissions are also in agreement that the above allegations require factual data concerning each particular Plaintiff or transaction. It is however apparent that the Defendant collects VAT on a mark-up estimated for purposes of the value of the taxable supplies anticipated to be made on imported goods. It must be assumed that the circumstances of each individual importer are peculiar to the importer. One importer for instance may import a vehicle for his or her use. Another one may import for sale and yet another person may become for tax purposes, the supplier of taxable supplies. However without the facts of each case, no specific conclusion ought to be made. What can be deemed provided by section 32 (1) (c) of the VAT Act is that the Commissioner General bases his or her belief on materials available to her or him concerning the transaction and taxpayer in question. The Defendants Counsel relied on the case of **Customs and Exercise Commissioners versus Pegasus Birds [2004] STC page 1509**. The case is clearly distinguishable on the ground that the directors of the company/taxable person pleaded guilty to evasion of tax. Subsequently the Commissioners exercised their powers to assess the VAT payable to the best of their judgement. In that case the owners of **Pegasus Birds Ltd** are alleged to have failed to keep proper or complete records of the purchases and subsequent sales and to have failed to account for the VAT that became due hence the issue of tax evasion. I must note that specifically the Defendants Counsel relied on the finding in the above case on what is meant by the term "best of their judgement". Under the Ugandan VAT Act

the term "best of their judgement" is not utilised. Section 32 (3) uses the phrase "based on the best information available". Subsection 3 provides that the "Commissioner General may, based on the best information available, estimate the tax payable by a person for the purpose of making an assessment under sub-section (1)." The Plaintiffs challenge is based on two fronts. The first front is the exercise of the Commissioner's powers exercisable on reasonable grounds based on belief that a person will become liable to pay tax but is unlikely to pay the amount due. In other words it is not on the quantum of assessment per se but on the legality of using the option of making an estimation of VAT on the basis of the Commissioner's belief that the Plaintiffs are unlikely to pay the amount due without regard to whether a taxable supply would be made or not. The second front relates to the phrase "based on the best information available". The phrase itself relates to the assessment of a person for VAT based on the best available information. That information may be availed by the taxable person as well as obtained from the resources of the Defendant.

In contrast with the case of **Customs and Excise Commissioners versus Pegasus Birds Ltd** (supra) the issue does not arise from returns of the taxpayer for purposes of VAT. The challenge of the Plaintiffs arises from imposition of VAT on the imported goods as well as VAT on a taxable supply before the supply has been made. On the other hand the Commissioner is alleged to without evidence being led to have exercised powers under section 32 (1) to assess the second category of VAT on taxable supplies. In the case of **Customs and Excise Commissioners versus Pegasus Birds Ltd** (supra) the taxable supplies had already been made. Similarly in the case of **Kampala Nissan Uganda limited versus Uganda Revenue Authority Civil Appeal Number 7 of 2009** (in the High Court), taxable supplies had already been made and the question of the mark-up value arose from an audit of records.

Furthermore Parliament has deliberately omitted the use of the phrase "taxable person" which is used under section 31 (1) of the Value Added Tax Act in imposing the duty to lodge tax returns for each tax period with the Commissioner General but has instead used the phrase under section 32 (1) of the VAT Act "a person". In

other words "a person" does not have to be a taxable person when the Commissioner General on reasonable grounds believes that he or she is unlikely to pay the tax due. It follows that the grounds to believe that "a person" is unlikely to pay tax does not have to be founded on the records of the taxable person who is obliged to periodically lodge tax returns with the Commissioner General. What is however clear is that the "reasonable grounds" upon which the Commissioner believes that "a person" is unlikely to pay tax which will become due must be peculiar to "a person" but not to a category of people. This is my further conclusion based on reading section 32 (3) of the Value Added Tax Act. Subsection 3 quoted above envisages an assessment by the Commissioner General based on the best information available to estimate tax payable by a person for purposes of making an assessment. The estimation presupposes that information is not available on the taxable value of the taxable supply. Yet in the Plaintiffs case is, the imported value is known and the VAT is deemed to have been paid for it before the goods are released. The Commissioner makes an estimate of the market value of the supply for purposes of applying the rate of VAT. However the value of commodities cannot be the same for every person especially the percentage which will form the value added for purposes of the mark-up. Lastly it is unknown whether there would be a taxable supply of the imported goods as part of a business activity envisaged by section 18 of the VAT Act. It is therefore objectionable to make a general conclusion with regard to the possibility of any person or persons being unlikely to pay tax which will become due before considering the merits of each case. What happened in the Plaintiffs case is factual and ought to be proved in evidence before conclusions can be reached on the controversy.

