THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL APPEAL NO. 007 OF 2008

UGANDA REVENUE AUTHORITY..... APPELLANT

VERSUS

TATA (UGANDA) LIMITED ..... RESPONDENT

BEFORE LADY JUSTICE FLAVIA SENOGA ANGLIN

JUDGMENT

Background:

The Respondent is a limited liability company dealing in importation and sale of motor vehicles, spare parts, pharmaceutical and medical products among other things. It is also a member of the Uganda Motor Vehicle Importers Association.

It is the contention of the Respondent that, the transaction of sale in bond had for a long time been an area of controversy for motor vehicle importers and exporters as it traversed both the Value Added Tax (VAT) Act and the East African Customs Management Act.

Some members of the Association had written to the Appellant requesting for clarification on the tax treatment of motor vehicles sold in bond having paid VAT on importation through Customs Department - (Annexture A)

The Appellant stated in response that the VAT due should be that computed by the Customs Department and payable by the customers in cases of Bond Sales (Annexture B).

The clients of the Respondents (Government Departments) applied to the Appellant for release of the vehicles without payment of the taxes, committing to pay taxes due at a later date.

The Appellant then authorized the Respondent to release the said vehicles. Bank payment Advice Forms were picked by the respective Government Departments, the relevant tax forms executed, and the motor vehicles were then picked from the Respondent (Annexture C).

Relying on the above communication and representation, the Respondent sold the vehicles to the clients on the basis that the customers bore the tax liability.

Later the Appellant conducted a comprehensive audit on the Respondent for the period April 2003 – March 2005 for VAT and on 17.10.06 raised an assessment against the Respondent for the sums of Ug. Shs. 799,160,119/-.

On 13.11.2006, the Respondent objected to the assessment and in particular the manner in which the Appellant had treated items such as assessment of VAT on bond sales, the method of computation of penalties by basing calculations on the assumption that output tax was not in dispute and the decision of the Appellant that (Sutures) are exempt from tax rather than being zero rated.

However, the Appellant went ahead and made an objection decision on 16.11.06, confirming its assessment on the following terms:-

a) Selling motor vehicles in bonded warehouses before payment of import duty is a taxable supply.

b) The penalties were rightly computed.

c) Sutures are exempt supplies and not zero rated supplies.

Dissatisfied with the assessment, the Respondent appealed to the Tax Appeals Tribunal (TAT) against the decision of the Appellant (TAT Application 35/2006) challenging the assessment of the Appellant.

Tax Appeals Tribunal ruled in favor of the Respondent as follows:-

a) Payment of VAT rested with the Respondent's clients who bought goods from the Respondent / Applicant without payment of the same.

b) Penalties are not due from the Respondent but from the clients of the Respondent / Applicant.

c) Any taxes that may have been collected from the Respondent / Applicant on account of the assessment should be refunded with interest.

The Appellant being dissatisfied with the decision of the Tribunal lodged this appeal to this court on the following grounds:-

a) The Tribunal erred in law when they failed to fully evaluate the evidence before it and ruled that the Respondent's clients had the responsibility of payment of the taxes in issue arising from the sale of imported goods in bonded warehouses.

The Respondents contended that the Appellant's record of appeal was amended by exclusion of certain documents that were on record in the lower court and are material to the Appeal. For example A_{28} – which was extensively referred to but was excluded from the compiled record of proceedings. And that the Appeal ought to fail on that ground alone.
The case of **Kemirembe Sarah vs. National Housing and Construction Co. Ltd C.A. CA 83/10** was cited in support of the submission.

However, as rightly pointed out by Counsel for the Appellant this matter was resolved by court allowing an oral application by Counsel for the Appellant to file supplementary documentation especially A_{27} and A_2 to be filed by 03.03.15. And indeed the documents were attached to the submissions in rejoinder filed on 03.03.15. Court therefore agrees that the submission that Appeal is incompetent on ground of incomplete records was overtaken by events.

The rest of the grounds of appeal will accordingly be determined.

