THE REPUBLIC OF UGANDA

IN THE TAX APEPALS TRIBUNAL AT KAMPALA

APPLICATION NO. 28 OF 2018

ADVENTCITY LIMITED……...APPLICANT

VERSUS

UGANDA REVENUE AUTHORITY ……..RESPONDENT

BEFORE: DR. ASA MUGENYI, MR. GEORGE MUGERWA, MS. CHRISTINE KATWE

RULING

This ruling is in respect of an application disallowing the applicant's claim of input tax of Shs 63,647,064 and the issuance of Value Added Tax (VAT) assessment of Shs. 223,056,932 by the respondent.

The applicant is company engaged in printing in Uganda. In October 2019, the respondent carried an audit on it and raised a VAT assessment of Shs 223,056,932 on the ground that the applicant's input tax claims were based on fictitious transactions with blacklisted companies.

The following issues arise

1. Is the applicant entitled to the input tax credit disallowed by the respondent?
2. Whether the applicant is liable to pay the tax assessed?
3. What remedies are available to the parties?

The applicant was represented by Ms. Damalie Tibugwisa while the respondent by Mr. Donald Bakashaba and Ms. Diana Prida Praff.

This is an application disputing a VAT assessment of Shs 223,056,932 by the respondent after the refusal to allow the applicant's input tax credit.

The applicant's witness, Mr. John Karumuna, its Managing Director testified that the applicant is VAT registered and its Tax Identification Number is 1000071933. In October 2019, the respondent raised VAT assessments for the period February 2016, April and May 2017 which the applicant objected to on 13th March 2019. The respondent upheld its objection on the ground that the applicant's input tax claims were from fictitious transactions with blacklisted fictitious companies. He testified that as a policy the applicant, before entering in any transaction with a supplier, first establishes whether the supplier is duly registered with the respondent. The applicant procures from various suppliers and does not need to establish their physical addresses because the suppliers always delivered directly to its premises.

The respondent's witness, Mr. Paul Kavuma, an officer in its Tax Investigation Department testified that through investigations and field reports, the respondent established that there were several entities created for the purpose of supplying fictitious invoices. The respondent communicated to the public through media and asked taxpayers to amend their returns to remove any wrong/fictitious declarations between January and March 2018 which was an amnesty period. On 25th May 2018, a list of blacklisted companies was published in the Daily Monitor Newspaper and the respondent's website. On 8th June 2019, the respondent published a list of taxpayers in the New Vision with queried transactions and requested for certain documentation. On 21st June 2018, the applicant provided copies of tax invoices and delivery notes of 46 companies. For Patrol Enterprises limited, it only provided copies of invoices and delivery notes on 13th July 2018 after several reminders. The applicant never provided any documentation supporting transactions with Mrs. Lukia Kayongo Nakiwolo especially regarding invoices No's 404,405 and 408 amounting to Shs 111,875,000 with an input VAT of Shs 20,137,500. Mrs Lukia Kayongo Nakiwolo did however declare them in her output VAT return.

The witness further testified that on reviewing the transactions between the applicant and Patrol Enterprises Ltd, he found that Invoice no 433 had a grand total of Shs 34,582,940 which was different from the filed return of Shs 24,582,940. To him, this was

forgery. Later invoices were issued on earlier dates and earlier invoices issued on later dates thus: invoice no. 318 was issued on 6th August 2016 while invoice no. 280 was issued on 12th September 2016 and invoice no. 312 on 20th August 2016. The applicant did not provide proof of payment or usage of the queried transactions; even the documents provided were suspicious. For Mrs. Lukia Kayongo Nakiwolo, the witness testified that invoice no. 404 was issued on 12th February 2016, invoice no. 405 on 14th February 2016 while invoice no. 408 was issued on 17th February 2016.The witness doubted whether these transactions ever took place.

