THE REPUBLIC OF UGANDA

IN THE TAX APPEALS TRIBUNAL AT KAMPALA

APPLICATION NO. 59 OF 2018

ERAM UGANDA LIMITED ====================================APPLICANT

VERSUS

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

BEFORE: DR. ASA MUGENYI, DR. STEPHEN AKABWAY, MR. SIRAJ ALI

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This ruling is in respect of an application challenging the computation of motor vehicle benefit-in-kind allowances which gave rise to an assessment of Shs. 55,865,565 issued against the applicant by the respondent.

The applicant has two vehicles: Nissan Patrol Registration Numbers UAR 637H and UAR 246H available for use by its directors. In 2018, the respondent carried out a Pay As You Earn (PAYE) return examination on the applicant for the period January 2015 to December 2017 and issued an assessment of Shs. 55,865,565 comprising of principal tax of Shs. 38,003,786 and interest of Shs. 17,861,779. The assessment was based on a finding by the respondent that the applicant had made two motor vehicles available for private use of its directors. While it is agreed that the motor vehicles were available for the private use of the applicant's directors, what is in dispute, is how the respondent, arrived at the assessment in question.

The following issues were agreed.

1. Whether the respondent applied the formula under Schedule 5 of the Income Tax Act correctly when computing the motor vehicle benefit in kind for the period January 2015 to December 2017?
2. What remedies are available to the parties?

The applicant was represented by Mr. Odokel Opolot and Mr. James Njogu while the respondent by Ms. Diana Prida Praff.

Mr. Edward Muhigirwa, the applicant's Managing Director, testified that out of the 13 motor vehicles owned by the applicant motor vehicles UAR 637H and UAR 246H are available for use by the applicant's directors. The said vehicles were used mostly for company work and for private use on weekends and when the directors travel to work and from home or vice versa. He testified that the applicant filed PAYE returns for its directors for the period January 2015 to December 2017 applying the formula stipulated under the 5th Schedule of the Income Tax Act. On 27th June 2018, the applicant received a letter from the respondent which stated that the former had under-declared the motor vehicle benefit in kind for its directors and issued an assessment of Shs. 55,865,565. On receipt of the said assessment the applicant requested the respondent for computations which gave rise to the assessment to no avail. The witness contended that the assessment had no legal basis and had been arrived at arbitrarily by the respondent without consideration that the said vehicles were used majorly to carry out company work and not for private use.

The applicant's second witness, Mr. Patrick Can Ojok, its accountant testified that he was involved in filing PAYE for the applicant's directors for the period January 2015 to December 2017, which amounted to Shs. 9,190,779. The witness testified that the applicant's computations considered the usage of the vehicles by the directors as private on Sundays and when they travelled to work and from home and vice versa. The witness contended that respondent in raising an assessment ignored the formula for computing motor vehicle benefit-in-kind as set in the 5th Schedule of the Act. The witness testified that the applicant used a motor vehicle usage book as a medium of accountability and management for the usage of motor vehicles.

The applicant's third witness, Mr. Kizza Katongole, a tax consultant with Shamak & Associates testified that he had been consulted by the applicant on the computation of

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motor vehicle benefits in kind. He was able to establish by an interview with the applicant's directors and perusing the applicant's motor vehicle log that the motor vehicles in question were used for company work and only for private business on Sundays, public holidays and when the applicant's directors travelled from home to work and vice versa. He contended that the formula to be applied in computing the motor vehicle benefit in kind payment is stipulated under the 5th schedule of the Income Tax Act as (20% x A x B/C)-D). When he applied the formula to the information supplied to him by the applicant, he realized that the assessment raised by the respondent was made on the assumption that the motor vehicles in question were being utilized entirely for the director's private use for the whole year.

