THE REPUBLIC OF UGANDA

IN THE TAX APEPALS TRIBUNAL AT KAMPALA

TAT APPLICATION NO. 4 OF 2019

COWI A/S ==========APPLICANT

V

UGANDA REVENUE AUTHORITY ==========RESPONDENT

BEFORE DR. ASA MUGENYI, DR. STEPHEN AKABWAY, MS. CHRISTINE KATWE

RULING

This ruling is in respect of an application challenging a Value Added Tax (VAT) assessment of Shs. 371,409,113 for work provided to the applicant from abroad.

The applicant is a foreign registered company with a branch in Uganda. Its headquarters is in Denmark. The applicant does consultancy services for customers. The staff of the applicant in Denmark do the consultancy services but allocate costs to the branch in Uganda. The respondent issued the applicant an assessment of Shs 371,409,113 as VAT for imported services.

The following issues were framed.

1. Whether the applicant is liable to pay the VAT assessed?
2. What remedies are available?

The applicant was represented by Mr. Absalom Mubangizi and Mr. Victor Bulinguriza while the respondent by Mr. Tonny Kalungi.

The applicant has its headquarters in Denmark. It has a branch in Uganda. The branch in Uganda receives work which is sent to the headquarters where it is done. The headquarter remits expenses to Uganda. The dispute in this matter revolves on whether

VAT should be paid for services done abroad but costs are remitted to the branch in Uganda.

The applicant's witness, Mr. Jens Rene Petersen, its Group Tax Director, testified that the applicant is a company registered and has headquarters in Denmark and carries on business in Uganda through a branch. The head office is not a separate legal entity from the branch. The applicant provides engineering and consultancy services. Engineering work includes quality assurance, review of feasibility studies and road designs, and making supervision reports. The employees at the head office perform certain activities such as consultancy, technical, accounting and legal work for the branch. The work is performed at the head office though it is sourced from the branch. For that reason costs are allocated to the branch. For instance, the design for the Kampala Northern Bypass was done in Denmark but was eventually sent to Uganda. The branch withholds 6% as taxes. The applicant pays taxes according to the Double Taxation agreement between Uganda and Denmark. In 2018, the respondent carried out an audit on the applicant which alleged that the branch did not charge VAT for purported imported services. The respondent issued a VAT assessment of Shs. 371,409,113.

The respondent called one witness, Mr. Tony Tukei Igune a tax officer in its Objections and Appeals unit. He testified that the applicant is engaged in the business of providing road design and construction services. The road designs are done outside and sent back to Uganda. In 2018, the respondent carried out an audit on the applicant which revealed that VAT on purported imported services was not paid. The respondent contended that the applicant received services from a foreign supplier and hence VAT on imported services was due under Regulation 13 of the VAT Regulations. It argued that the applicant claimed man hour expenses in its income tax returns but not the VAT ones.

In its submissions, the applicant contended that it is not liable to pay VAT on the man-hours and the income monies allocated to the branch. The said man hours are not imported services as they were provided by the applicant's own employees. It cited S. 11(2) of the VAT Act which provides that "a supply of a service made by an employee to

an employer by reason of employment is not a supply by the employee." It contended that the technical work and support work was performed by its employees. This cannot be regarded as an import of services.

The applicant submitted that the Income Tax Act makes a distinction between a branch and a head office for purposes of ascertaining income of a non-resident person. S. 79 of the Income Tax Act defines income derived from sources in Uganda to include income derived by a non-resident person carrying on business through a branch in Uganda. The applicant submitted that the Double Taxation Agreement provides for taxation of a branch as permanent establishment. The applicant argued that the VAT Act does not have provisions equivalent to the Income Tax Act.

The applicant further contended that the VAT Act defines a "person" to mean 'an individual, a partnership, company, trust, government or any public or local authority'. The definition does not include a branch. The applicant contended that the respondent's witness admitted that the entity registered for VAT is the applicant and not the branch. The VAT Act does not create a distinction between a head office and its branch.

