THE REPUBLIC OF UGANDA

IN THE TAX APPEALS TRIBUNAL AT KAMPALA

APPLICATION NO. 68 OF 2018

APOLLO HOTEL CORPORATION LIMITED ==========APPLICANT

VERSUS

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

BEFORE: DR. ASA MUGENYI MRS. CHRISTINE KATWE MR. SIRAJ ALI

RULING

This ruling is in respect whether the right to use the band 'Sheraton' and the 'Sheraton' centralized reservation system by the applicant is an imported service for the purposes of the VAT Act.

The applicant, a company incorporated in Uganda, is engaged in hotel and hospitality industry. In January 2008, the applicant made an international license agreement with Sheraton International Inc. for the right to operate its hotel in Kampala under the 'Sheraton' brand and also to use Sheraton International's centralized reservations system. The applicant pays to Sheraton International Inc. as consideration for the benefits accruing it under the agreement.

From October 2013 to June 2014, the respondent raised corporate income tax assessments on the applicant for 2010 to 2012. The applicants objected to the assessments which was disallowed. The applicant entered a partial consent and the issue of Value Added Tax (VAT) of Shs. 398,418,285 on franchisee fees was left for determination before the tribunal.

The applicant was represented by Mr. Andrew Kibaya and Mr. Deus Mugabe while the respondent by Mr. Alex Ssali Alideki and Mr. Ronald Baluku.

The following issues were set down for determination.

1. Whether there was an imported service to attract VAT?
2. What remedies are available to the parties?

No evidence was led by either of the parties, as there was agreement that the dispute related to a question of law.

The applicant submitted that its use of the centralized reservation system of the franchisor did not amount to an imported service. The system has its server in the United States of America which are accessed by the franchisor's customers from all over the world. The applicant benefits from business accrued from bookings made through the system. The franchisor kept no staff in Uganda. The applicant contended that nothing tangible or intangible was brought or caused to be brought into the country by the applicant or the franchisor through the use of the centralized reservation system. The applicant submitted further that the services under the said system were provided not to it but to the franchisor's loyal and prospective customers. The applicant contended that in cases where loyal customers come to Uganda, it did not mean that the service through which they were able to make a booking had been brought into Uganda.

The applicant submitted that Sections 4(c) and 5 of the VAT Act were not applicable as the use by the applicant of the centralized reservation system did not amount to an importation of a service. The applicant submitted that for S. 4(c) of the VAT Act to apply the service in question must have been brought into the country from a foreign country. With the exception of persons who ended up in the country after using the system there was nothing done by the franchisor that could be said to have been imported into the country. The applicant argued the law focuses not where the benefit of the service is enjoyed but where the service is provided.

The applicant argued that a person who uses a hotel in Uganda did not mean that a service has been imported into the country. The applicant cited *Africa Broadcasting (U) Ltd v Uganda Revenue Authority* TAT Application No. 44 of 2018 and submitted that for

a service to fall within the ambit of the VAT Act, the service in question must not only be provided by a person outside Uganda but it must also be imported into Uganda. Relying on also on *Cape Brandy Syndicate v Inland Revenue Commissioner* (1921) 1 KB 64 and *Warid Telecom Uganda Ltd v Uganda Revenue Authority* Civil Appeal No. 24 of 2011, the applicant submitted that the words used in Sections 1 and 4(c) of the VAT Act must be interpreted strictly and given their literal meanings. Relying also on *Mix Telematics East Africa Ltd v Uganda Revenue Authority* TAT Application No. 4 of 2018, where the tribunal stated that "imported services are said to be supplied from abroad but delivered locally or remotely" the applicant submitted that there is nothing that can be said to have been delivered in Uganda for S. 4(c) to apply.

The applicant submitted further that in order to determine what amounts to an imported service S. 4(c) ought to be read together with S. 11(1)(b) of the VAT Act. The applicant submitted in this regard that supposing that the centralized reservation system amounted to '*making available a facility or an advantage'* it would still fail the import test. The applicant submitted further that the facility and advantage is made available to the customers of the franchisor and not the franchisor's brand users and that it had not been shown that the said service had been imported into the country. The applicant submitted that a person resident in Mexico who books a room at the applicant's hotel using the centralized reservation system, does not make such a booking in Uganda though they may access the hotel's services in Uganda. The applicant submitted further that the consideration that ought to be taken into account was not the hotel reservation system that is accessed in Uganda but whether the booking facility was imported into Uganda. It argued that the centralized reservation system is a business strategy employed by the applicant to attract customers intending to use the services of the hotel in Uganda which does not amount to an imported service.

