

THE REPUBLIC OF UGANDA
IN THE TAX APPEALS TRIBUNAL AT KAMPALA
APPLICATION NO. 17 OF 2017

GUSTRO LIMITED ===== APPLICANT
VERSUS
UGANDA REVENUE AUTHORITY =====RESPONDENT

RULING

This ruling is in respect of an application challenging a Value Added Tax (VAT) assessment of Shs. 55,530,070 by the respondent on the applicant arising from importation of books.

Briefly the facts are: The applicant is a limited company that supplies books to among others educational institutions. The respondent carried out a post clearance audit on the applicant for the period January 2011 to June 2016 and alleged that the latter imported goods which were not exclusively educational materials.

The following are the issues:

1. Whether the importation and or supply of the disputed books and other materials is zero rated or exempt under the VAT law?
2. What remedies are available?

The applicant was represented by Mr. Festo Assimwe Tindyebwa while the respondent by Ms. Diana Kagonyera Mulira and Mr. Ronal Baluku.

The applicant's witness was Mr. Augustine Lusiba, its director, who filed a witness statement. He deponed that since 1989 the applicant is in the business of importing, distributing, wholesale and retail of only educational materials. It imports and deals in textbooks, educational charts, catalogues, dictionaries and reference books for schools and other educational institutions. It gets orders from bookshops, schools, government ministries like Education, universities, colleges, vocational school, nurseries and

kindergartens. The applicant relies on circulars published by the National Curriculum Development Centre. The respondent conducted an audit on the applicant for the period January 2011 to June 2016 and assessed it tax of Shs. 55,530,070. In its report the respondent decided to classify some books and materials imported by the applicant as novels, leisure reading books, self-help and children books. The respondent concluded that the books, charts and catalogues do not fall under the ambit of educational materials as defined in the law and the Florence Agreement. The applicant objected to the assessment. The applicant has been using the customs procedure codes and has also been relying on the Florence Agreement on the importation of educational, scientific and cultural materials.

In cross and re-examination, Mr Augustine Lusiba stated that the applicant does not sell to individuals. He stated that the applicant represents publishers. He said the orders from the schools are based on circulars from the National Curriculum Development Centre.

The respondent called Mr Paul Higenyi who works with its Customs Audit division as its witness. The respondent carried out an audit on the applicant which purportedly revealed that the applicant had declared some books as being VAT exempt whereas they were not. It issued an assessment of Shs. 55,530,070 on the applicant. The applicant objected to the assessment which was disallowed.

When the witness was asked by the Tribunal he admitted that he had not read the books imported by the applicant. On the criteria used, he said the respondent looks at the exclusivity which he did not clarify. He said the respondent also looks at the authors. The respondent also looks at where the client sold the books.

In its submission, the applicant submitted that S. 114(2) of the East African Community Customs Management Act (EACCMA) exempts the importation of educational materials under the Florence Agreement from duty. The applicant submitted that the books it imported and sold to educational institutions for their exclusive use are educational materials and therefore not taxable.

The applicant cited item 17 of Part B of the Fifth Schedule to EACCMA which exempts education materials and articles specified in the Florence Agreement. The applicant submitted that the Florence Agreement is one on the importation of educational, scientific and cultural materials that came into force on 21st May 1952. It is an agreement between contracting states to facilitate the free exchange of ideas and knowledge. It was adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organisation (UNESCO). It was ratified and domesticated in the 5th Schedule of the EACCMA.

The applicant submitted that Article 1 of the Florence Agreement provided for exemption of books, publications and documents listed in annex A to the Agreement. The annexes to the agreement expound on what comprises books, publications and documents. These include printed books, newspapers and periodicals, books and documents produced by duplicating processes other than printing, publications whose purpose is to stimulate study, catalogues of books being offered for sale, geographical maps and charts. The applicant submitted that its managing director testified that the company only imports books which it sells to schools. It submitted that the educational materials imported and sold to schools fall within the ambit of the 5th Schedule of the EACCMA and the Florence Agreement.

