THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL COURT DIVISION)

CIVIL APPEAL No. 26 OF 2018

(ARISING FROM TAT APPLICATION NO. 11 OF 2016)

UGANDA REVENUE AUTHORITY.....APPELLANT

VERSUS

JACOBSEN UGANDA POWER PLANT CO. LTD .....RESPONDENT

BEFORE JUSTICE RICHARD WEJULI WABWIRE

JUDGMENT

This Judgment arises from an Appeal from the Ruling of the Tax Appeals Tribunal (TAT) in TAT No. 11 of 2016 delivered at Kampala on 23rd July 2018.

Briefly, the background to this Appeal is that the Appellant carried out an audit of the Respondent and imposed an assessment of a sum of UGX. 5,351,374,339/= in unpaid Value Added Tax and Withholding Tax. Upon objection by the Respondent, the sum was revised, vide an objection decision, to UGX. 2,369,047,723/=. The Respondent being dissatisfied with the Appellant's objection decision, filed TAT Application No.11 of 2016.

In its majority decision, the Tax Appeals Tribunal held that Withholding Tax and Value Added Tax were not applicable to the expenses of the Respondent and its staff in respect of costs incurred for air tickets, accommodation and per diems incurred while providing management services to the Respondent. Being dissatisfied with the Tribunal's decisions, the Appellant lodged this Appeal on grounds that;

a. The Honorable Members of the Tribunal erred in law when they failed to properly evaluate the evidence on record and ruled that the Appellant was not justified in charging Withholding Tax on the payment of 15,000 Euros made by the Respondent to JELCO.
b. The Honorable Members of the Tribunal erred in law when they failed to properly evaluate the evidence on record and relied on speculation that it is doubtable that all the payments for the air tickets were sourced in Uganda.
c. The Honorable Members of the Tribunal erred in law when they failed to properly evaluate the evidence on record and ruled that the Appellant was not justified in charging VAT on the Respondent.

At the hearing, the Appellant was represented by their own Legal Department while the Respondent was represented by Dusabe and Company

Advocates. The parties filed a Record of Appeal, respective written submissions and authorities upon which they relied to support their respective cases.

I have carefully considered the Record of Appeal, the submissions together with the authorities cited and all the grounds of appeal. Except for the pertinent parts of the Ruling from which the Appellant derived their grounds for appeal, I find no reason to delve into the detail of the entire Ruling made by the TAT.

Ground 1: The Honorable Members of the Tribunal erred in law when they failed to properly evaluate the evidence on record and ruled that the Appellant was not justified in charging Withholding Tax on the payments of 15,000 Euros made by the Respondent to JELCO.

The Appellant's Counsel submitted that the basis of this ground is on page 563 of the Record of Appeal where the Tax Appeals Tribunal in its majority ruling held that:

"... The expenditure incurred by JELCO in respect of air tickets, hotel expenses, per diem and other travel costs does not constitute a management charge due to the Respondent or income under Section 83 of the Income Tax Act..."

The Appellant's Counsel further submitted that the effect of the above ruling is that the Respondent is not liable to pay Withholding Tax and interest on late payments in respect of its payments to JELCO. Counsel submitted that the dispute was whether the monthly sum of 15,000 Euros formed part of the management charge.

The Appellant's Counsel submitted that the monthly sum of 15,000 Euros formed part of the management charge envisaged under Section 83(1) of the Income Tax Act. That Section 87(1) (b) of the Income Tax Act shows that the Parliament did not intend to permit a deduction for any expenditure incurred by a non-resident person in deriving the management charge and as such, any such expenditure must be included in calculating Withholding Tax for the non-resident person.

Counsel prayed that Court find that the monthly sum of 15,000 Euros, being the cost of travel, accommodation and per diem expenses, formed part of the gross amount of the management charge in accordance with Section 83(1) and Section 83(2) of the Income Tax Act and as such, the Appellant was justified in charging and the Respondent is liable to pay Withholding Tax on the sum of 479,615 Euros and interest on late payments in respect of the management charge it paid to JELCO. Counsel cited the case of **Stanley Mining Services (T) Limited -Vs- Commissioner General & Commissioner Income Tax (2004) 2] TLR 22** to support their argument.