The applicant also contended that its use of the 'Sheraton' brand name did not amount to an importation of a service within the meaning of S. 4(c) of the VAT Act. The use of the 'Sheraton' brand name on a non-exclusive basis did not amount to an import of a service. The applicant submitted further that there was nothing in the License agreement relating

to either the exportation or the importation of a service. The applicant relying on the *Africa Broadcasting* case argued that for it to be brought within the confines of S. 16 and S. 18 of the VAT Act, which relate to the importation of a service and supply by foreign persons, the service in question must be taxable and must be enjoyed in Uganda by a non-taxable person as the final consumer. The applicant contended the franchisor is based in the United States and grants a right to the applicant to use the 'Sheraton' brand name. The applicant submitted that in this case there is no equivalent of a viewer or ultimate consumer from which to draw parallels. The applicant submitted that unlike in the Africa Broadcasting case, where there was a consumer of the broadcasting services, in the instant case, the person using the brand is the applicant, who is a taxable person. The applicant submitted that the conditions under Sections 16 and 18(8) of the Act had not been fulfilled for the reason that the franchisor has no presence or business in Uganda for its supply to amount to a taxable supply.

In reply, the respondent submitted that the applicant had received services from a foreign company and made payments for them. The transactions fell under S. 4(c) of the VAT Act and Regulation 13 of the VAT Regulations. The respondent submitted that S. 16 and 18 of the Act were not applicable for the reason that Sections 4(c) and 5(c) of the Act impose VAT on anyone who receives services from any foreigner. The respondent argued that S.16 of the Act, related to 'place of supply of services' and not to 'supply of imported services'. The respondent submitted that S.16 read in its entirety relates to S.4 (a) of the Act and not S.4 (c). The respondent submitted that similarly when S.18 of the Act is read in its entirety, it relates to a taxable supply by a taxable person and not to the supply of an imported service. Relying on *Elma Philanthropies East Africa Limited v URA* TAT No. 46 of 2019, the respondent submitted that the general VAT rule is that all goods and services are subject to VAT unless expressly exempted. The applicant received management services that are not exempt hence liable to pay VAT.

In rejoinder, the applicant submitted that the respondent had not addressed whether there was an import of a service by the applicant for VAT to apply. It reiterated its submissions

that the provision of a centralized reservation system and the use of the 'Sheraton' brand did not amount to an import of a service.

Having heard and perused the evidence of the parties and the submissions the following is the ruling of the tribunal.

In resolving this issue we will determine, the following questions. Firstly, whether the use of the 'Sheraton' brand' and the provision of the centralized reservation system amounted to a supply of a service and If they did, whether the supply was of an imported service? A perusal of the International License Agreement between Sheraton International Inc. and Apolo Hotel Corporation Ltd shows that the agreement is for the grant to the applicant of the non-exclusive right to operate the hotel under the Sheraton brand and system (See recital B and Article 2.1 of the License agreement). The term 'system' is defined under Exhibit B to the License agreement, as the business methods, designs, processes and arrangements for developing and operating brand hotels, including the standards and policies, manuals, licensed marks, technology systems including proprietary software, creative materials, brand elements, confidential information and other programs and procedures unique to the brand. It will be observed that the centralized reservations system is a part of the system as defined under exhibit B above. The above shows that the License agreement is much more than the grant of the right to use the Sheraton brand but a complex arrangement through which the applicant is entitled to the use of both the brand and the system.

Sheraton International Inc. allowed the applicant to use its brand 'Sheraton'. Black's Law Dictionary 10th Edition p. 224 defines a 'brand' as;

> "A name or symbol used by a seller or manufacturer to identify goods or services and to distinguish them from competitor's goods or services; the term used colloquially in business and industry to refer to a corporate product name, a business image, or mark, regardless of whether it may legally qualify as a trademark."

A trademark on p. 1721 is defined as; "A word, phrase, logo or other sensory symbol used by a manufacturer or seller to distinguish its products or services from other or others." A brand like a trademark is an intellectual property and is an intangible good. In *Vikas Sales Corporation v CCT*.

(1996)102 STC 106 the Supreme Court of India ruled that trademarks are goods. However, in the matter before us, Sheraton International Inc. did not sell a trademark but the right to use it which come with a bundle of other rights. These under Article 2.1 of the Agreement included the right to operate the hotel in strict conformance with the system. Article 2.3.1 provided for placement right, the right to market, promote or sell any products or services offered by the licensor. Under Article 2.4 the licensor may use or benefit from common reservations, hardware, software, communication equipment etc.

In *Metropolitan Life Limited v Commissioner for the South African Revenue Service* A 232/2007 the court defined service as follows:

> "services' mean anything done or to be done, including the granting, assignment, cession or surrender of any right or the making available of any facility or advantage, but excluding a supply of goods, money or any stamp, form or card contemplated in paragraph (c) of the definition of good"

Sheraton provided a bundle of composite rights to the applicant. In *Sagar Ratna Restaurants Pvt Ltd & Ors. v The Value Added Tax Officer & Ors* (WP No. 4453/2013 and 3404/2015), the Delhi High Court, found that transactions entered into by McDonalds and other franchisors relating to the non-exclusive use of certain trademarks and a bunch of other composite services constituting an arrangement through which the McDonalds and other franchises were operated were to be treated as services and not goods for the purposes *inter alia* of Value Added Tax. The decision in the Sagar Ratna case above is on all four with the case before us. In the instant case the right to use the Sheraton brand is non-exclusive, further as can be seen from the definition of the term 'system' above, the applicant through the license agreement is entitled to the use of a whole range of services including the use of the centralized reservations system. Applying the above decision to the facts of our case we are of the view that the rights granted to the applicant under the license agreement, namely the rights to use the Sheraton brand and system constitute services and not goods.