The conclusion that all the Plaintiffs are unlikely to pay any amount of VAT on future taxable supplies of goods initially imported by the Plaintiff's should not be grounded on the administrative convenience of the Defendant. Some objective criteria for each specific case for the conclusion of the Commissioner General needs to be advanced and for purposes of this suit, to the satisfaction of the court and therefore that question cannot be conclusively determined under the general issue agreed to as a point of law for determination by this court covering every

Plaintiff. Furthermore the question cannot be concluded in light of the pleadings of the parties. The Plaintiff's case is for declaration that Domestic Value Added Tax was charged on imported goods of the Plaintiff with no legal basis in paragraph 4 of the plaint. In paragraph 5 the Plaintiff asserts a matter of fact to the effect that the Plaintiffs were charged at the time of importation with Domestic Value Added Tax. In paragraph 6 it is averred that the Defendants act unlawfully. The written statement of defence of the Defendant in paragraph 7 admits that the Defendant in line with the Value Added Tax Act has the mandate to impose Domestic Value Added Tax. Secondly the Defendant's written statement of defence is explicit that the Defendant shall contend that the Domestic Value Added Tax was lawfully imposed on the Plaintiffs and consequently the Plaintiffs were not entitled to any refunds. The issue of the mandate of the Defendant is a point of law. The other matters as to whether the Commissioner properly estimated Domestic VAT is a mixed question of fact and law. The court can only make conclusions on the basis of the mandate of the Commissioner General to impose "Domestic VAT" at the point of importation of goods into Uganda without establishing whether there was a taxable supply of the commodity or goods in question which requires the resolution of questions of fact and which has counter objections of the Defendant.

I further agree with the Plaintiff's Counsel that the Defendant relies on assumptions to make a general policy to charge VAT on supply of imported goods as a taxable supply after payment of the prescribed 18% on the value of the imported goods at the point of entry or at the time of payment of tax under customs law. The objection of the Plaintiffs is based on being charged VAT on alleged taxable supplies at the same as VAT on imported goods. The assumption which the Defendant has to make to charge VAT on supplies is that the imported goods would be supplied and become a taxable supply as defined under the Act made by a taxable person chargeable with VAT. Section 18 of the VAT Act makes it clear that a taxable supply has to be made as part of a business activity. It has to be a supply for consideration either in money or in kind. The law does not make an assumption about taxable supplies. It specifically prescribes when a supply takes place and the place and time it is deemed to have occurred. The

prescriptions cannot be circumvented in the manner admitted by the Defendant. They are circumvented when prior to ascertainment of whether a supply has occurred, by whom, when and where, the Commissioner General fixes VAT on the mark up based on estimation of the value of a taxable supply which is to occur in future. To give an illustration of goods imported for own use by an importer, that information can be provided by the importer to the Commissioner General. The definition of "application for own use" is found under section 1 (a) of the Value Added Tax Act and provides that it means applying the goods or services to personal use, including personal use by a relative, or any other non-business use. Section 18 (1) read together with section 18 (4) provides that the taxable supply is a supply made by a taxable person for consideration as part of a business activity and further clarifies that the supply is for consideration if the supplier directly or indirectly receives payment for the supply: "whether from the person supplied or any other person, including any payment wholly or partly in money or kind." An assumption therefore cannot be made about the stipulations of law. The stipulations of the law have to be followed to establish the relevant facts for charging VAT.

Before establishing whether there has been a taxable supply it would be erroneous to assume that the VAT in respect thereof accrues.

The second assumption concerns the person making the supply. What if the supply is made by another person other than the importer of the goods? The goods may be sold at a wholesale price to the final trader who sells it to the consumer at the market rate. The assumption presupposes that the supplier of the taxable services is also the importer of the goods. Secondly it assumes that the goods will be sold at a market rate as opposed to a wholesale price. It assumes that the goods are not for own use or a gift.

I have further considered the question of administration of VAT tax by the Defendant. A similar question was considered by this court in the case of **Kampala Nissan Uganda limited versus Uganda Revenue Authority Civil Appeal Number 7 of 2009**. In that case Uganda Revenue Authority had assessed the appellant for tax and the appellant's application for review of a taxation decision of Uganda

Revenue Authority was dismissed by the Tax Appeals Tribunal. The assessment was based on a reconciliation of accounts of the taxable person. The reconciliation concerned specific taxable periods. Under section 1 (w) of the Value Added Tax Act "tax period" means the calendar month. In that case there was no question of additional VAT based on the additional taxable supplies after payment of VAT on the import as the reconciliation exercise included a review of all input and output tax for the taxable periods. The entire controversy was based on the value of the supplies to the consumers of the goods compared to previous assessments made on the basis of available information on valuation for customs purposes at the time of importation of vehicles. An assessment was made on the difference in the values after the goods were supplied as taxable supplies to the consumer. I held that the question of whether the appellant made any taxable supplies is a question of fact that ought to be proved or disproved through the audit process. The evidence was that the VAT in question was charged on the difference between the import value or cost and the sales price. The case is clearly distinguishable on the ground that in the appellant's case, the question was decided after a taxable supply or taxable supplies had been made to the final consumer of the vehicles and therefore there was an issue of the difference between the sales price and the import value to be considered.