The applicant further submitted that the respondent in its objection decision relied on the definition of the education materials in the Value Added Tax (VAT) Act. It contended that its tax arose out of a customs post clearance audit and therefore the EACCMA is applicable. The applicant submitted that therefore the interpretation of the VAT Act does not apply. S. 24 of the VAT Act provides for a schedule where item 1 of the Schedule Paragraph 4(d) provides for the supply of educational materials as exempt. Paragraph 4(a) defines educational materials specified in paragraph 2 of the Second Schedule to this Act. Paragraph 2(a) states that educational services means education provided by a school, technical college or university or institution established for the promotion of adult education etc.

In the Practice Note No. 1 of 2017 which expounded the definition of education materials the Commissioner General states that therefore educational materials for the purposes of the VAT Act are those materials used and are suitable for use only in educational establishments or institutions which are listed in paragraph 2(a) of the Second Schedule to the VAT Act. The applicant submitted that the Practice Note does not change the EACCMA.

The applicant submitted that the respondent's interpretation in the audit report of 27th October 2016 that storytelling books like novels, leisure reading books, self-help books and children books do not comprise educational materials is wrong. The applicant's managing director confirmed that it sold books to educational institutions. The applicant submitted that once books are bought by an education institution they can only be for education.

The applicant submitted that learning in an education institution does not stop at text books. It also comprises reading from library. Where self-help books are utilised it is part of learning. Novels and other books are instructional materials for students in learning, reading, comprehension, English speaking and expression in the language of learning. It therefore submitted that where educational books have been bought it is immaterial that they have dual purposes.

The applicant submitted that education is the process of facilitating learning, or the acquisition of knowledge, skills, values, beliefs and habits. Education materials include storytelling, discussion, teaching. The applicant cited that Education (Pre-Primary, Primary and Post-Primary) Act no. 13 of 2008 which consolidates the existing law relating to the development and regulation of education and training in Uganda. The applicant stated the policy for education, the categories of education institutions, levels of education and the curriculum for education. The applicant concluded that the education materials required for such a robust education curriculum is not just text books. The applicant submitted that the inadequate criteria of the respondent limited the scope of books to the respondent's knowledge.

The applicant prayed that the assessment of Shs. 55,530,070 be declared incorrect and unlawful. It should be vacated. It prayed for the refund of 30% tax paid and for general damages.

The respondent submitted that it carried an audit on the applicant which revealed that the latter imported books where it declared some books as exclusively educational materials whereas they were not. On the 9th October 2017 the respondent communicated to the applicant that its books were of dual purpose which disqualifies them from being used only in public libraries and specialised educational establishments.

The applicant submitted that S. 24 of the VAT Act provides that the rate of tax imposed on taxable supplies specified in the third schedule is zero. Under Paragraph 1(d) of the third schedule the supply of educational materials is a zero rated supply.

The respondent contended that the applicant misused Custom Procedure Code (CPC) 472. The respondent argued that VAT is solely and squarely provided under the VAT Act. The respondent submitted that the EACCMA was enacted to make provisions for the management and administration of customs and related matters, while the VAT Act was enacted to provide for the imposition and collection of VAT and for other purposes connected to the tax. The respondent further submitted that import VAT may be referred to under the EACCMA however where it is not defined reference has to be made to the actual statute itself. The respondent contended that the Florence Agreement is not applicable to the case at all.

The respondent argued that the applicant's attempts to rely on letters issued by the ministries are inconsequential considering that they cannot override the provisions of a statute. The respondent also submitted that the applicant's reliance that the tax in dispute is on importation and not a supply does not apply. The VAT being charged is on a supply.

The respondent submitted that the goods being charged tax are those the applicant had failed to show that they had been supplied to specifically educational institutions. The respondent also submitted that the National Curriculum Development Centre Act and Education Acts cited by the applicant are irrelevant considering that the VAT law is clear.

In reply to the respondent's submission, the applicant reiterated that the matter before the Tribunal concerns import duty on goods imported by the applicant which arose from a customs post clearance audit carried out by the respondent. The applicant cited S. 20 of the VAT Act which defines exempt import of goods to include goods that are exempt from customs duty under the 5th Schedule of the EACCMA. Under S. 2 of the EACCMA import duties are defined as any customs duties and other charges levied on imported goods. Item 17 of Part B of the fifth Schedule provides that education materials are exempt from import duty. The applicant reiterated its position that the issues before the Tribunal concerns educational materials imported by the applicant.