The applicant submitted that input tax credits is provided for in S. 28 of the VAT Act which provides that credit is allowed to a taxable person for tax payable in respect of all taxable supplies made to that person during the tax period. The applicant applied for input tax credit which the respondent disallowed on the ground that its claims were from fictitious transactions with blacklisted fictitious companies. It submitted that Mr. Paul Kavuma, the respondent's witness testified that Patrol Enterprise Ltd and Mrs. Lukia Kayongo Nakiwolo, had physical addresses. The transactions with the companies in issues were in 2016 whereas the blacklisting was later in 2018 as indicated by the public notice exhibited. It was only Patrol Enterprises Ltd which was blacklisted. Mrs. Lukia Kayongo Nakiwolo was not a blacklisted. Therefore there was no justification in disallowing input tax credit arising from transactions with Mrs. Lukia Kayongo Nakiwolo. Thirdly, the applicant was not aware of the companies blacklisted and it cannot be blamed for their wrong doings. The applicant had no connection with the ownership or management of the said companies. The applicant contended that the suppliers in issue were VAT registered and had Tax Identification Numbers and were filing returns.

The applicant explained the inconsistencies in the invoices and VAT returns. The applicant submitted that the respondent rejected its input tax credit because it provided only tax invoices and delivery notes. The applicant argued that the respondent should cross check with the documents in its possession from Patrol Enterprises Ltd to verify the information given. The applicant cited **Target Well Control Uganda Limited v Commissioner General, Uganda Revenue Authority,** HCCS No.751 of 2015 where

court observed; “it is the defendant who has access to the books of businessmen in the country. They are the ones who find out returns that are recklessly or intentionally made to deceive”. In conclusion, the applicant submitted that the respondent had no basis for disallowing its invoices

On the second issue, the applicant submitted that the respondent raised penal tax of Shs. 159,234,910 under Sections 65(3) and (6) of the VAT Act which provide that where a person knowingly or recklessly makes a statement to an officer of Uganda Revenue Authority that is false or misleading in a material particular, that person is liable to pay a penal tax equal to double the amount of excess. The applicant argued that its failure to pay the tax was because it was not due. Secondly, according to the interpretation of “Penal tax equal to double the amount of the excess”, the penal tax could not be applied on the entire sum, but only on the sum found to be the excess of what was initially assessed. But the respondent doubled the tax assessed. Thirdly, it should not be the respondent to determine whether the applicant knowingly or recklessly made a misleading statement. This is contrary to the rules of natural justice and the right to a fair hearing granted under the constitution. The applicant argued that it should have appeared before an impartial and independent tribunal/court for fair adjudication. It cited **Sande Pande Ndimwibo v Uganda Revenue Authority** HCCS No. 424 of 2012 where court held that penal tax cannot be imposed without a conviction save for provisions of subsection 13. The right to fair hearing is enshrined in Articles 28 and 44(c) of the Constitution of Uganda. The applicant contended that there had not been any prosecution of the blacklisted companies.

In reply, the respondent contended that the documents the applicant availed in respect of transactions with Patrol Enterprises Ltd and Mrs. Lukia Kayongo Nakiwolo had inconsistencies and could not prove the alleged transactions. Accordingly it assessed the applicant VAT of Shs 223,056,932 due to disallowed fictitious purchases. The respondent argued that under S. 18 of the Tax Appeals Tribunals Act, the burden of proof is on the applicant. It cited **Red Concepts Ltd Vs Uganda Revenue Authority**, TAT No, 36 of 2018 where the tribunal held that the standard of proof as in civil cases is

on a balance of probabilities and the burden of proof is on the applicant to prove that those transactions are not fictitious. The respondent contended that the applicant wrongly claimed input tax credit based on fictitious transactions between it and Patrol Enterprises Ltd and with Mrs. Lukia Kayongo Nakiwolo. The applicant was involved in invoice trading which is VAT fraud. It the above case the Tribunal described invoice trading as setting up companies for one to claim VAT input by issuing fictitious invoices.