The respondent's first witness, Mr. Nicholas Karyeija, an officer in its Large Tax Payer's office testified that he reviewed the authenticity of the returns filed by the applicant. He established that whereas some of the vehicles owned by the applicant were pool vehicles used for the distribution of veterinary supplies, the motor vehicles in question were available for use by each of the two directors. He contended that the said directors, derived motor vehicle benefits from the use of these vehicles which was under declared in the applicant's returns. The respondent recomputed the benefits for the period under review and subjected them to tax in accordance with S.19 (1) and the 5th schedule of the Income Tax Act and raised the assessment which is the subject of this application. The witness testified further that since the applicant's accounting date is December and the amendment providing for depreciation came in July 2017, it was not possible to factor in depreciation in its computation as the year was already running. The witness stated that when computing they considered that the two motor vehicles were available to the directors for their private use for 365 days.

The respondent's second witness, Ms. Catherine Nabifo, an officer in its Forensics Unit Tax Investigations Department testified that in the year 2019 she was requested by the respondent's Manager of Objections and Appeals to carry out a forensic examination of a suspected fabricated motor vehicle movement book used by the applicant. She testified that as part of the examination the handwritings and the ink used in the book were

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reviewed through random sampling of pages in the book. She used a Video Spectral Comparator VSC 6000 to carry out tests including ink analysis and chromaticity tests. She testified that her findings showed that; the black ink used throughout the document was similar, the red ink used to input the titles and column separators was similar to the red ink used to input records for all the years, the dates on some pages were written by the same person, there were three different handwritings used to input records in the book with the predominant one featuring throughout the book from 2012 to 2019, records entered in black and red ink were entered using similar ink while for the records in blue ink, different inks were used. She testified that she carried out the examination objectively.

The applicant submitted that the 5th Schedule of the Income Tax Act provides for the formula for computing motor vehicle benefit in kind which is (20%x A x B/C) – D. Wherein A stands for the market value of the vehicle at the time it was first provided for the private use of the employee. B stands for the number of days in the year of income during which the motor vehicle was used or available for use for private purposes by the employee for all or a part of the day. C stands for the number of days in the year of income. D stands for any payment made by the employee for the benefit. In 2017, the formula was amended to include depreciation. The applicant contended that for the period January 2015 to June 2017, the respondent ought to have applied the formula prior to the amendment and for the period July 2017 to December 2017, the respondent ought to have applied the formula subject to the amendment. The applicant submitted that the respondent's failure to take into account the depreciation was unlawful.

In respect of computing the motor vehicle benefit in kind due, the applicant estimated that each motor vehicle was used by either directors for their private purposes for 1.5 hours daily, which amounted to 450 hours in a year. The applicant then divided 450 hours by 24 hours to arrive at 19 days, as the number of days each of the motor vehicles was available for private use in a year from Monday to Saturday, having excluded Sundays and public holidays. The applicant submitted that the respondent's computation was based on the assumption that the motor vehicles in question were being used privately for 24 hours each day of the year. The applicant submitted that this was a total departure

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from the requirements of the 5th schedule of the Income Tax Act which requires that in computing motor vehicle benefits in kind the number of days that the vehicle was available for private use must be taken into consideration. The applicant submitted that the position taken by the respondent gave the impression that the applicant's directors spent their entire lives driving the vehicles in question for their private purposes and even spend their nights in the said motor vehicles.

In reply, the respondent submitted that a plain reading of Paragraph 3 of the 5th Schedule reveals that once a motor vehicle has been made available for the private use of an employee, it is irrelevant whether the motor vehicle is in fact used wholly or partly for private use by the employee. The respondent submitted that in the instant case the motor vehicles in question were available for the private use of the applicant's directors it was therefore irrelevant whether or not the same vehicles were also partly used for official work.

The respondent submitted further that the attempt by the applicant to compute the benefit in question on the basis of hours and minutes is alien to the provisions of the Act and should be disregarded. The respondent submitted that the applicant's computations had not been adduced as evidence during the trial. The respondent submitted further that the amendment to the formula under the 5th Schedule only came into effect in July 2017 which was half way through the applicant's year of income of January to December 2017. The respondent submitted that since under the law motor vehicles are depreciated at the end of the year it followed that depreciation could only be applied to the computation of the benefit in question from 1st July 2018. The respondent submitted that benefits prior to 1st July 2018 should be computed in accordance with the formula before the amendment.