Having listened to the evidence and read the submissions of the parties the Tribunal rules as hereunder.

It is not in dispute that the applicant imports books for sale. What is in dispute is whether the said books attract VAT. Some books imported were disputed by the respondent as not being exempt from VAT. The list of books that are in dispute is listed in exhibit AE2. A perusal of the list shows that they are mostly leisure and literature books. Some of the books are classical novels such as "Tom Sawyer", "Lord of the Flies", "Huckleberry Finn", "Around the world in 80 days", "King Solomon's mine", "Jane Eyre", general knowledge books and other story books including those for children. What is clear is that they are not text books for standard subjects in educational establishments. After importing them an audit carried out by the respondent for the period January 2011 to June 2016 alleged that the books imported were not exclusively education materials and an assessment of Shs 55,530,070 was raised as VAT payable.

The law concerning VAT on goods is set out in the VAT Act. S. 4 of the VAT Act provides that a tax known as value added tax (VAT) shall be charged in accordance with this Act on:

- “(a) every taxable supply made by a taxable person;
- (b) every import of goods other than an exempt import; and
- (c) the supply of imported services, other than an exempt service, by any person.”

S.4(c) is not applicable to this dispute as the applicant imported books which are not a service. This leaves two remaining instances where VAT on goods is charged as being applicable namely where there is a taxable supply and where there is an import of goods. Under S. 4 (a) and (b) of the Act if one imports goods and sells them that person would be liable to pay VAT twice. There is VAT payable on import and also on sale or supply. The issue would revolve around: “Did the applicant make a taxable import and supply or were they exempt import or both or neither?”

The applicant contends that the books it imported were VAT exempt. S. 20 of the VAT act provides for an exempt import. S. 20 of the VAT Act reads:

“An import of goods is an exempt import if the goods-

- (a) are exempt from custom duty under the Fifth Schedule of the East African Community Customs Management Act, 2004...
- (b) would be exempt had they been supplied in Uganda.”

S. 20 of the VAT Act envisages two situations where there is an exempt import. The first is under the EACCMA while the second one is where there is a supply in Uganda. S. 10 of the VAT Act provides that a supply of goods means any arrangement under which the owner of the goods parts or will part with possession of the goods, including a lease or an agreement of sale and purchase.

S. 19 (1) of the VAT Act provides that a supply of goods is an exempt supply if it is specified in the Second Schedule. The Second Schedule Paragraph 1(g) provides that a supply is exempt for purposes of S. 19 if it is a supply of educational services. Paragraph 2 (a) of the Schedule provides that educational service means education provided by:

- “(i) a pre-primary, primary, or secondary school,

- (ii) a technical college or university,
- (iii) an institution established for the promotion of adult education, vocational training, technical education, or the education or training of physical or mentally handicapped persons.”

However Paragraph 1 of the Second Schedule deals with a supply of educational services. A supply of books or goods does not amount to a supply of educational services. It is not a service. The education has to be provided by a school, a college or an institution. When one supplies books to the aforesaid one is not providing education. A perusal of the said Second Schedule does not show any instance where a supply of educational books is an exempt supply. Hence a supply or sale of books under the VAT Act of imported a books is not an exempt supply. This should not be confused with the import of books. By supply we are referring to retail and or wholesale trade after import.

However the Third Schedule Paragraph 1(d) provides that a supply of educational materials should be deemed to be a zero-rated supply under S. 24(4) of the Act. S. 24(4) of the VAT Act provides that the rate of tax imposed on taxable supplies specified in the Third Schedule is zero. This applicant imported books and other items. The question is do these qualify to be considered educational materials?

Paragraph 4(a) of the Third Schedule defines educational materials to mean:

“materials, whether printed or audio, suitable for use only in public libraries and educational establishments specified in paragraph 2 of the Second Schedule to this Act.”