The respondent argued that S. 29(I) of the VAT Act requires a taxable person making a taxable supply to any person to provide that other person at the time of supply with an original tax invoice for the supply. S. 29(5) provides that a person who has not received a tax invoice as required may request a person who has supplied goods or services to him or her to provide a tax invoice in respect of the supply. The respondent cited the **Red Concept Ltd v URA** (supra) where the Tribunal stated that Paragraph 2 of the Fourth Schedule requires an invoice to include: a) The commercial name, address, place of business and the Taxpayer Identification Number and the VAT registration number of the recipient of a taxable supply, b) The quantity or volume of the goods and services supplied. The respondent also cited **Gurcharan Singh c/o Smethwick Carpet Furniture Warehouse v The Commissioner for Her Majesty's Revenue and Customs** (2016) UKFTT 643TC where the Tribunal gave the following requirements: 1) The applicant must have paid VAT in respect of taxable supplies (S. 24 VAT, Act) 2) The applicant must hold a valid VAT invoice issued by the person who made the supplies (Regulation 29(2)(a)VAT Rules) or 3) The applicant must provide such other evidence of the VAT he claims to have paid as HMRC may consider acceptable (the proviso to 29(2)VATR).

The respondent contended that S. 15 of Tax Procedure Code Act 2014 and Regulations 8 of the VAT Regulations 1996 requires a taxpayer with a taxable turnover exceeding Shs 100 million per annum to keep the following records: 1) orders and delivery notes, 2) relevant business correspondence, 3) appointment and job cards, 4) annual accounts including trading, profit and loss accounts and balance sheets, 5) bank statements and pay in slips. Considering the above, the respondent specifically examined Patrol

Enterprises Ltd and established it was issuing fictitious invoices and was blacklisted. The blacklist was published on 25th May 2018, another list of blacklisted companies for the period 2013-2017, which included the applicant on 8th June18.

The respondent submitted that the applicant produced photocopies of tax invoices and delivery notes for Patrol Enterprises Ltd. Upon review of the said documentation, it found that of the 8 invoices provided 4 had not been declared by Patrol Enterprises Ltd. Invoice 433 had as sum of Shs 34,582,940 while the filed return had 24,582,940.The applicant explained it as a mistake. The respondent's witness stated that a taxpayer does to reduce income tax liability. Invoices with higher numbers were: Invoice 318 of 6th August 2016, Invoice 280 of 12th September 2016, Invoice 312 of 20th August 2016. The applicant did not provide proof of payment or usage of queried supplies. Some of the invoices like invoice no.312 did not indicate the quantity of goods supplied. In some instances, where the quantity was indicated, the total amount did not tally e.g. invoice no 426 with a quantity of 489 at Shs 82.0000 each showed a total of Shs 39,864,000 instead of 39,852,000. The applicant also provided photocopies instead of originals as required by law. The respondent submitted that the applicant did not provide any documentation in support of the transactions with Mrs. Lukiya Kayongo Nakiwolo. It doubted whether transactions with Mrs. Lukia Kayongo Nakiwolo ever took place.

The respondent submitted that S. 18(4) of the VAT Act provides that a supply is made for consideration if the supplier directly or indirectly receives payments for the supply whether from the person supplied or any other person including any payment wholly or partly in money or in kind. The respondent submitted that the applicant failed to prove that the supplies were made to it and that the consideration was paid or that they were used in its business. The applicant failed to prove that the transactions ever took place. Secondly, the inconsistences in the documentation provided and finally the findings of investigations.

The respondent also contended that on checking the given address of both Patrol Enterprises Ltd and Mrs. Lukia Kayongo Nakiwolo, they could not be located. It cited the

case of **Red Concept Ltd v Uganda Revenue Authority** (supra) where the Tribunal held there is no evidence that was adduced to show that Boone existed. This omission is fatal. In the absence of such evidence one cannot rule out fraud and fictitious transactions or invoice trading. In respect of transactions with Mrs. Lukia Kayongo Nakiwolo, the respondent submitted that the applicant never provided any document or proof of any transaction with her. The respondent again cited the above case where the tribunal observed: "Where a statute requires one to give information or other particulars, the said information should be accurate to enable public authorities act on it. If information is false or misleading the Tribunal cannot turn a blind eye to it as this would amount to condoning an illegality and perpetrating fraud"

