<u>THE REPUBLIC OF UGANDA</u>

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL APPEAL NO. 26 OF 2015

WABULUNGU MULTI-PURPOSE ESTATES LTD:::::::::::::::::::::::::: APPELLANT

VERSUS

UGANDA REVENUE AUTHORITY:::RESPONDENT

BEFORE: <u>THE HON. JUSTICE DAVID WANGUTUSI</u>

<u>J U D G M E N T:</u>

This is an Appeal against the finding of the Tax Appeals Tribunal between Wabulungu Multi-Purpose Estates the Appellant and Uganda Revenue Authority the Respondent.

The Appellant seeks the following;

a) That the Honourable members of the Tax Appeals Tribunal erred in law when they upheld the formulas and computations of the Respondent in assessment of UGX. 7,575,494,879/= as VAT chargeable on the Appellant when the VAT Act does not prescribe for any formula for low value addition in VAT computations.

b) The Honourable members of the Tax Appeals Tribunal erred in law and fact when they held that the process applied by the Appellant to the coffee were low value adding activities, but went ahead without a basis to uphold the assessment on the ground that the said process added value above 5% of the total value of the supply under paragraph 3 of the 2nd Schedule of the Act, thus rendering their sales of processed agricultural products, that are liable to VAT assessment under the VAT Act.

c) The Honourable members of the Tribunal erred in law when they upheld a figure of UGX. 7,575,494,879/= that had been computed using a different formula and without computing the costs of the processes in relation to the total value of the supply.

d) The Honourable members of the Tribunal erred on the law when they held that the Applicant failed to discharge its burden under section 18 of the Tax Appeals Tribunal

Act to show that the value addition of the process it applied to its coffee was less than 5% of the total value of supply.

e) That the Honourable members of the Tribunal erred in law and in fact when they failed in their mandate to refer the matter back to the Respondent for re-computation of the VAT chargeable as a result of the uncertainties in the methods used for the computation by the Respondent.

f) The Honourable members of the Tribunal erred in law and in fact when they departed from the earlier decision in ***Savannah Commodities Ltd vs URA*** which had clear guiding principles, thus coming to a wrong conclusion.

The Appellant then prayed that the decision and orders of the Tribunal be set aside with costs.

The Appellant whose physical address is Plot 508 Bombo Road Kawempe deals in coffee trading and processing with VAT Number 30799-E. Her activities were both domestic and international namely selling Fair Average Quality (FAQ) coffee in the local market and exporting some after processing.

In March 2009, the Respondent's officers did an audit on the Appellant Company for the period October 2003 to September 2008. The findings and assessment were communicated to the Appellant; namely that;

a) The Appellant purchased processed coffee from dealers in the form of FAQ which was a standard rated item within the provisions of the VAT Act.
b) The Appellant further enhanced its value by various activities such as; sorting, moisture control, color sorting, grading and bagging
c) Additional information on exports were provided and the local sales were taxed accordingly.
d) Penalty for non submission of VAT returns for the period November 2007 had been charged under section 65(2); amounting to UGX. 23,686,316/= and;
e) Cash refunds received yet Appellant was liable to pay tax would be computed for recovery and penalty imposed in accordance with the VAT Act.

Objecting to the assessment by a letter dated 26th March 2009 the Appellant contended that they had not been availed with minutes of the meeting held on 26th February 2009 and many issues remained unresolved. Furthermore, that they purchased FAQ coffee beans from Kiboko farmers which coffee beans were then dried removing all foreign materials like stones, sisal, dust leaves

and husks then graded and packed into 60kg polythene bags. According to the Appellant during this period the company did not have color sorter machines so the coffee beans had to be sold to local processors.

The Appellant also contended that this unprocessed agriculture produce which it sold as non export to local suppliers after carrying out the drying and grading did not exceed 5% of the total value of supply therefore recovery and penalty as per the provision of section 65(6) of the VAT Act could not apply.

In a letter dated 30th April 2009 the Respondent reiterated its position stating that the sale of FAQ was not the sale of unprocessed agricultural product since the value added by the process of hulling was more than 5% and at the time of purchase the coffee was therefore a standard rated item.

In May 2009 the Appellant objected to the VAT assessment of UGX 7,575,495,879/= as being unreasonable. The Appellant also contended that the assessment of UGX. 7,575,494,879/= was illegal because it did not comply with section 32 of the VAT Act.