The above analysis clearly establishes that VAT on imports is based on the customs value of the goods while VAT on a taxable supply can be calculated on the mark-up. The so-called mark-up is not a terminology of law but that of auditors. The estimation thereof is purely a matter of administrative convenience. Once a sale of an imported good is made in Uganda to a customer, the transaction is strictly termed a taxable supply in terms of sections 4, 5 and 18 of the Value Added Tax Act. The legal terminology is therefore whether there was a taxable supply which has occurred for there to be VAT chargeable. I have already established that VAT on imports is separate and severable from a taxable supply comprising of the same goods in the Ugandan market. Consequently the value added is reflected in the difference in price of import and the sale supply as a taxable supply to the consumer. For purposes of illustration, section 23 of the VAT Act provides that the taxable value of an import of goods is the total sum of the

value of the goods ascertained for purposes of customs duty, the amounts of customs duty, excise tax and any other fiscal charge. Assuming that the total is Uganda shillings 20,000,000/=, import VAT would be 18% of the amount which amounts to Uganda shillings 3,600,000/=. Tax payable on the good by a supplier is input tax and is a credit under section 28 of the VAT Act. Secondly assuming that the importer subsequently in a future date supplies the imported goods as a taxable supply, the taxable supply shall be liable to VAT. However under section 21, the taxable value of the taxable supply is exclusive of tax paid. Consequently if the goods are sold to the final consumer at Uganda shillings 28,000,000/=, the taxable value would be less Uganda shillings 3,600,000/=. (Assuming that customs duty, excise duty and any other fiscal charge or taxes which comprised the taxable value of the importer for purposes of VAT are also not excluded for purposes of a simple analysis). Consequently the taxable value of the taxable supply shall be 28,000,000/= -23,600,000/= giving a taxable figure of Uganda shillings 4,400,000/=. 18% of Uganda shillings 4,400,000/= is Uganda shillings 792,000/= which is the VAT payable on the taxable supply (assuming other taxes are not subtracted as well). The policy of the respondent/Defendant is to assume that 15% of the imported goods would be the additional value added to be imported goods so as to attract VAT of 18% thereon. On the basis of the assumption, the Defendant in addition to VAT on imports also charges VAT on the importer on a future taxable supply which has not occurred at the time of taxation. The question is whether section 32, subsection 1 (c) gives the Commissioner reasonable grounds to assume that an importer will become liable to pay tax but is unlikely to pay the amount due. In my opinion the Commissioner cannot make a blanket assumption. Reasonable grounds for assumption cannot be arbitrary but ought to be grounds based on facts and have to be handled on a case-by-case basis. A taxable supply VAT is imposed on a supplier of taxable goods and not on an importer. The two categories should remain distinct even if importers subsequently supply the goods in the market.

It cannot be assumed that there would be a taxable supply of imported goods in Uganda after the goods have been imported. Most importantly as far as tax administration is concerned, the return of the taxable person for a taxable period

is something to be considered on a case by case basis. It cannot be assumed that the taxable person shall not lodge taxable returns which are accurate for the Commissioner General to invoke the provisions of section 32 or even come to a conclusion that there are reasonable grounds to believe that the person will become liable to pay tax but is unlikely to pay the amount due. Furthermore a strict interpretation of section 32 (1) (c) of the Value Added Tax Act confines the belief of the Commissioner General to reasonable grounds that a particular person will become liable to pay tax but is unlikely to pay the amount due. This by necessary implication refers to the circumstances of a particular person in each case. Consequently section 32 (1) (c) can only be invoked on one taxpayer at a time and cannot cover a general category of taxpayers.

In the premises I cannot conclude without qualification that the charging of "domestic VAT" is illegal per se. Firstly naming the VAT in question as “domestic VAT” cannot take out the substance of the tax as VAT on taxable supplies. It is irregular to charge VAT on taxable supplies before the supply takes place. If it is to be charged in the manner suggested by the Defendant’s Counsel, it can in theory only be charged on a case-by-case basis and on the basis of information leading to reasonable belief that the supplier of the taxable supply is unlikely to pay the VAT.

The Defendant is alleged to have resorted to a method not envisaged by the law by assessing a mark-up on a future taxable supply. The question of reconciliation of output tax and input tax at the end of the tax period is something that can only be considered on a case by case basis. For whatever period reconciliation of input tax and output tax is made for any particular taxable person, it cannot be a matter for consideration on a point of law. Furthermore if calculation of VAT on taxable supplies is made on the basis of section 21 (3), the input tax being the VAT on imports is excluded from the value of the taxable supply to get the difference between the market consideration of the supply and the import value. Only the difference is tax giving a net position which does not require reconciliation since import VAT is input and VAT on taxable supplies is output. The total tax on the imported good supplied would become 18% of the sale value of the goods.