The next question for our determination is whether the use of the 'Sheraton' brand' and the provision of the centralized reservation system amounted to supplies of imported services which attract VAT? In most jurisdictions including our own VAT is applied to

international trade through the destination principle. Under the destination principle, exports are exempt from VAT while imports are taxed on the same rates as local supplies. S. 4 of the VAT Act, excludes exported services and exported goods from the category of goods and services which are chargeable to VAT while under S. 1(a) of the Third Schedule the export of goods and services are zero-rated. Under the destination principle, VAT paid is determined by the rules applicable in the jurisdiction of its consumption and revenue accrues to the jurisdiction where consumption takes place. (See *Mars Logistics v Commissioner of Domestic Taxes* Tax Appeal No. 6 of 2018). Further the destination principle requires that services consumed in foreign jurisdictions should be considered as exported services while services supplied from a foreign jurisdiction and consumed in one's own jurisdiction are considered as imported services. In the instant case it is not disputed that the Sheraton brand and system, inclusive of the centralized reservations system were supplied for use in Uganda by Sheraton International Inc. It is also not in dispute that Sheraton International Inc. was incorporated in Delaware and has its principal office in the United States of America (See preamble to the International License Agreement). The services in question were used in Uganda by the applicant. It follows that these services were imported services for the reason that they were supplied from a foreign jurisdiction and consumed in Uganda. We therefore find that there was an imported service in respect of the use of both the Sheraton brand and the centralized reservations system.

In *Metropolitan Life Limited v Commissioner for the South African Revenue Service* (supra) the court held that;

> "imported services' means a supply of services that is made by a supplier who is resident or carries on business outside the Republic to a recipient who is a resident of the Republic to the extent that such services are utilized or consumed in the Republic otherwise than for the purpose of making taxable supplies".

S. 1(j) of the VAT Act defines import to mean to bring, or cause to be brought into Uganda from a foreign country or place. The licence agreement allows the applicant to operate and maintain hotels services that are similar to Sheraton Hotels worldwide. Article 5.1 provides that the applicant shall operate the hotel in strict compliance with all standards

and polices. The applicant pays licence and administration fees to provide the said services in line with the agreement and on set standards and policies. The licence is permission to provide Sheraton services in Uganda using a system set up in the United States of America. The brand 'Sheraton' enables prospective customers identify that the applicant provides 'Sheraton' Hotel Services that are similar to other hotels holding the same brand. The centralized reservation system enables Sheraton customers to book accommodation in the applicant. It is highly unlikely that Sheraton Customers would come to 'Apollo Hotel' if it was not operating services on standards similar to other Sheraton Hotels. The licence agreement should be read as a whole. It provides for branding, standards, reservation and other rights and obligations. It enables Sheraton hotel services using the 'Sheraton' brand to be imported into Uganda. It is not only about the brand and reservation. Otherwise, we would have 'Apollo Hotel Services' masquerading as 'Sheraton' services.

Having found that there was an imported service in respect of the use of both the Sheraton brand and the centralized reservations system, the question which arises is whether both supplies attracted VAT. S. 4(c) of the VAT Act makes VAT chargeable on the supply of any imported services by any person. In *Card Protection Plan v Commissioners of Customs & Excise Case* C-349/96 the European Court of Justice held that

> "every supply of a service must normally be regarded as distinct and independent and, second, that a supply which comprises a single service from an economic point of view should not be artificially split, so as not to distort the functioning of the system of value added tax and that there is a single supply in particular in cases where one or more elements are to be regarded as constituting the principle service, whilst one or more elements are to be regarded, by contrast, as ancillary services which share the tax treatment of the principal service. A service must be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself but a means of better enjoying the principal service supplied. In these circumstances the fact that a single price is charged is not decisive".

The principal service granted under the License agreement was the right to operate the hotel under the Sheraton brand using the 'System'. The right to use the brand and the centralized reservations system did not constitute an aim itself but merely a means of

better enjoying the principal service supplied. The License agreement also shows that the right to operate the hotel under the Sheraton brand using the system, constituted a single service, which it would be unrealistic from an economic point of view, to split into different services. For these reasons we are of the opinion that the supply of the centralized reservations system was merely an ancillary service and that only the principal service namely the right to operate the hotel under the Sheraton brand using the 'System' attracted VAT.

Having found as above the following are the findings of the tribunal;

1. The use of the 'Sheraton' brand' and the provision of the centralized reservation system amounted to a supply of an imported service.
2. VAT is only due on the principal service namely the right to operate the hotel under the Sheraton brand using the 'System'.
3. The supply of the centralized reservations system was merely an ancillary service to the principal service.
4. This application is accordingly dismissed with costs.

Dated at Kampala this 27th day of August 2021.

DR. ASA MUGENYI	**MRS. CHRISTINE KATWE**	**MR. SIRAJ ALI**
CHAIRMAN	**MEMBER**	**MEMBER**