Paragraph 4(a) is clear. It states the books imported should be “suitable for use only in public libraries and educational establishments”. The word ‘only’ limits the application of the books to public libraries and educational establishments but not the functionality of the books. The Act used the word ‘public’ library as opposed to ‘private library’. *Black’s Law Dictionary* 8th Edition p. 1264 defines ‘public’ to mean “the people of a nation or community as a whole”. Private is defined by the same dictionary at p. 1233 as “Relating or belonging to an individual as opposed to public or the government”. A public library is different from a private one. One should be able to find all sorts of books in a public library. This is because the public consists of people with diverse interests. Any member of the public should be able to find a book suitable to what he or she

needs to read in a public library. The Paragraph mentions educational establishments specified in paragraph 2 of the Second Schedule. Books in educational establishments should be educational, for instance text books. These should be used in pre-primary, primary or secondary schools: a technical college or university; an institution established for adult education, vocational training, technical college. However books in a public library are not limited to textbooks and educational ones. These can include leisure books, general knowledge and any book of interest to a member of public.

The only requirement is that books should be suitable for use. It seems the parties omitted to consider the importance of the word “suitable”. The omission to include it when interpreting the law is reading into the law what is not there. In *Cape Brandy Syndicate v Inland Revenue Commissioners* [1921] KB 64 the court stated

“It simply means that in a taxing Act one has to look merely at what is clearly said. There is no room for intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing to be read in, nothing to be implied. One can only look fairly at the language used.”

The Tribunal has already stated that a perusal of the books imported by the applicant shows that some of them are classical novels while others are for general knowledge and self-help. The Act does not mention what amount to a book being suitable for use only in a public library or educational establishments. *Oxford Advanced Learner's Dictionary* 6th Edition p. 1199 defines ‘suitable’ to mean “right or appropriate for a particular purpose or occasion”. So the question arising should be: are the books supplied right or appropriate for use only in public libraries and educational institutions? This use of the word ‘suitable’ would serve only to exclude books that may be offensive such as pornography, seditious, those that promote violence, immorality, sectarianism or other books not appropriate for public consumption or for the consumption of students and teachers or lecturers in educational institutions.

The respondent objected to the books being suitable for use only in public libraries or educational institutions because they serve both educational and leisure purposes. The fact that the books may be for dual purposes does not stop them from being suitable for use only in a public library or educational establishments. Public libraries are known to

contain all types of book including novels, leisure books, general knowledge books. The Act does not provide for the dual purpose test. There is no evidence to show that public libraries and educational establishments do not accept books that are for dual purposes. There is no evidence adduced to show that the books imported by the applicant are not suitable for use in public libraries or educational establishments.

The respondent contended that there is no evidence by the applicant that it sold the books to public libraries and educational institutions. There is no requirement that the books should have been sold to public libraries and educational establishments. Paragraph 4 clearly reads the books should be “suitable for use only” and not “for sale only” in or to public libraries and not educational institutions. One cannot substitute the word “suitable” with “sale”. The use of the word ‘suitable’ does not mean that books have to be sold to public libraries or educational institutions only. Inserting requirements that are not provided for by the law is a distortion of the law. The Tribunal does not think it was the intention of the legislature to limit the application of VAT to the sale of books to only public libraries and educational establishments. If the Act had intended to do so it should have clearly stated so. The Act clearly provided that the books should be suitable for use only in public libraries and educational establishments meaning that they can still be sold to members of the public and attract zero VAT as long as they are suitable as stated. Therefore the Tribunal holds that where there is a supply of books, that are suitable for use only in public libraries and educational establishments, whether to public libraries, educational establishments, government or private members of the public the said supply attracts zero rate VAT.

Coming back to VAT on the import of books, S. 20 of the VAT Act provides for VAT exemption of goods by virtue of importation under the Fifth Schedule of the EACCMA. Item 17 of Part B of The Fifth Schedule of the EACCMA provides exemption for educational articles and materials as specified in the Florence Agreement. The Florence Agreement is not attached to the Schedule nor to the Act.