On whether the penal tax was imposed properly, the respondent cited S. 65(3) of the VAT Act and submitted that the assessment was raised on 8th October 2018 and is still outstanding. For penal tax under S. 65(6) the respondent contended that the applicant failed to prove the existence of the queried transaction for Patrol Enterprises Ltd, the documentation fell short and for Lukia Kayongo Nakiwolo no documentation was provided. The respondent further contended that S. 65(6) does not create an offence but refers to a civil infraction and the standard of proof required thereof on a balance of probability. If further argued that the imposition of penal tax under the subsection does not call for a trial or pronouncement of guilt; it is sufficient that administrative steps and actions are followed in reaching the decision to impose penalty. The respondent finally submitted that the penal tax was properly charged because first investigations revealed fictitious invoices issued and secondly, the applicant failed to discharge its burden that the assessment should not have been made or that the transactions queried took place.

Having listened to the evidence adduced and considered the submissions by the parties this is the ruling of the Tribunal.

The respondent disallowed the applicant's input tax credit claim and issued a VAT assessment of Shs 223,056,932 on grounds that claim was based on fictitious transactions with blacklisted fictitious companies. The transactions in question were with

Patrol Enterprises Limited and Ms. Lukia Kayongo Nakiwolo. The dispute between the parties relates to documentation.

Input Tax is defined in section A1(c) of the VAT Act to mean a tax paid or payable in respect of a taxable supply to or an import of goods or services by a taxable person. The basis on the applicant's claim for input VAT lies on the invoices and other documentation it presented to the respondent. S. 29(1) of the VAT Act provides that a taxable person making a taxable supply to any person shall provide that other person at the time of supply, with an original invoice for the supply. S. 28(8) provides that a tax invoice is an invoice containing the particulars specified in Section 2 of the Fourth Schedule which provides:

> "2. A tax invoice as required by Section 29 shall, unless the Commissioner General provides otherwise, contain the following particulars –
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> (a) the words "tax invoice" written in a prominent place;
>
> (b) the commercial name, address, place of business, and the taxable payer identification and VAT registration numbers of the taxable person making the supply;
>
> (c) the commercial name, address, place of business, and the taxpayer identification number and VAT registration number of the recipient of the taxable supply;
>
> (d) the individualized serial number and the date on the tax invoice is issued;
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> (e) a description of the goods or services supplied and the date on which the supply is made;
>
> (f) the quantity or volume of the goods or services supplied;
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> (g) the rate of tax for each category of goods and services described in the invoice; and
>
> (h) either –
>
> (i) the total amount of the tax charged, the consideration for the supply exclusive of tax and the consideration inclusive of tax; or
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> (ii) where the amount of tax charged is calculated under Section24 (2), the consideration for the supply, a statement that it includes a charge in respect of the tax and the rate at which the tax was charged."

Therefore the Tribunal has to look at the documentation presented by the applicant to the respondent. It has to compare the said documentation with the returns.

The tribunal will first examine the transactions with Patrol Enterprises Limited. The respondent disallowed the claims of the applicant for supplies by Patrol Enterprises Limited on the ground that it was a blacklisted company. The respondent contended that there were several discrepancies in the invoices and returns. The VAT on the invoices adduced by the respondent in respect of Patrol Enterprises are Invoice 281 of 12th September 2016 of Shs. 8,598,600, 318 of Shs. 3,799,980, Invoice 369 of Shs. 900,000,, Invoice 416 of Shs. 6,000,120, Invoice 422 of shs. 7,824,600 dated 13th June 2016, Invoice 426 of Shs. 7,175,520 and invoice 433 of Shs. 3,749,940 of 22nd July 2016. The applicant did not tender the payments of VAT or receipts thereof and the VAT returns. The delivery notes were not adduced in evidence. It is difficult for the Tribunal to say that the transactions were genuine when the relevant documentation is missing.

The applicant contended that the said documents were with the respondent. It ought to have kept in copies. If it needed any documentation from the respondent during the hearing, it ought to have applied for interrogatories under the Civil Procedure Rules which was not done. Therefore in the absence of the relevant documentation the Tribunal is not in a position to ascertain whether the applicant is entitled to input VAT credit in respect of transactions with Patrol Enterprises Limited.