In reply, the Respondent's Counsel submitted that the amount of Euro 15,000 was an estimate of what costs would be incurred by JELCO per month in the provision of its management services to the Respondent. That the actual figures as incurred by JELCO were under their agreement with the Respondent. That evidence was indeed provided to the Tribunal showing the air tickets as purchased in Norway and the expensed costs as incurred for the per diems and hotel accommodation expenses by JELCO staff when visiting and staying in Uganda which was not challenged by the Appellant before the Tribunal. The Respondent's Counsel submitted that there is

evidence on record that the figure varied for each month depending on the frequency of travel and longevity of stay in Uganda.

He further submitted that the Tribunal very clearly and correctly ruled that these reimbursable expenses in issue are neither dividends, royalty, natural resource payment nor a management charge and cannot attract tax. That Court upholds the finding of the Tribunal that this cost was not a deduction in as far as it related to a non-resident entity such as JELCO. That the case of **Stanley Mining Services (T) Limited -Vs- Commissioner General & Commissioner Income Tax (2004) 2] TLR 22** was cited by the Appellant out of context because in that case, the taxable monies in issue qualified to be a management charge within the tax laws of Tanzania and the arrangements by that specific taxpayer were different from the tax planning arrangements in this case. Counsel prayed that Court uphold the findings of the Tribunal and dismiss this ground.

DETERMINATION OF COURT

Interpretation of a taxing Act was elaborated in the case of **Siraj Hassan Kajura Versus Uganda Revenue Authority SCCA No. 9 of 2015**, where the Supreme Court cited **Cape Brandy Syndicate Versus Inland Revenue Commissioners [1921] KB 64**, in which Rowlett J, reiterated the cardinal principle that;

> *"In a taxing Act, one has to look at what is clearly said. There is no room for any intendment. There is no equity about the tax. There is no*

presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

Their Lordships further held that;

"The principle propounded in the above case is the literal rule which is to the effect that when words of a statute are clear and unambiguous, they should be given their plain meaning and that Courts should not read into the sections of a taxing statute, words that are not there so as to meet the minds of the legislators…In other words, the fundamental role of the Court is to give force and life to the interpretation of a statute having regard to the language of the statute and the particular facts of the case."

Section 83(1) of the Income Tax Act Cap. 340 as amended provides that a tax is imposed on every non-resident person who derives any dividend, interest, royalty, natural resource payment or management charge from sources in Uganda. Under **Section 120(1) of the Income Tax Act** the person making such payment is required to withhold tax from it. In this regard, I am in agreement with the Tribunal's finding that the reimbursable expenses were not dividends, royalty, natural resource payments leaving management charges in dispute when they stated that ;

"*The Tribunal rules out that the reimbursable expenses were dividends, royalty, natural resource payments leaving management charges in dispute."*

S. 78(b) of the Income Act as amended defines a "*management charge"* as any payment made to any person, other than a payment of employment

income, as consideration for any managerial services, however calculated. The employment income herein was the Euro 35,000 which was paid by the Respondent to JELCO as consideration for the services they were providing. From the submissions, there is no contention regarding this sum. The dispute was whether the monthly sum of 15,000 Euros formed part of the *management charge*.

The Appellant's contention is that the Tax Appeals Tribunal erred when they held that the expenditure incurred by JELCO in respect of air tickets, hotel expenses, per diem and other travel costs does not constitute a management charge due to the Respondent or income under **Section 83 of the Income Tax Act**.

The reimbursed expenses of Euro 15,000 per month were not paid as consideration for services provided by JELCO but rather as reimbursement of expenses already incurred by JELCO in rendering services to the Respondent. As such these expenses cannot be categorized as *management charges.*

S. 87 of the Income Act as amended provides as follows;

> *"(1) the tax imposed on a non-resident person under Sections 83, 84, 85, 86(1) and 86(4) is a final tax on the income on which the tax has been imposed and—*
> *(a) that income is not included in the gross income of the non-resident person who derives the income;*

(b) no deduction is allowed for any expenditure or losses incurred by the non-resident person in deriving that income...'