The applicant contended that the respondent's reliance on Regulation 13(3) of the VAT Regulations 1996 is misconceived. The Regulation treats a branch or place of business as a separate person. The said Regulation does not have any enabling provision under the VAT Act. It introduces tax liability which is not imposed under the VAT Act. In making the Regulations, the Minister did not have the power to expand the definition of the word person to include a branch. Where there is a conflict between a provisions of the statutory instrument with that of a parent Act, the latter prevails. The applicant cited **Shah Vershi v Transport Licensing Board** *[1971] EA 289* where the court held that "subsidiary legislation must not go beyond the purposes or the dominant purposes of the Act...the regulation, if in conflict must give way". It also cited **Stanbic Bank of Uganda Limited and 3 others v The Attorney General** HCT -00-CC-MA-0645-2011 where the court held that the Minister's power to amend the Schedule to classify trade was subject to the definition of trade under the Act. By extending the definition of trade to include

financial institutions business, the Minister had acted ultra vires his powers under the Act and his decision was quashed.

In the alternative, the applicant contended that the services provided by the applicant's employees cannot be deemed an import within the definition under the VAT Act. S. 1 of the VAT Act defines import as "to bring, or to cause to be brought, into Uganda from a foreign country or place." The work was done in Denmark and never imported into Uganda. The administrative and support services were performed and utilized in Denmark.

The respondent in reply, submitted that the applicant is liable to pay VAT on imported services. It contended that the applicant's branch in Uganda received services from its head office in Denmark. It cited **Mix Telematics East Africa Limited v Uganda Revenue Authority** *TAT 4 of 2008* where the Tribunal noted that imported services are supplied abroad where they are manufactured but delivered locally or remotely. It argued that the applicant's witness testified that the services provided at the head office include engineering work, quality assurance, review of feasibility services etc. Legal services such as drafting documents were done at head office and the contracts sent to Uganda.

The respondent argued that Regulation 13(3) of the VAT Regulations provides that if part of a business is carried on outside Uganda by an overseas person, the overseas person is not a taxable person, the internal provision of services is treated as a supply of services made outside Uganda by the overseas person to a taxable person for a reduced consideration. The respondent contended that the applicant carries business both in and outside Uganda. The provision of services by the head office in Denmark is for the purposes of VAT treated as if it were carried on by a person separate from the branch. The respondent argued that there is no conflict between the VAT Act and the Regulations; they both complement each other. The respondent contended that the Tribunal is not clothed with jurisdiction to declare the Regulations null and void.

The respondent contended that the applicant is raising new grounds that were not stated in its objection notice. In the objection notice the applicant raised the issue of imported services. The applicant has introduced a ground that the services were performed by employees of the applicant in Denmark.

In rejoinder, the applicant argued that **Mix Telematic East Africa Limited v Uganda Revenue Authority** (supra) is different from the present case. In the present case the applicant's employees performed management and support services. These services were never brought into Uganda. Secondly in the said case the applicant Mix Telematic East Africa Limited is a separate legal entity from the parent company, Mix Telematics Limited.

In respect of jurisdiction, the applicant cited **URA v Rabbo Enterprises (U) Limited and another** *SCCA 12 of 204* where the Supreme Court held that the Tax Appeals Tribunal has original jurisdiction in all tax disputes. As regards, the new ground, the respondent submitted that it has not raised any. Its witness testified that it was the applicant's own employees who carried out the work. The applicant argued that even if a new ground is raised the Tribunal has the discretion to base its decision on it. The applicant cited **Re Christine Namatovu Tebajjukira** *(1992 -93) HCB 85,* where the court held that "the administration of justice should normally require that the substance of justice should be investigated and decided on their merits and that errors and lapses should not debar a litigant from the pursuit of his right".

Having heard the evidence and read the submissions of the parties, this is the ruling of the Tribunal.