In respect of Ms. Lukia Kayongo Nakiwolo, no documentation was adduced in respect of the transactions. It is difficult for the Tribunal to state that the documents did not have the address and details of the recipient and were filled with inconsistences. It is also difficult to determine whether the invoices were fictitious when they have not been tendered in as evidence. The Tribunal agrees with the respondent that although Mrs. Lukia Kayongo Nakiwolo included the transactions in the VAT returns, it is the responsibility of the applicant to claim the input tax credit by proving that it actually paid the tax.

On rejecting the applicant's claim for input tax credit, the respondent issued it with an assessment of Shs. 223,056,932. During the hearing the applicant did not challenge the assessment. S. 18 of the Tax Appeals Tribunal Act places the burden of proof on the applicant to show that an assessment is excessive or it ought to have been made differently.

The applicant contended that the respondent under S. 65(3) of the VAT Act, slapped a penal tax of Shs 159,234,910 on it. S. 65(3) reads:

> "A person who fails to pay tax imposed under this Act on or before the due date is liable to a penal tax on the unpaid tax at a rate specified in the Fifth Schedule for the unpaid tax which is outstanding"

The rate is 2% per month compounded. The Tribunal has already upheld the assessment. The applicant's admission that it had not paid any tax makes S. 65(3) applicable

The applicant argued that its failure to pay the tax was because it did not think that there was any tax due. The tax assessed is Shs 63,822,022 and the penal tax is Shs 159,234,910. The tribunal finds that the bone of contention is S. 65(6) which stipulates

> "Where a person knowingly or recklessly:
>
> a) Makes a statement on declaration to an official of the Uganda Revenue Authority that is false or misleading in a material factor or
> b) Omits from a statement made to an officer of the Uganda Revenue Authority any matter or a thing without which the statement is misleading in a material particular; and
>
> i. the tax properly payable by the person exceeds the tax that was assessed as payable based on the false or misleading information.
> ii. the amount of the refund claimed was false, or
> iii. the person submitted a return with an incorrect offset claim"

That a person is liable to pay penal tax equal to double the amount of excess tax, refund or offset claim. The applicant argued that the determination of whether the person has knowingly or recklessly made a statement or declaration should not be left to the respondent to act as a prosecutor and Judge at the same time. It submitted that a

person should be accorded a fair hearing by an independent body or tribunal. Where an application is before the Tribunal where one is challenging penal tax, he or she is already before a competent court which is empowered by the Constitution to hear tax disputes. It would be double jeopardy for a party to appear before a criminal court as well as a civil one to listen to tax dispute in respect of penalties.

For a party to be made liable for penalty under S. 65 the burden shifts to the respondent to show that the taxpayer made a statement on declaration, knowingly recklessly that is false or misleading in a material factor or omitted from the statement any matter which makes it misleading. The respondent has not adduced any statement of declaration that is false or misleading or the omission in respect thereof. Therefore the Tribunal finds it difficult to determine that the applicant acted recklessly or knowingly to mislead.

This leaves penal tax under S. 65(3) as being applicable. The said tax is charged on the outstanding tax unpaid. The applicant contended that it is charged on the outstanding tax unpaid on the due date, which the Tribunal agrees with. The penal tax assessed by the respondent does not show how it arrived at the computation of it. It should not be on the whole tax but the amount outstanding. Therefore the Tribunal will remit the issue of computation of the penal tax back to the respondent for reconsideration under S. 19(c) of the Tax Appeals Tribunal Rules. The respondent ought to cap the penal interest so that it does not exceed the principal tax. S. 65A of the VAT Act provides that the interest due and payable on unpaid tax shall not exceed the aggregate of the principal and penal tax.

The tribunal therefore rules that;

1. The respondents rightly disallowed the input tax credit consequently the applicant is liable to pay tax assessed
2. The respondent recalculates the penal tax in accordance with S. 65(3) of the VAT Act with effect from the date of issue of the assessment.
3. The respondent is awarded half the cost of the application.

Dated at Kampala this 4th day of November 2020.

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DR. ASA MUGENYI	**MR. GEORGE MUGERWA**	**MS. CHRISTINE KATWE**
CHAIRMAN	**MEMBER**	**MEMBER**