The record shows evidence of the travel costs, hotel expenses and per diem incurred by JELCO staff. In their undisputed submissions the Respondent stated that the payment of 15,000 Euros to JELCO was a reimbursement of the said expenses.

The import of citing the above provision, **S. 87 of the Income Act (b),** is to highlight the position that no deduction is allowed for any expenditure or losses incurred by the non-resident person in deriving that income.

15,000 Euros to JELCO was a reimbursement of expenses incurred by the non-resident person in deriving income, indeed as stated by the Tribunal, an expense does not become income because it is reimbursable. The 15,000 Euros to JELCO not having been a dividend nor a royalty, natural resource payment nor a management charge but a reimbursement of expenses incurred in deriving income could not attract a tax and the Tribunal therefore rightly found so.

The Appellant was not justified in charging Withholding Tax on the payments of 15,000 Euros made by the Respondent to JELCO. This ground of appeal fails.

Ground 2: The Honourable members of the Tribunal erred in law when they failed to properly evaluate the evidence on record and relied on speculation that it is doubtable that all the payments for the air tickets were sourced in Uganda.

The Appellant's Counsel submitted that the Honorable Members of the Tribunal erred in law when they failed to properly evaluate the evidence on record and relied on speculation that it is doubtable that all the payments for the air tickets were sourced in Uganda. That all the payment for the air tickets was sourced in Uganda since JELCO's expense in respect of the air tickets was subsequently reimbursed by the Respondent, a Ugandan company. Counsel further submitted that premised on **Section 18 of the Tax Appeals Tribunal Act, Cap. 345,** the Respondent had the burden of proving that not all the payment for the air tickets was sourced in Uganda and that the monthly sums of 15,000 Euros paid to JELCO by the Respondent were not a part of the gross amount of the management charge but the burden of proof was shifted to the Appellant. That Court reconsider the evidence adduced before the Honorable Tribunal proving that all the payments for the air tickets were sourced in Uganda and that the Tribunal erred in law when they shifted the burden of proof to the Appellant.

In reply, the Respondent's Counsel submitted that the Tribunal properly evaluated the facts on record and did not engage in any acts of speculation as averred by the Appellant. That it was demonstrated in the evidence on record that all the tickets were procured outside of Uganda - in Norway the home country of JELCO, and were paid for by JELCO and its staff/technical consultants. Counsel further submitted that the Respondent whether before the Tribunal or in this appeal was and is not under a burden to prove that the assessment was excessive because they do not challenge the excessiveness of the assessment but rather the legality of the tax that was imposed on the non- chargeable expenses. That as such no burden was shifted to the Appellant as this was not necessary under the circumstances

of this case. He prayed that this ground of appeal is rejected as it is of no merit.

DETERMINATION OF COURT

The issue in contention under this ground is on page 8 of the Tribunal's majority ruling, wherein it was held that;

> *"...It is not in dispute that the monthly sum of 50,000 Euros paid, by the Respondent to JELCO which constitutes a management charge of 35,000 Euros and, reimbursement expense of 15,000 Euros were derived by a non-resident person from sources in Uganda as envisaged under Section 83 of the Income Tax Act. It is still doubtable that all the payment for the air tickets was sourced in Uganda. The flights originated from abroad, Norway. Such expenses ought to have been removed as income due to the Applicant as it was not sourced in Uganda..."*

According to the above extract, the learned members of the Tribunal were of the view that the reimbursement expense of 15,000 Euros was income derived by a non-resident person from sources in Uganda as envisaged under **Section 83 of the Income Tax Act**.

The issue arises from the doubts raised by the Tribunal as to whether all the payment for the air tickets was sourced in Uganda because the flights originated from Norway. The evidence on record from page 35 – 299 shows that all JELCO's air tickets were procured from Norway and paid for by JELCO.

Appendix 1 of the Agreement Management and Services Agreement entered between JELCO and the Respondent, exhibited at page 468 of the Record of Appeal, provided that JELCO would invoice the Respondent with the travel cost such as air tickets, hotel expenses, per diem and other travel cost incurred by personnel assisting the Respondent, estimated to be on average 15,000 Euros per month. The fact that the said costs were to be invoiced to the Respondent by JELCO shows that JELCO had already paid for them and all that the Respondent was doing was to reimburse JELCO for the expenses incurred therein.