The applicant is registered and has its headquarters in Demark. The applicant has a branch in Uganda. It deals in engineering and consultancy services. Engineering work includes quality assurance, review of feasibility studies, supervision reports and road designs. The head office also does some legal work for the branch such as drafting contracts. The branch sources work in Uganda which is sent to the head office where it is

worked on. The work is then sent back to Uganda. From the income received the head office 'allocates costs' to the branch. The applicant pays income tax on monies received from the head office according to the Double Taxation Agreement between Uganda and Denmark as income derived by a non-resident person carrying on business through a branch in Uganda under S. 79 of the Income Tax Act. However the problem that arises is in respect to VAT. The respondent contends that the branch should charge VAT for the work done by the head office as it is purportedly an imported service. The applicant counter argued that the VAT Act does not have provisions equivalent to the Income Tax Act.

In respect of VAT, our beginning point is S. 4 of the VAT Act which provides that:

> "A tax, to be known as a value added tax, 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 exempt services, by any person,"

For a taxable supply and an import of services other than exempted ones they should be made by persons. While under S. 4(a) it is a taxable person, under 4(c) it is any person. S. 1 of the Income Tax Act provides that a "person" includes an individual, a partnership, company, trust, government, and any public or local authority. S.1 of the Act does not define what a person is; it merely states what a person includes. It is not exhaustive on who or what a person is. The list maybe expanded. If one were to use the *ejusdem generis* rule of statutory construction, one would not fail to notice that the persons or specifics listed in S. 1 are legal persons. The *ejusdem generis* rule requires where a phrase lists a group of specifics, the phrase will be interpreted to include only items of the same class as those listed or the specifics. Would a branch of a company qualify to be considered as a legal person? The Tribunal does not think so.

The VAT Act is concerned with taxable person. S.1 provides that a taxable person has the meaning in S.6 which provides that a person registered under S. 7 is a taxable person from the time the registration takes effect. For a person to be taxable, it has to be registered for VAT. So the Tribunal has to ask itself: Do branches register for VAT or it is

the legal entities that register for it? S. 4(c) of the VAT Act unlike S. 4(a) deals with a person and not a taxable person.

The Value Added Tax Regulations were passed under the VAT Act as subsidiary law. Regulation 13 deals with imported services. The relevant Regulation 13(3) provides that:

> "If a taxable person carries on a business both in and outside Uganda, and there is an internal provision from services from the part outside Uganda to the part in Uganda, then in relation to those services, the following applies for the purposes of the Value Added Tax Act and these Regulations –
>
> (a) that part of the business carried on outside Uganda is treated as if it were carried on by a person (referred to as the "overseas person") separate from the taxable person;
>
> (b) the overseas person is not a taxable person; and
>
> (c) the internal provision of services is treated as a supply of services made outside Uganda by the overseas person to the taxable person for reduced consideration."

From the said Regulations, the respondent contends that the head office would be deemed to be the overseas person while the branch in Uganda would be considered the taxable person. The problem created by Regulation 13 is that in this case the overseas person and the taxable person are one and the same legal person, but just different offices and locations or a head office and a branch. The applicant cited **Mix Telematics East Africa Limited v Uganda Revenue Authority** (supra). The Tribunal notes that in that case the service provider and the recipient were two separate legal entities. One was a parent company and the other a subsidiary. In this case, the party in Denmark and the one in Kampala are one and the same person. For an import to take place, there is need to be at least two different legal persons involved in the activity. One cannot be said to be importing to itself. As soon as the services are performed by employees of the head office to the applicant in Denmark, it cannot be deemed to be an import, though the work is used in Uganda. This is because it is one and the same person in two countries.