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

The applicant provides two of its vehicles to its directors for use, Nissan Patrols Registration Numbers UAR 637H and UAR 246H. The cars are used for both official and

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private use. The respondent issued an assessment of Shs. 55,865,565 as income tax for use of the benefit in kind. The respondent contended that once a motor vehicle has been made available for the private use of an employee, it was irrelevant whether the motor vehicle was used wholly or partly for the employee's private purposes. The applicant contended that the respondent assumed that the motor vehicles had been made available for use by the applicant's directors on a daily basis. The applicant contended that "the number of days in the year of income during which the motor vehicle was used or available for use for private purposes by the employee for all or a part of the day" must mean the time actually spent by an employee in using the said motor vehicle for the employee's private purposes. Further, that the period during which the motor vehicle was not being used by the employee ought not to form part of "the number of days in the year of income during which the motor vehicle was used or available for use for private purposes by the employee for all or a part of the day".

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The dispute between the parties turns on the interpretation of Paragraph 3 of the 5th Schedule of the Income Tax Act which reads:

> "Where a benefit provided by an employer to an employee consists of the use, or availability for use, of a motor vehicle wholly or partly for the private purposes of the employee, the value of the benefit is calculated according to the following formula –
>
> **(20% x A x B/C)-D**
>
> Where –
>
> A is the market value of the motor vehicle at the time when it was first provided for the private use of the employee depreciated on a reducing balance basis at a rate of 35% per annum for subsequent years; and
>
> B is the number of days in the year of income during which the motor vehicle was used or available for use for private purposes by the employee for all or a part of the day;
>
> C is the number of days in the year of income; and
>
> D is any payment made by the employee for the benefit."

The said formula shows that the period or time a vehicle is put to use is calculated according to days and not hours. Where an employee uses a vehicle partly for private use and official use it is difficult to discern how many hours he put it to private or official use. Item B mentions a vehicle being made available for all or part of the day. Therefore,

it is assumed that where a vehicle was available for private use for part of the day it is irrelevant whether the employee used it also for official use. As long as he used it for part of the day.

The applicant estimated that each motor vehicle was used by either director for their private purposes for 1.5 hours daily, which amounted to 450 hours in a year. The applicant then divided 450 hours by 24 hours to arrive at 19 days, as the number of days each of the motor vehicles was available for private use in a year from Monday to Saturday, having excluded Sundays and public holidays. We have already stated that the formula is calculated according to days and not hours. Further the said computation was not adduced in evidence but in submissions.

The applicant adduced in evidence a motor vehicle movement book to prove the directors' use of the said motor vehicles. In **Uganda Communications Commission and another v Uganda Revenue Authority** TAT 43 of 2019 the Tribunal stated that:

> "For an employer to determine how many days an employee has used a vehicle for private use there is need for it to have a *journey or mileage log to show how the vehicles have been used.* The *journey or mileage log* should show when the vehicle was used for official purposes and when for private use. Using the journey or mileage log, the employer should be able to determine how many days a month a vehicle was used for private use."

The tribunal cited **Vinyl Design Ltd: Hanmer: Templeman** 2014 TC 03345, where it was found that "in the absence of journey or mileage logs the appellants had failed to prove their claim relating to the use of motor vehicles available for their private use."

As already stated, the applicant availed a motor vehicle movement book. However, the most important information that would enable a revenue officer compute the days the vehicles were put to private use was missing. The column which provided for purpose of the journey in the movement book was hardly filled. The absence of such information makes it difficult for the Tribunal to establish which days the vehicles were used for official use and which for private use. S. 189 of the Tax Appeals Tribunal Act places the burden of proof on the taxpayer to show that an assessment would have been made differently

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or not at all. In the absence of such information the Tribunal cannot stay the respondent ought to have made the assessment differently or not at all.

Having stated the above, it is not important to discuss the depreciation of vehicles. However, the Tribunal notes that the amendment in the Income Tax Act came into effect in July 2017. The depreciation component could only be factored in the computations from 1st July 2018.

Having failed to discharge the burden of proof, this application is dismissed with costs to the respondent.

Dated at Kampala this 29th day of January 2021.

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Dr. ASA MUGENYI	**DR. STEPHEN AKABWAY**	**MR. SIRAJ ALI**
CHAIRMAN	**MEMBER**	**MEMBER**