"*Source of income*" is provided for under **Section 79 of the Income Tax Act, Cap. 340 as amended** which provides as follows;

> *"Income is derived in Uganda to the extent to which it is:*
> *(a) derived by—*
> *(i) ...*
> *(ii) a non-resident person in carrying on a business through a branch in Uganda;*
> *(b) ...*
> *(q) a management charge paid by a resident person."*

The question therefore ought to have been whether the reimbursement of costs incurred by the JELCO in Norway amounted to an income derived from Uganda. In my opinion, not at all.

In my analysis of the evidence on record, all the air tickets in issue originated from Norway not Uganda. The learned members of the Tribunal were right in holding that an expense does not become income because it is reimbursable, it still remains an expense which is not taxable. Following the

finding that all JELCO's air tickets were procured from Norway, the learned Tribunal correctly assessed that not all the payments for the air tickets were sourced in Uganda.

The Appellant's Counsel further submitted that the Respondent had the burden of proving that not all the payment for the air tickets was sourced in Uganda and that the monthly sums of 15,000 Euros paid to JELCO by the Respondent were not a part of the gross amount of the management charge.

In reply, the Respondent submitted that they are not under a burden to prove that the assessment was excessive because they do not challenge the excessiveness of the assessment but rather the legality of the tax that was imposed on the non- chargeable expenses.

The burden of proof in proceedings before a Tribunal for review of a taxation decision is provided for under **Section 18 of the Tax Appeals Tribunal Act, Cap. 345** which provides that in a proceeding before a Tribunal for review of a taxation decision, the Applicant has the burden of proving that the assessment is excessive where the taxation decision is an objection decision in relation to an assessment. To understand the background of the TAT Application, we will look at the Respondent's Application to TAT made on 17th November 2016 exhibited at pages 5 – 9 of the Record of proceedings.

In that Application, the Respondent stated that they were objecting to the treatment of the Euro 180,000 as a taxable item since it is a disbursable item. It is therefore evident that the Respondent was not objecting to the excessive assessment but rather the legality of the assessment. In such a case, there is no *excessiveness* to prove but what is to be proved is the evidence of the illegality of the assessment which the Appellant does not dispute having been proven.

In the circumstances therefore, I am inclined to agree with the Respondent's submissions that the Respondent was not under a burden to prove that the assessment was excessive because they do not challenge the excessiveness of the assessment but rather the legality of the tax that was imposed.

The evidence on record shows that the Respondent tendered air tickets, upon the basis of which this Court is convinced that the payment for the air tickets was sourced in Norway and not Uganda. This ground of appeal fails.

Ground 3: The Honorable Members of the Tribunal erred in law when they failed to properly evaluate the evidence on record and ruled that the Appellant was not justified in charging VAT on the Respondent.

The Appellant's counsel submitted that the Honorable Members of the Tribunal erred in law when they failed to properly evaluate the evidence on record and ruled that the Appellant was not justified in charging VAT on the Respondent. Counsel submitted that JELCO, a Norway-based company supplied management services to the Respondent, a Ugandan company, which is a supplier of imported services within the meaning of **Section 4(c) of the Value Added Act** which provides that VAT shall be charged in accordance with the Act on the supply of any imported services by any person. That **Section 5(c) of the VAT Act** provides that the person liable to pay VAT in the case of a supply of imported services, other than an exempt service, is the person receiving the supply of imported services. In this case the Respondent. That a supply of management services is not an exempt import service under Section 20A and the Second Schedule of the VAT Act and as such, the supply is subject to VAT.

Counsel submitted that the Respondent is liable to pay VAT and interest on late payments in respect of the monthly sum 15,000 Euros, being the cost of travel, accommodation and per diem expenses, since the 15,000 Euros formed part of the total consideration paid for the supply of management services.

Counsel further submitted that Sections 4, 5, 18 and 21 of the VAT Act show that the Parliament did not intend to permit a deduction for any expenditure incurred by a non-resident person in deriving the total consideration in respect of a taxable supply and as such, even the value of such expenditures must be included in calculating VAT for the taxpayer.

Counsel cited the case of **Rowe & Maw (A Firm) Versus Commissioners of Customs & Excise (1975) 1 BVC 51** to support their arguments.