Failure to evaluate evidence:

Counsel for the Appellant referred to the ruling of the Tribunal on page 153. He contended that the Tribunal erroneously relied upon Exhibit A_{28} to rule that the Respondent was not liable to VAT, and that the Appellants should collect the VAT from the Respondent's clients.

The contents of the document A_{28} were set out verbatim. It was then argued that the Tribunal misdirected itself when it relied on the Respondents / Applicants submission last paragraph pp 25-26 to rule in favor of the Respondent that document A_{28} was binding on the Appellant because they were not formerly reversed by the Appellant / Respondent. And also when they relied upon the Respondent / Applicant's submission to rule that the payment of VAT for the goods supplied by the Applicant while in bond without paying taxes rests on the Respondents/ Applicant's clients who bought them from the importer without paying the taxes.

It was stated for the Appellant that document A_{28} is not binding on the Appellant as it was neither a private ruling nor a practice direction and at the time of its issue, that provision was not in the law- S.79 and 80 of the VAT Act were relied upon to support the argument, plus the case of **Kampala Nissan Uganda Ltd vs. Uganda Revenue Authority C.A 7/2009 (Arising from TAT 28/2007)** – Justice Madrama – the use of the word **"shall"** – S. 4 VAT Act makes the charging of VAT on taxable supplies on the items mandatory…. And acts done in disobedience of the provision are generally null and void…. And the case of **VITA Foods Products Inc. vs. Unns Supplying Co. Ltd (in Liquidation [1939] IAU ER 513** – Lord Wright ***"… a statute enacted in public interest and which is concluded in mandatory language intends what is due in disobedience of it to be a nullity as a matter of public policy…."***

Adding that the use of the word **"shall"** under S.4 VAT Act ***"makes the provision mandatory and any act done contrary to it is void."*** The section makes it mandatory for VAT to be charged on every taxable supply in Uganda made by a taxable person.

Defining the term **"taxable supply"** – S. 18 VAT Act. It was argued for the Appellant that the Respondent made a "taxable supply" when it sold goods in the bonded ware house at a price over and above the price it had declared to customs. And therefore, the Responded is liable to VAT as assessed by the Appellant and cannot rely on document A_{28} to exonerate itself of the tax liability.

The case of **Pride Exporters Ltd vs. Uganda Revenue Authority HCCS 563/2006** was cited for the holding that ***"powers given to a Statutory body under a statute cannot be fettered or overridden by estoppels and or mistake"***- Justice Kiryabwire.

Further that under Article 152 of the Constitution, the Appellant is bound by the laws of Uganda and therefore a tax can only be imposed under an Act of Parliament. The position was reiterated by Justice Madrama in **Kampala Nissan Uganda Ltd. vs. Uganda Revenue Authority (Supra)** ***"….. VAT imposed by statute cannot be waived by the Commissioner…..".***

The Appellant is therefore not bound by document A28.

The Appellant challenged the Tribunal's ruling Page 28 paragraphs 3 that the Respondent was exonerated from VAT responsibilities by document A_2 thereby making the buyer of the goods in the bond the importer and liable to pay VAT.

They went through document A_{28} arguing that the Tribunal did not address itself to the law – SS. 4 (a), 18 (2), 18 (4), 1(j) and 1 (k) were cited and relied upon to emphasis that the Respondent is the importer of the goods it brought from India to Uganda.

Further that all necessary documents like the commercial invoice, the bill of lading and certificate of origin all indicate the Respondent as the consignee. The Respondent had possession of the goods in its warehouse and was beneficially interested in them although they were later sold to Government Departments or other customers.

It was emphasized that the Respondent abdicated the position of importer and became a taxable person making a local supply when it sold the goods to the final consumer at a price higher than the customs value of the goods. It is this excess amount that the Appellant subjected to a charge of VAT, hence the tax due and payable. – S. 23 of the VAT Act was relied upon to support the argument.

The difference in the customs value represented an added value which is chargeable to VAT. Whereas if the Respondent had sold the goods at a value equal to the taxable value of the goods declared for customs purposes, there would have been no VAT chargeable other than that chargeable at importation. The tax was therefore correctly assessed under S.4 VAT Act.