In this case, the applicant has a head office in Denmark and a branch in Uganda. The employees at the head office provide services to the branch in Uganda. It is not difficult to discern that the employees at the head office are providing service to the same applicant as those of the branch. S. 11(2) of the VAT Act provides that "a supply of a service made

by an employee to an employer by reason of employment is not a supply by the employee." In essence, the supply of service by employees at the head office in Denmark cannot be considered to be a supply to the applicant. If we are to use the respondent's interpretation, the effect of Regulation 13 when applied to one and the same company would have the effect of rendering S. 11(2) of the VAT Act inoperative. The Regulations being subsidiary law to the VAT Act should not be read to contradict the main law. The Tribunal would agree with the applicant's authority **Shah Vershi v Transport Licensing Board** *[1971] EA 289* where the court held that "subsidiary legislation must not go beyond the purposes or the dominant purposes of the Act...the regulation, if in conflict must give way". Therefore the Regulations should not be read to contradict the VAT Act.

The applicant provides engineering and consultancy services to consumers in Uganda. The branch in Uganda confers a permanent establishment on the applicant in Uganda under Article 5 of the Double Taxation Agreement between Uganda and Denmark. The Double Taxation Agreement deals with income tax. Article 7 of the Double Tax Agreement between Denmark and Uganda provides

> "the profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise maybe taxed in the other State but only so much of them as is attributable to that permanent establishment."

In line with S. 79 of the Income Tax Act the applicant is charged taxes for income sourced in Uganda. The Double Taxation Agreement is silent on VAT. However the applicant can still charge VAT on the consumers in Uganda for the supply of services to them. We already stated that the applicant has a permanent establishment in Uganda and any supply of services would be deemed a local supply. It is not necessary for the respondent to impose VAT on services by employees of the applicant in another country when VAT can be charged on the local consumers in Uganda.

The costs that the applicant allocates to its branch in Uganda are derived from the income it receives from the projects in Uganda. These costs are expenses the applicant incurs to

sustain the branch in Uganda. These expenses cannot be considered as income by the branch and then subject to VAT. It depends on the circumstance of the case.

The respondent contended that the Tribunal does not have jurisdiction to declare a statutory instrument null and void. The Tribunal has not declared Regulation 13 null and void. The Tribunal simply states that Regulation 13 does not apply to situations where a company is being provided services by its employees. The said Regulation apply where a company is being provided services by a parent company or subsidiary which are not taxable persons in Uganda, that is, they are not VAT registered. The subsidiary and or parent company may be considered as overseas persons. Such an interpretation of the Regulations would be harmonious with the VAT Act. The Regulations do not need to be annulled.

However with due all respect to the submissions of the respondent and without prejudice to the foresaid, the jurisdiction of the Tax Appeals Tribunal is created by Article 152 of the Uganda Constitution which vests it with the power to listen to all tax disputes. This was echoed in **URA v Rabbo Enterprises (U) Limited and another** *SCCA 12 of 204* where the Supreme Court held that the Tax Appeals Tribunal has original jurisdiction in all tax disputes. If in listening to tax disputes, it is necessary for the Tribunal to declare a statutory instrument null and void, by doing so it will be exercising the powers vested in it. The powers vested in the Tribunal are equivalent to a court which is exercising original jurisdiction over a matter.

Lastly the respondent contended that the applicant raised a new ground in its arguments that were not in the objection notice contrarily to S. 16(4) of the Tax Appeals Tribunal Act. S. 16(4) of the Tax Appeals Tribunal Act was intended to limit a tax payer from raising new factual grounds not stated in the objection notice. A ground on law or on constitution can be raised at any time. If the Tribunal were to turn a blind eye to legal grounds it may end up condoning illegalities. At times there is a thin line between a factual and legal ground or at times there are too intertwined that one cannot raise a factual ground without raising a new legal ground. That is left to the discretion of the court or Tribunal. Where a

party is not prejudiced by a new legal ground which is tied to the factual ground the Tribunal will entertain it.

Taking into consideration the above, this application is allowed with costs to the applicant.

Dated at Kampala this 22nd day of May 2020.

DR. ASA MUGENYI	**DR. STEPHEN AKABWAY**	**MS. CHRISTINE KATWE**
CHAIRMAN	**MEMBER**	**MEMBER**