Counsel prayed that Court find that the Appellant was justified in charging and the Respondent is liable to pay VAT and interest on late payments in respect of the monthly sum 15,000 Euros. That the Appeal be allowed and the Respondent pays costs of this appeal and the costs of the application before the Tax Appeals Tribunal.

In reply the Respondent's Counsel submitted that the Tribunal was right in holding that the Appellant should not have charged VAT on the Respondent. That the Tribunal found as a fact that the provision of the services - travel (air tickets, accommodation and other related services) – to JELCO and its staff were for services extended by third parties. That the Tribunal rightly found that for the Appellant (Respondent herein) to be charged VAT in

respect of the same expenses would amount to double taxation which would not be tenable under the law. That whereas Section 4(c) of the VAT Act imposes Value Added Tax on the supply of imported services, no imported service was provided by or to the Respondent. That Section 5(c) of the VAT Act is quoted out of context as there is no imported service applicable in this case, the only imported service that is chargeable being for the services for which the Euro 35,000 provided and had all taxes fully paid for.

Counsel also submitted that the case of **Rowe & Maw -Vs- Commissioners of Customs & Excise (1975) I BVC 51** is distinguishable from the case before this Court. Counsel went ahead to submit that in the case before this Court, the air ticket costs were incurred in another country and are being claimed by the foreign entity in Uganda as a taxable/chargeable income. That Court be pleased to dismiss this appeal and the Tax Appeal Tribunal's majority ruling in TAT Application No.11 of 2016 be upheld and the Appellant pay costs of this appeal and the costs of the application before the Tax Appeals Tribunal.

Determination of Court

S.4(c) of the VAT Act provides that VAT shall be charged on the supply of imported services other than an exempt service by any person.

S.1 (j) of the Act defines an import to mean to bring or cause to be brought into Uganda from a foreign country, while **S.1 (t) of the VAT Act** defines services as anything that is not goods or money.

According to Appendix 1 of the Management and Services Agreement, it was agreed that the Respondent was to pay to JELCO a monthly fixed amount of

Euro 35,000 for the services provided. This was a payment being made by the Respondent to JELCO for the services rendered to the Respondent which, in effect, was a payment for the supply of imported services.

S. 20(2) of the VAT Act provides that import of a service is an exempt import if the service would be exempt had it been supplied in Uganda or would be used in the provision of an exempt supply.

S.19 and the Second Schedule of the VAT Act show that a supply of management services is not an exempt import service which means that such supply is subject to VAT.

I am persuaded by the decision in the case of **Bank of Africa Uganda Ltd Versus Uganda Revenue Authority TAT Application No. 62/2018**. In that case, the Honorable Tribunal resolved a sub-issue as to whether the reimbursable expenses incurred by non-resident service providers formed part of the consideration between the Applicants in that case and the non-resident service providers. The reimbursable expenses referred to included travel expenses, per diem and accommodation expenses used in facilitating the work carried out by the non-resident service providers. In explaining how reimbursable expenses are treated for purposes of VAT, the learned Tribunal relied on the decision of **Rowe & Maw -Vs- Commissioners of Customs & Excise (1975) I BVC 51** where the issue for Court's determination was whether the reimbursement of an expense related to travel to Court in connection with the defence of the client formed part of the consideration which the client paid for the service supplied by the solicitor. Bridge J held that;

"...different considerations apply where the goods or services purchased are supplied to the solicitor, as here in the form of travel tickets, to enable him effectively perform the service supplied to his client, in this case to travel to the place where the solicitor's service is required to be performed. In such case, in whatever form the solicitor recovers such expenditure from his client, whether as a separately itemized expense or as part of an inclusive overall fee, Value Added Tax is payable because the payment is part of the consideration which the client pays for the service supplied by the solicitor.'

The Tribunal went ahead to hold that;

"A reimbursement is a supply and is subject to VAT...Applying the above decision to the facts of our case the expenses in question were incurred by the employees of the three non-resident service providers. These expenses were incurred by them to enable them effectively perform the services supplied to the applicant.....For the reasons above, we find that the expenses in question fall within the definition of consideration under S.1(d) of the VAT Act. We accordingly find that the Respondent was justified in charging VAT on these expenses."