It was prayed that the appeal be allowed and the prayers set out granted.

In reply, Counsel for the Respondent submitted that sales in bond transactions attract two taxes imposed under the East African Customs Management Act (EACMA) which imposes VAT as part of import duty and the Value Added Tax Act (VATA) as a domestic tax.

It was argued that the VAT Act does not make specific provision for bonded warehouse, yet under the EACMA a sale in bond is like an export. The buyer in bond becomes an importer while the seller becomes the exporter and is **not** liable to charge VAT. But according to the VAT Act, VAT is chargeable on the supply of goods in Uganda while the goods in bond are technically not goods in Uganda.

According to Exhibit A_{27}, it was pointed out, the Appellant indicates that when goods are sold in bond, the person buying the goods in bond is the importer and the person who sells on bond ***" to avoid double tax refund of VAT to your client, the tax invoice issued will indicate the costs of the goods with nil VAT charged."***

It was stated that, the communication in A_{27} which is to the effect that"***an import takes place on the date when the customs duty is payable".*** And S. 5 (b) VAT Act which provides that ***"Tax is payable by the importer".***

That as pointed out by the Commissioner, Large Tax Payers Department of the Appellant, there is a lacuna between the VAT Act and the Customs Management Act as the VAT Act does not provide for **"bond sales"**. And that is why the Appellant's Commissioner decided **"not to impose any additional VAT liability resulting from the said review"**.

It was maintained that the VAT paid by the importer is the output tax in the said sale in bond. The Respondent argued that the goods are not imported into the country until taxes are paid for them.

Referring to the definition of **"bonded warehouse"** under the EACMA 2004, it was submitted that the Respondent did not abdicate the position of importer, but that the customers who bought in bond were the importers, because they are the ones who paid taxes at importation. The Respondent was only required to comply with document A27 which it did.

The Respondent explained that **"Bond sales are made to customers who are exempt from payment of duties and taxes or to customers who have to arrange for payment of duties and taxes directly, such as government ministries."**

On supply of such vehicles, the Respondent does not charge VAT since the sale is on **"ex-bond"** basis (Duty and Tax free), before the import formalities are completed. And the exemption of duties, taxes and VAT for payment of the same if applicable is arranged for directly by the customer.

S.17 (a) and (b) VAT Act was cited to explain**" when import takes place".** And it was then stated that in **"bond sale"** ownership is transferred while the vehicles are still in customs control, on the date on which customs duty is payable upon releasing the vehicles from bond. The importers were therefore the entities to which the vehicles were supplied and not the Respondent.

Since bonds are customs gazette areas where transfer of ownership is made therein the sale is not made in Uganda, there is no value added and the goods are not subject to VAT.

The Customs Bill of Entry (Exhibit A_{10} page 32 record of Appeal) shows that for any such transaction, the Customs and Excise Department classifies the company (Respondent) as the Exporter and the entity receiving the supply of goods as the Importer.

That documents A_7, A_8, A_9 and A_{10} (pages 29 – 32 record of Appeal) clearly indicate who is liable to pay VAT, and there are commitments by both the Appellant and the tax payer / importer to pay tax. And that the Appellant has never shown that the State House Comptroller and or the Ministry of Justice and Constitutional Affairs failed to pay the taxes which they had promised to pay. And neither does the Appellant show that the said Government entities paid VAT based only on customs value, leaving out the extra VAT arising out of the Respondent's alleged pricing.

It was maintained that the Respondent is not obliged to pay VAT as the vehicles were in a pre-tax position and there was no value added.

The contents of Exhibit A28 were reproduced verbatim arguing that the Appellant does not dispute that the Commissioner General issued the letter. It was then contended that the cases relied upon by the Appellant to argue that it has no power to waive or exonerate a tax payer

of any liability are distinguishable from the facts of the present case, as the facts and issues are different.

In the present case, there was a concession between the Appellant, the Respondents and the Respondent's clients that the taxes would be paid by the clients unlike in the **Nissan Case (Supra).**

The client (State House) applied to the Appellant for release of the vehicles without payment of taxes (Exhibit A_{18} page 24 record of Appeal). And the Appellant upon receipt of the request from the client (tax payer) authorized release of the said vehicles.