The Respondent delivered its objection decision on 27th May 2009 in the following terms;

> *"2.Since to arrive at FAQ, the value is more than 5%, URA treated the local sale of FAQ as a standard rated supply and subjected it to VAT. See our computation communicated to your client vide letter of 30th April 2009.*
>
> *3. It was also noted that the VAT Act Cap 349 exempts the supply of unprocessed agricultural products (listed under the second schedule). The term unprocessed is given in paragraph 3 of the second schedule to include low value added activity such as sorting, drying, salting, filleting, deboning, freezing, chilling, or bulk packaging provided the value added does not exceed 5% and therefore local sale of FAQ is a standard rated supply.*

> *4. It is not in dispute that a tax period is a calendar month and it is further noted that the above assessment covers tax periods from September 2004 to February 2009.*
>
> *In light of the foregoing, we wish to confirm that the VAT assessment of Shs. 7,575,494,879 for the periods September 3004 to September 2009. Please advise your client to pay the outstanding tax liability in order to avoid further accumulation of interest."*

Being aggrieved by the decision of the Respondent the Appellant exercised her rights under section 33(c) of the Value Added Tax Act and filed an application before the Tax Appeal Tribunal. Three issues were raised before the Tax Appeals Tribunal namely;

1. ***What type of coffee was the Applicant dealing in?***
2. ***Whether the Applicant's dealing in coffee added value in excess of 5% under the VAT Act?***
3. ***What are the remedies available to the parties?***

In their decision the learned members of the tribunal found that;

> *" In the event the processes applied to the coffee sold for the period 2003 to 2008 were local consumption in the decision of the Tribunal would still depend on the costs involved in the processes in relation to the total value of the supply. That if the Applicant had adduced evidence in the Tribunal to show that the processes it applied to the coffee for the period 2003 to 2008 were different from those after 2008, which it did not, the Applicant would still need to compute the costs of the processes in relation to the total value of the supply."*

From the foregoing, the learned members of the tribunal found that;

> *" The Applicant has failed to discharge its burden under section 18 of the Tax Appeals Tribunal Act to show that that value addition of the processes it applied to its coffee was less than 5% of the*

> *total value of the supply. The Tribunal rules that the local sales of the coffee by the Applicant as not sales of unprocessed agricultural produce to qualify as exempt supplies in the VAT Act. The Applicant is liable to pay the taxes of Shs. 7,575,494,879 assessed. The Application is dismissed with costs to the Respondent."*

On the first issue that the members of the Tax Appeals Tribunal erred in law when they upheld the formulas and computations of the Respondent in assessment of UGX. 7,575,494,879 as VAT chargeable on the Appellant when the VAT Act does not prescribe for any formula for low value addition in VAT computations, Counsel for the Appellant submitted that the formula used was different from the one they presented during the hearing of the Application. That in fact the Act does not provide a formula. That they preferred the formula that was adopted in the Savannah Commodities case.

It is not necessary to reproduce the formula here; suffice it to say that the Tribunal did not in fact uphold the formula in either the Savannah case or this one. The Tribunal considered them in these words;

> "The *methods used by the Revenue Authority in Savannah case and in this case are ambiguous in their Applications. The said methods are not only arbitrary, but also do not appreciate when Value Added Tax is about and how it works. The Tribunal notes that the VAT Act does not prescribe any formula for computing value addition. Any attempt to insert a formula into the VAT which is not prescribed would be an attempt to amend the Act which is the duty of the legislature."*

The Tribunal further wrote;

> "*Instead of concocting high sounding formulas the parties ought to have given the VAT Act paragraph 3 of the Second Schedule a literal or simple interpretation."*

I fully agree with the views of the Tribunal because in this case the formula simply lies in the definition of Value Addition.

Value Addition presupposes that an item has a certain value which is improved by future processes. This change in value accounts for charge. This very court dealt with such a situation in ***SWT Tanners Ltd & 13 others vs. Uganda Revenue Authority CS No. 880/ 2014.*** In that case the court was faced with what value had been added to rice from Paddy to Shop shelf. It was found that;

> *"the transformation of Paddy to an edible form involved 5 salient mechanical processes which were, de husking, sorting, polishing, whitening and grading."*

The serial performance of those activities coupled with extensive quality assurance programme resulted into rice which hither to was unprocessed into a processed product. Each of the steps made an improvement called value addition. Instead of Court delving in complicated formula, it simply got the change of price of the commodity at each step. The cumulative sum was the value added to the rice. Coffee is not different. It changed from FAQ to the point of sale. In the absence of statutory formulae for computation of tax, the easier way would have been to compute the sales against the value the subject was when it was bought in FAQ state in that way all the costs of processing the transformation would be take care of. In that way it would be easy to see whether through the transformation of the coffee from FAQ to the state it was resold, it had exceeded 5% of the value at FAQ. If it was found to be less than 5%, it would be exempt from VAT.