The Florence Agreement is also known as the Agreement on the Importation of Educational, Scientific and Cultural materials. It was drafted by the United Nations

Educational, Scientific and Cultural Organisation (UNESCO). The agreement was approved by the General Conference of UNESCO at its fifth session. It was adopted in Florence, Italy hence the name of the Agreement. It came into force on 21st May 1952. In its introduction it states that “It was designed to abolish customs and remove trade barriers which impede exchanges not only of visual and auditory materials.” It provides for the free treatment and reduction of trade barriers for the imports of educational, scientific and cultural materials with the aim of facilitating the international free flow of ideas and information.

On the 26th November 1976, a Protocol to the Agreement on the importation of Educational, Scientific and Cultural Materials was concluded in Nairobi, Kenya known as the Nairobi Protocol which expanded the types of materials covered by the Florence Agreement. Uganda is a signatory to the Protocol and the Florence Agreement was domesticated by Uganda in the 5th Schedule of the EACCMA. Paragraph 3 of the Protocol stated that contracting states undertake not to levy on the materials listed below any internal taxes or other internal charges of any kind, imposed at the time of importation or subsequently. VAT is an internal charge. It is in line with the said paragraph that S. 114(2) of EACCMA provides customs duty shall not be charged on the goods listed in Part B of the Fifth Schedule. Uganda as a signatory to the Protocol should exempt any VAT imposed on the types of material covered by it not only at importation but also subsequently.

The Florence Agreement provides for a wide range for duty free admission of items including books, publications and documents. Article 1 of the Agreement provides that:

“The contracting States undertake not to apply custom duties or other charges on, or in connexion with, the importation of:

(a) Book, publications and documents, listed in Annex A to this Agreement;”

Annex A provides that the books, publication and documents include printed books, newspapers and periodicals, books and documents produced by duplicating processes other than printing, publications whose purpose is to stimulate study, catalogues of books being offered for sale, geographical maps and charts. The list is endless.

Under the Protocol, Paragraph 3(a) provides that there should be no levy on books and publications consigned to libraries referred to in paragraph 5 of the Protocol. Paragraph 5 of the Protocol provides:

- “(a) Books and publications consigned to libraries serving the public interests include the following:
- (i) National libraries and other major research libraries;
 - (ii) General and specialised academic libraries, including university libraries, college libraries, institute libraries and university extra-mural libraries,;
 - (iii) Public libraries;
 - (iv) School libraries,
 - (v) Special libraries serving a group of readers who form an entity, having particular and identifiable subjects of interest, such as government libraries, public authorities libraries, industrial libraries and libraries of professional bodies;
 - (vi) Libraries for the handicapped and for readers who are unable to move around, such as libraries for blind, hospital libraries and prison libraries;
 - (vii) Music libraries groups, including record libraries;
- (b) Books adopted or recommended as textbooks in higher educational establishments and imported by such establishments;
- (c) Books in foreign languages, with the exception of books in the principal native language or languages of the importing country;
- (d) Films, slides, video-tapes and sound recording of an educational, scientific or cultural nature, imported by organisations approved by the competent authorities of the importing country for the purpose of duty-free entry of these types of articles.

Under the Florence Agreement and its Protocol the list of educational materials liable to be VAT exempt on importation is wider than those that attract zero tax when supplied or sold domestically under the VAT Act

However what is important to note is that the books imported by the applicant fall within the items stated in the annex to the Florence Agreement and Paragraph 3 of its Protocol. The books imported by the applicant include those that are printed books and whose purpose is to stimulate study. Therefore the said books when imported do not attract custom duty in the form of VAT. The books and other educational items imported by the applicant are therefore exempt from VAT at the time of importation. The

respondent's assessment of VAT of Shs. 55,530,070 for the books imported by the applicant is therefore misconceived and set aside.

The applicant is also not liable for any VAT at the time of sale or supply of the books suitable for use only in public libraries or educational institutions whether sold to individual members of the public or sold to public libraries or educational institutions. They attract zero rate VAT.

A nation that taxes books that are critical in the improvement of its citizens' reading skills aims at promoting illiteracy. In a county like Uganda that has illiteracy problems it would be difficult to comprehend a law that discourages the supply of books aimed at improving the reading skills of its citizens.

In the circumstance this application is allowed with costs.

Dated at Kampala this day of 2018.

DR. ASA MUGENYI

DR. STEPHEN AKABWAY

MR. GEORGE MUGERWA