It suffices to conclude that VAT on taxable supplies can only be made in the manner prescribed by the Value Added Tax Act upon the occurrence of the supply and not before. This cannot stop the Defendant for instance from charging VAT on the basis of tax invoices for the supply of taxable supplies comprising of goods which have been imported into the country and for which VAT on the import value have been paid. Furthermore if subsequently any of the Plaintiffs supply the goods as taxable supplies defined under section 18 and as ascertained using other provisions of the Value Added Tax Act reviewed above, I agree that the reconciliation of the input/output tax for the person would establish the correct amount of tax the taxable person is supposed to pay. The administrative arrangement by which this may be done cannot be resolved by this suit without evidence of the practical challenges faced in assessing and collecting VAT after import VAT has been paid by the importer.

In the premises, let this suit be fixed for hearing to ascertain whether any taxable supplies were made by the Plaintiff's on the basis of imported goods for which VAT on imports have already been assessed and perhaps paid. Alternatively, the issue can be determined through a reconciliation exercise conducted by auditors with the full participation of all the parties.

In conclusion and in the circumstances the Plaintiffs have only established generally that it would be irregular to charge VAT on taxable supplies which have not occurred and without giving the reasons why an importer who has paid VAT on the import ought also to pay VAT on a taxable supply before making the supply on the basis of an estimate made under section 32 (1) (c) of the VAT Act. Because taxable supplies are defined expressly to mean a supply which has occurred, VAT ought not to be assessed and paid before the occurrence of the supply. Supply as we have seen includes the issuance of a tax invoice in respect of a taxable supply. Specifically section 4 (a) of the Value Added Tax Act provides that VAT shall be charged in accordance with the law on every taxable supply in Uganda made by a taxable person. The supply of goods is specifically defined to mean the owner of the goods parting with possession of the goods under section 10 (1) of the VAT Act. Furthermore section 14 specifically prescribes the time when the supply

takes place and in respect of goods includes the issuance of an invoice or the payment for goods. Furthermore the Act prescribes the place of supply of the goods under section 15 of the VAT Act in respect of goods as having taken place when goods are delivered or made available by the supplier of the taxable supplies. To charge VAT without compliance with the Act prescribing when the taxable supply takes place and defining what is meant by taxable supplies is irregular and contrary to the prescriptions in the above written provisions of the law. However to charge VAT on a person who would never supply the goods as a taxable supply would be illegal as submitted by the Plaintiff. On the other hand VAT charged on an importer on the premises of taxable supplies before the supply is made which product is subsequently supplied is an irregularity and not an illegality as tax on taxable supplies is prescribed by the VAT Act. In other words it is a curable defect. A tax has to be enabled by an Act of Parliament. The illegality however has to be proved from the fact of whether a supply of the imported good was in the case of any particular plaintiff subsequently made as a taxable supply or not. If VAT is estimated on an anticipated supply which eventually occurs, it would not be an illegality but an irregularity. If there was over assessment, the Plaintiff can object to assessment on the merits subject of course to the procedure provided by the VAT Act. This goes to prove that facts of whether the Plaintiffs never supplied the imported goods as taxable supplies in Uganda are necessary to finalise the Plaintiff's suit on the merits. In the Plaintiff's suit it is assumed that the matters of fact as to whether a taxable supply has subsequently been made by any of the Plaintiffs or not is deemed to have occurred. This can be established through audit or trial of matters of fact. The point of law determined cannot resolve the merits of the Plaintiff's action.

I further agree with the Plaintiff's Counsel that there are several penal provisions under the Value Added Tax Act which prescribe penalties for breach of the law. The offences include failure to apply for registration under section 51, failure to provide tax invoices under section 52, failure to lodge returns under section 53, failure to maintain proper records under section 55, and providing false and misleading statements under section 59 among other penal provisions. The provisions inter alia assist the Commissioner General in the implementation of the

Act so as to achieve the objective of collecting VAT on taxable supplies rather than resort to estimates of VAT assessed before taxable supplies are made and without knowledge of the likelihood of its being made in future.

The costs will follow the event. However the event should be based on facts to be proved on the merits as to whether any of the Plaintiffs ever supplied the goods as taxable supplies or the merits on questions of valuation and should await trial of matters of fact through audit by consent of the parties or hearing in the court. The suit will be fixed for further hearing.

Partial judgment on point of law delivered this 10th of January 2014.

Christopher Madrama Izama

Judge

Partial judgment delivered in the presence of:

Patrick Kabagambe for the Plaintiffs

Haruna Mbeeta holding brief for Mathew Mugabi for the defendant

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

10/January/2014