Bank advice forms (BAFs) were issued to the client by the Appellant, although it is not indicated if any payments were made by the client. It was contended that the BASs are an indication that the Appellant had accepted that the Respondent's clients pay the taxes due and it meant that the Respondent was not under any obligation to pay taxes and it would be wrong to hold the Respondent liable for VAT.

The Appellant is bound by the document under S.114 of the Evidence Act. The case of **Premchandra Shenoi & Another vs. Maximov Oles Petrovic SCCA 09/2003** was cited in support.

Insisting that the communication from the Commissioner is binding, it was stated that he has authority to interpret the law and make a decision. In this case the Commissioner exercised his discretion and granted a tax deferment and he cited within his powers. And that, whereas the Appellant claims that only practice notes and private rulings are binding on the Commission General, at the time the Commissioner issued the said communication, there was no such provision in the law. And S.79 and 80 VAT Act are not being relied upon by the Respondent, as this is a decision made by the Commissioner just like an assessment made under the law.

- S. 2 (d) Income Tax Act was cited to define assessment as "a decision binding on the Commissioner yet it is neither a private ruling nor a practice note under the Act".

The case of **Hedly Byrne & Co. Ltd. vs. Hiller & Partners Ltd [1964] A 465** was relied upon to fortify the argument.

It was also stated that the assessment period in question is for the years 2003 – 2005 yet the statutes sought to be relied upon by the Appellant were inserted by the VAT (Amendment) Act 2005, and therefore cannot be relied upon by the Appellant.

And that it would be an unfair abuse of power for the Appellant to depart from the guidance or informal clearances given to tax payers if they are expressed in terms in which the tax payer could reasonably expect to rely upon……. – **RVS Commission Exparte Matrix Securities Ltd [1994] BTC 561** and **R vs. IR Commissioner exparte MFK Underwriting Agencies Ltd [1989] BTC 561** were cited in support.

It was accordingly prayed that the appeal be dismissed with costs and the decision of the Tribunal upheld.

The Appellant filed submissions in rejoinder and also reiterated earlier submissions and prayers.

The issue for court to determine is **whether the Tribunal erred in law and failed to fully evaluate the evidence before it** when it ruled that the Respondent's clients had the responsibility of payment of the taxes in issue arising from the sale of the imported goods in bonded warehouses.

It is apparent from the decision of the Tribunal that before arriving at its decision the submissions of both parties were taken into consideration, together with the documents filed and relied upon by both parties. The evidence of the witnesses of the Respondent (then Applicant) and the laws applicable.

The issues agreed upon by the parties were noted and one that had been resolved before the hearing was dropped and decision was made on the rest of the issues in favor of the Respondent, as already indicated in this judgment.

The real bone of contention between the parties was and still remains as to who was responsible for the payment of VAT on the goods that were brought by the Respondent's clients from the bonded warehouses.

The Tribunal determined this issue in favor of the Respondent basing on the provisions of the applicable laws and the documents.

In coming to its decision the Tribunal relied upon Exhibit A_{28} to rule that the Respondent was not liable to pay VAT and that the Appellants should collect VAT from the Respondent's clients.

This court has to determine - Whether **document A_{28} is binding on the Appellant**. Whether it was a private ruling or a practice discretion at the time it was issued.

In reference to documents A27 and A28, the evidence available indicates that NIS (U) Ltd **representing** other motor vehicle importers including the Respondent, approached the Commissioner for both VAT and Customs to get clarification in order to avoid double taxation. - Refer to exhibits A_6, A_5, A_{15}, A_{16}, A_{27} and A_{28}.

Exhibit A_{27} is the effect that ***"when goods are sold in bond, the person buying the goods in bond is the importer and that the person in bond to avoid double tax refund of VAT to your client, the tax invoice to him will indicate the costs of the goods with NIL VAT charged."***

The Commissioner referred to S. 17 VAT Act – which is to the effect that ***"import takes place on the date the customs duty is payable".*** And S.5 (b) of the same Act provides that tax is payable by the importer.