The sub-issue in the case of **Bank of Africa Uganda Ltd Versus Uganda Revenue Authority (supra)** is similar to the question at hand which is; *Whether the Appellant was justified in charging VAT on the Respondent for the reimbursed expenses.* In **Bank of Africa Uganda Ltd Versus Uganda Revenue Authority (supra)**, the expenses were clearly reimbursements

because they were incurred by the three non-resident service providers when supplying services to the Applicant.

Appendix 1 provides that JELCO was to invoice the Respondent for the travel costs incurred in assisting the Respondent and the same was to be estimated to be on a monthly average amount to Euro 15,000. This was duly done and the Respondent accordingly reimbursed JELCO for the said expenses.

The Respondent argued that the case of Rowe & Maw -Vs- Commissioners of Customs & Excise is distinguishable because in that case the train/air tickets were bought from and the costs were all incurred in the United Kingdom by the traveler that directly enjoyed the service in the UK and was not clear that VAT had been charged and paid for on the train fare/air tickets by the traveler/firm of solicitors as is the case with JELCO and its staff. In the case of Bank of Africa Uganda Ltd Versus Uganda Revenue Authority (supra), the Applicant's Counsel raised an argument that the 18% VAT rate was applied on a tax base that already contained VAT and that the Respondent therefore applied a tax onto a tax.

I have dutifully addressed myself to the decisions in **Rowe & Maw -Vs- Commissioners of Customs & Excise (1975) I BVC 51** and in **Bank of Africa Uganda Ltd Versus Uganda Revenue Authority (supra**). Whereas the principles enunciated therein are accurately stated by the Appellant, their application in the circumstances of the instant case is misconceived for the following reasons:

In the instant case, the monthly Euro 15,000 was in respect of air tickets purchased from an airline in Norway to Uganda, accommodation and per

diem expenses incurred by JELCO for purposes of aiding the services that JELCO was providing to the Respondent. The refund of Euro 15,000 disbursements falls out of the scope of Sections 1(j) and 4 (c) of the VAT Act as it is not in respect of any imported services that were supplied by JELCO to the Respondent.

The Euro 15,000 would not be subject to VAT for the reasons that VAT should be charged based on the place of supply of goods or services rather than the location of the supplier customer. Even if therefore, the disbursements were in respect of expenses incurred in furtherance of economic activity in Uganda, within the tax jurisdiction of the Appellant, the place of supply of the services, specifically the air tickets, was Norway as was demonstrated at the Tribunal hearing.

It is a cardinal principle of tax law, VAT legislation inclusive like any other, that tax law must be interpreted strictly. In Uganda, the liability to pay VAT is on the taxable person engaged in making taxable supplies of goods or services. VAT therefore ought to have been already charged and collected at the point and time of consumption of the goods and services which in the case of the air tickets this was in Norway and in the case of the hotel accommodation at the respective hotel where the money was expended. *Whereas I am in agreement with Counsel for the Respondent and with the finding of the TAT that it would amount to double taxation, I am also alive to the fact that* in the absence of a legal obligation or framework to withhold VAT, nothing can be brought to bear upon the Respondents to hold them accountable for or require them to collect or pay VAT for services provided by a third party entity.

I accordingly find no justification nor legal basis for the Appellant to have desired to or indeed charged VAT on the Euro 15,000. The Tribunal rightly found that the Appellant is not justified in charging VAT on the Respondent.

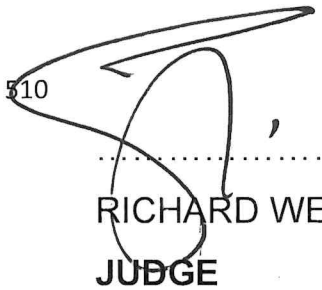
This ground of appeal fails.

The Appeal fails and is disallowed on all Grounds 1, 2 and 3.
Consequently;

1. The Tax Appeals Tribunal's majority Ruling in TAT Application No.11 is upheld.

2. The Appellants shall bear the costs of this Appeal .

Dated at Kampala, this 17th day of February, 2023.



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RICHARD WEJULWABWIRE

JUDGE