It is therefore court's finding that the Tribunal did not uphold any of the formulas.

The other ground of Appeal was that Honourable members of the Tribunal erred in law when they upheld a figure of UGX 7,575,494,879/= that had been computed using a different formula without computing the total processes in relation to the value of the supply.

This matter was in fact considered. The Tribunal in dealing with this matter said;

> *" In the matter before us the parties ought to have computed all the costs it incurred in de stoning, cleaning, grading etc and calculated it as a percentage in respect of the total value of the supply. The total value of a product is the total sale of the product.*

If a cost incurred by all the processes do not exceed 5% of the total value or sales then said supply would be exempt under the VAT Act."

These considerations as to the cost of processing was the burden of the Appellant. Once an assessment had been made by the Respondent the burden to show that the Respondent had not taken into account the costs of the processes in relation to the total value of the supply lay upon the Appellant. This they did not do. This ground therefore fails.

The other ground of Appeal was that the Tribunal erred when it held that the Applicant failed to discharge its burden under section 18 of the Tax Appeals Tribunal Act to show that the value addition of the process it applied to its coffee was less than 5% of the total value of the supply.

The Appellant was supposed to prove that the value addition to the coffee was below 5% so as to insulate their transaction from tax. It was therefore their duty to detail the process that the coffee passed through to bring it to saleable quality thereto clear with the attendant costs of the processing. This burden at no time did it lie upon the Respondent.

In reaching this position I am fortified by section 18 of the Tax Appeals Tribunal Act. It provides;

"*In a proceeding before the tribunal for review of a taxation decision, the applicant has the burden of proving that-*

(a) Where the taxation decision is an objection in relation to an assessment, the assessment is excessive; or

(b) In any other case, the taxation decision should not have been made or should have been made differently."

This provision receives support from section 101 of the Evidence Act which provides;

"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which she or he asserts must prove that those facts exist."

Further section 102 of the Evidence Act provides that;

" The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on both sides."

In other words he who asserts must prove. In this case it is the Appellant who asserted that the value addition was less than 5 %. It is the Appellant who filed the Application in the Tax Appeals Tribunal. It was therefore the duty of the Appellant to prove that the value addition to the coffee was below 5%. This being a tax exemption matter and the law as we know it does not look with favour on tax exemptions, the burden heavily fell on the Appellant to justify the exemption she sought; ***Uganda Revenue Authority vs Siraj Hassan Kajura CA. No. 26 of 2013.*** For the above reasons, this ground also fails.

The fifth issue is that the Tribunal erred in law and in fact when they failed in their mandate to refer the matter back to the Respondent for re-computation of the VAT chargeable as a result of the uncertainties in the methods used for the computation by the Respondent.

Counsel for the Appellant submitted that the Tax Appeals Tribunal found uncertainties in the formula that was used by the Respondent to arrive at the figure 7,576,494,879. Counsel submitted that under such circumstances the Tribunal should have reviewed or sent the matter back to the Respondent for re-computation.

In reply the Respondent's Counsel submitted that the Tax Appeals Tribunal did not refer the matter back to the Respondent because the Appellant failed to discharge its burden to show that the value added to the processes it applied to its coffee, was less than 5% of the total value.

It is true that the Appellant failed to prove that the value addition was less than 5%. The foregoing is however not the only issue envisaged in the fifth ground of appeal. What is in that ground of appeal is that questions arose as to the method used in the assessment. These were questions of whether the formula used by the Respondent in the assessment was correct or not. The Tribunal considered the formula used by the Respondent at length. It faulted not only the formula used in this instant case but in Savannah Commodities as well. The Tax Appeals Tribunal observed;

"The methods used by the Revenue Authority in Savannah case and in this case are ambiguous in their Applications. The said methods are not only arbitrary, but also do not appreciate what

Value Added Tax is about and how it works. The Tribunal notes that the VAT Act does not prescribe any formula for computing value addition. Any attempt to insert a formula into the VAT which is not prescribed would be an attempt to amend the Act which is the duty of the legislature."