The Commissioner Large Tax Payers Department of the Appellant sorted out the lacuna between the VAT Act and the Customs Management Act because the VAT Act does not provide for **"bond sales"** by stating that **"we shall not impose on you any additional VAT liability resulting from the said review".** Therefore that VAT paid by the importer is the output tax in the sale in bond.

The issue **whether goods sold in bond are in a pre tax situation and VAT does not apply** was not responded to by the Appellant either in its tax decision or in its submissions.

This court therefore finds that, the documents A_{27} and A_{28} relied upon by the Respondent were not reversed by the Appellant and are therefore binding.

According to document A_7 – State House pledged to pay all taxes outstanding including VAT. The Appellant agreed to the terms of State House. And there is no indication that State House failed to clear the liability. See also documents A_{18} and A_{19}.

It is not disputed by the Applicant that NIS (U) Ltd to whom A_{28} was addressed was representing all motor vehicle importers. The Tribunal also noted that the Applicant did not distinguish circumstances of NIS (U) Ltd and those of the Applicant / Respondent in treatment of bond sales. Both companies are motor vehicle importers.

There is also evidence that other tax payers selling goods while in bond made use of A_{28}, in handling matters of VAT and only the Respondent / Applicant was sought out thereby raising issues of equal treatment of tax payers in similar situations.

The Tribunal took into account documents A_{27} and A_2 – referring to **"VAT on goods sold in Bond and Time for issuing of Tax Invoices and VAT treatment of Bond Sales"**

The two documents were carefully examined by the Tribunal and no evidence was found to suggest that the Respondent / Applicant failed to fulfill any of the requirements outlined in document $_{A27-1(b)}$ which clearly states that ***"The transferee of goods in bond to indicate in his tax invoice the costs of the goods with NIL VAT charge."***

It was noted that the Appellant made no clarification as to **whether this cost of the goods is the import value of the goods or the sale price of the goods.**

The Respondent seems to have taken it that the cost of the goods is **"the sale price of the goods"** and without evidence to the contrary, the Tribunal found no reason to disagree with the interpretation.

It was also stated in document A_{28} by the Commissioner Large Tax Payers Department regarding the query of VAT treatment of Bond Sales that ***"The VAT due should be that computed by the customs department and payable by your customers in case of bond sales."***

It should be noted that, no taxes payable by the Respondent / Applicant's customer were ever computed. This is indicated by documents A7, A18 and A19. Instead the Appellant agreed that the goods in bond be released to State House and the Ministry of Justice and Constitutional Affairs without the VAT due being collected. Well knowing that these are Government bodies that are exempted from payment of the taxes being sought.

While Bank advice forms were issued by the Appellant with regard to payment of VAT, it still remains that it was agreed that the VAT be paid at a later date by the Respondent's customers.

Since document A_{27} clearly states that **"in this case your client will be considered to be the importer"**- I have found no reason to disagree with the Tribunal's findings that once the Respondent's clients became the importers, they took on the responsibility to pay the outstanding taxes.

As advised by the Appellant, the Respondent indicated NIL VAT charged.

The finding of the Tribunal that documents A_{27} and A_{28} exonerated the Respondents as they were authorized to release the goods without payment of taxes and that the responsibility to pay taxes rested with the Government Department who bought vehicles without payment of taxes is accordingly upheld.

Penalties: Having found that the responsibility to pay VAT on the goods rested on the Government Departments, all penalties for non- payment or late payment would have lain with those departments and not on the Respondent. But these are exempt from payment of tax under S.2 (1) (a) Customs Tariff Act and Schedule 3 Finance Act 2001.

I therefore agree with the submissions of the Respondent that they should not be penalized in penalties and costs.

This court finds that the Tribunal properly evaluated the evidence before it and arrived at the correct decision. The decision is hereby upheld.

The Appeal is accordingly dismissed with costs to the Respondent.

FLAVIA SENOGA ANGLIN
JUDGE
25.01.16