The Tribunal further observed;

"So to ascertain the total value of a product in a financial year, a tax payer would be required to compute the total sales during the period. This would take into consideration all vagaries and variables like seasons, transport costs etc in the period… Value addition can be obtained by the processor computing the costs incurred at each process in relation to the total value. It is a matter of computing the costs each process contributes to the end product. Therefore for an unprocessed product to qualify for an exemption under the Second Schedule the contribution of the process/processes should not exceed 5% of the total value of the supply."

The Tribunal proceeded to hold;

"In the matter before us, the parties ought to have computed all the costs it incurred in de stoning, clearing, grading etc and calculate it as a percentage in respect of the total value of the supply. The total value of a product is the total sale of the product. If the costs incurred by all the processes do not exceed 5% of the total value or sales then the said supply would be exempt under the VAT Act."

It is clear from the proceedings that the Respondent did not follow the procedure as outlined by the Tax Appeals Tribunal. The Respondent came up with a formula of their own. The Appellant preferred a formula used in the Savannah case. The Tax Appeals Tribunal found both formulas "ambiguous" and insertions in the Act a job assigned only to the Legislature. TAT referred to them as "concocting high sounding formulas." Further that their product was uncertain.

That they were a source of uncertainty is not in doubt. Uncertainty creates unreliability of outcome. It creates qualm, misgiving, apprehension, quandary and dilemma. Since the Tax Appeals Tribunal found that the method used in assessment was unreliable, it should not have gone ahead and affirmed the tax assessment.

It should have proceeded under section 19 of the Tax Appeals Tribunal Act. The section provides as follows;

> *"For the purpose of reviewing a taxation decision, a tribunal may exercise all the powers and discretions that are conferred by the relevant taxing Act on the decision maker and shall make a decision in writing;*
>
> > *(a) affirming the decision under review*
> >
> > *(b) varying the decision under review or*
> >
> > *(c) setting aside the decision under review and either*
> >
> > > *(i) making a decision in substitution for the decision so set aside;*
> > >
> > > *(ii) remitting the matter to the decision maker for reconsideration in accordance with any directions or recommendations of the Tribunal."*

Indeed the Tribunal in the instant case found that the Respondent had acted arbitrarily. It found that the Respondent had relied on 'concocted' formula. There was therefore great likelihood of arriving at a wrong outcome.

The Tax Appeals Tribunal should not under those circumstances have left the assessment in that unreliable state. They clearly gave directions of what the Respondent should have done in a situation where the law provided no formula. They should then have varied, substituted or remitted the amendment back to the decision maker.

Considering all the foregoing its this court's finding that the procedure in assessment and the resultant tax were unreliable. They are hereby set aside and the matter be sent back to the Respondent as the decision maker for reconsideration taking into account the procedure recommended by the Tax Appeals Tribunal.

As to whether the Honourable members of the Tribunal erred in law and in fact when they departed from the earlier decision in ***Savannah Commodities Ltd vs URA*** which had clear

guiding principles, thus coming to a wrong conclusion it should be noted that Savannah Commodities stopped at hulling turning the coffee to fair average quality coffee. This fairly average quality coffee was not in exportable standard. Exporting FAQ is in fact not recommended according to the coffee regulations. The exportable standard would require an improvement beyond where Savannah Commodities stopped.

From the evidence given on behalf of the Appellant they would in addition to FAQ further process it by sorting, drying etc to bring it to the required international moisture content standard sought, and de stone, grade and bag to exportable standards. It is this improvement added to what FAQ was that the Respondent contended was value added in excess of 5%.

From the foregoing, the Savannah standards fell far short to those exportable requirements and thus distinguishable from the instant case. In that case therefore, they do not fall on all fours as submitted by the Appellant.

Furthermore, the formula in the Savannah case is unknown to the Act and as found by TAT it cannot be relied upon to give you accurate tax assessment.

The sum total is that after subjecting the evidence as a whole to that fresh and exhaustive scrutiny, it is my finding that the Appellant's criticism of the Tax Appeals Tribunal that it did not properly scrutinize and evaluate the evidence

In respect of the procedure of the assessment and by implication that had it done so, would have rejected the Respondent's assessment and accepted the Appellant's prayer for reassessment and re-computation justified.

For the above reasons this court is convinced like the TAT was that the assessment was based on a wrong premise. The assessment is set aside and the matter should therefore be remitted to the Respondent who is the decision maker for reconsideration in accordance with the directions as to procedure recommended by the Tribunal. Since the Appellant did not discharge the burden of proving its exemption from the tax, each party will bear its own costs.

Dated at Kampala this 11th day of December 2018

HON. JUSTICE DAVID WANGUTUSI

JUDGE.