THE REPUBLIC OF UGANDA

IN THE TAX APPEALS TRIBUNAL OF UGANDA AT KAMPALA

APPLICATION NO. 55 OF 2018

INDEPENDENT PUBLICATIONS LIMITED …….. APPLICANT

VERSUS

UGANDA REVENUE AUTHORITY…….....…….,,,,,…… RESPONDENT

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

RULING

This ruling is in respect of payment of a Withholding Tax (WHT) refund due to the applicant, income tax and Value Added Tax (VAT) assessed on the applicant.

The applicant is a publishing house conducting the business of selling magazines and advertising. In 2014, the applicant applied for a WHT refund of Shs. 261,127,178. The respondent conducted an audit on the applicant and issued an assessment of Shs. 595,090,050. The applicant objected to the tax assessed which the respondent disallowed.

Issues agreed

1. Whether the good sold are VAT inclusive?
2. Whether the applicant is liable to pay VAT on imported services?
3. Whether the applicant is entitled to deduction arising from marketing expense?
4. What remedies are available to the parties?

The applicant was represented by Mr. Oscar Kamusiime while the respondent by Ms. Diana Mulira Kagonyera and Ms. Tracey Basiima.

The applicant's first witness, Mr. Charles Kankya, its manager, testified that the applicant is a publishing house conducting the business of selling magazines and advertising. On

20th November 2014, the applicant applied for a WHT refund of Shs. 261,127,178. On 26th January 2015, it wrote a reminder demanding the refund. The respondent conducted an audit and assessed the applicant tax. The applicant objected to the tax and the respondent disallowed the objection.

He testified further that the applicant and the respondent had several meetings. As a result of the meeting the applicant conceded to certain taxes. However, it still contested the imposition of Shs. 10,220,021 as VAT on imported services. The applicant has an access code to the internet for an online media platform where it accesses worldwide information and paid fees for it. It also contested the respondent's decision not to allow marketing expenses of Shs. 57,087,038 as deductions for the fiscal year 2012. The respondent refused to grant the marketing expenses on the ground that it was exempt for tax purposes. The respondent has not refunded the applicant.

The applicant's second witness was Mr. Kiiza Katongole, a tax consultant who was engaged by it to verify its tax computations for the period 2008 to 2009. He testified that upon review, he advised the applicant to apply for a cash refund of Shs. 261,127,178, which it did. He testified further that the respondent confirmed a refund of Shs. 116,345,140 being principal income tax due. The applicant admitted liability of WHT and VAT on undeclared sales and on the disposal of a motor vehicle. He testified that the applicant incurred marketing costs of Shs. 57,087,038 in the production of its income which the respondent refused to recognize. He stated that the source of the marketing expense was a grant. He also stated that the applicant disputes the VAT on imported services.

The respondent's witness, Ms. Barbara Nakasolya, is a tax officer in its compliance section under the Domestic Tax Department. She testified that the applicant is a company that publishes newspapers. She stated that the applicant made a refund claim of Shs. 270,701,843. She testified that the applicant agreed with the respondent on the computation for VAT on disposal of a motor vehicle, no VAT for bad debts. She stated that the respondent established that the applicant had imported services and VAT of Shs

10,220,021 was computed. The applicant had accessed internet for an online media platform to access worldwide information. She stated that the applicant's audited accounts for 2010 had marketing expenses of Shs. 57,087,038 which the respondent allowed but disallowed Shs. 55,524516 which was not reflected in the audited accounts. The applicant agreed to WHT of Shs. 25,203,801. She testified that there were deductions leaving a balance of shs. 45,523,218 as refundable.

The applicant submitted that it is not in dispute that there were undeclared sales of Shs. 156,823,407 which were VAT inclusive. It contended that the respondent having found that the undeclared sales were VAT inclusive, it ought to have made a necessary adjustment of Shs, 71,176,655 to the refund.

The applicant submitted that it is not liable to pay VAT on imported services because there was no supply in Uganda within the meaning of S. 16(2) of the VAT Act. S. 16(2) states that a supply of services shall take place in Uganda, if the recipient is not a taxable person and the services are electronic services delivered to a person in Uganda. It contended that electronic services are defined to include images, text and information and the recipient has to be a non-taxable person.

The applicant submitted that the interest and penal tax of Shs. 140,104,360 imposed by the respondent after 30th June 2020 for the period while the matter was pending disposal before the tribunal is not payable. The applicant cited *Airtel Uganda Ltd v Uganda Revenue Authority* Civil Appeal No. 40 of 2013 where it was stated that a person should not be penalized when a matter is being addressed by the Tax Appeals Tribunal. The applicant submitted that the tribunal should exercise natural justice under Article 44 (c) of the constitution. It would be averse to justice to penalize the applicant for the period the matter has been pending before the tribunal from the time the applicant filed its application on 7th August 2019 to 7th February 2022. .

The applicant submitted that interest is also waived by S. 40C of the Tax Procedure Code Act which reads “Waiver of interest and penalty on unpaid principal tax. Any interest and penalty outstanding as at 30 June 2020 is waived.”

In reply, the respondent submitted that as at 1st July 2020, the interest due and unpaid attracted interest under the law. The respondent cited S. 136 of the Income Tax Act which states that a person who fails to pay any tax or pay any penal tax on or before the due date for payment is liable for interest at a rate equal to 2% per month. S. 39 of the Tax Procedure Code Act 2014 provides that interest payable on unpaid tax under a tax law shall be collected by the commissioner in accordance with the act as if it were unpaid tax. The respondent submitted that it is not disputed that transactions took place, which gave rise to tax liability falling within S.136 of the Income Tax Act. The respondent submitted further that applicant did not comply with the statutory requirement to pay the tax assessed by 26th June 2019 and therefore falls within the ambit of S. 136 of the Income Tax Act, S. 39 of the Tax Procedure Code Act and is consequently liable to pay interest on the outstanding tax. The respondent cited *Cape Brandy Syndicate v IRC (1921) KB 64* where it was stated that in a taxing act, one must merely look at what is said. There is no room for intendment. The respondent submitted that the law is clear upon failure to pay tax within time, the outstanding liability accrues interest.

The respondent argued that *Airtel Uganda Ltd V Commissioner General URA* (supra) does not apply to the facts at hand. That case dealt with interest under the VAT Act which interest is penal in nature, it stated that: “Whether a taxpayer who contests the tax assessment through the tax appeals tribunal ought to be subjected to the penal tax in the event the objection is subsequently dismissed.” The respondent submitted that the key word is penal tax. What is sought in the instant case is interest on unpaid tax not imposition of any penal tax, and in this regard reliance on Airtel case is untenable given that what is sought herein is interest under the income tax act and the Tax Procedure Code Act.

In rejoinder, the applicant submitted that the objection decision gives a due date for payment of 2nd August 2019. The applicant submitted that no interest can be charged as there was no due date for payment of the reconciled outstanding tax liability of Shs. 625,422,542. The applicant submitted that it is not required to pay interest or penalties on arrears following the waiver of statutory interest and penalty as at 30th June 2020 at the time this matter was pending before the tribunal. Any interest payable (2%) would only arise within the 4 installments under paragraph 4 of the partial consent settlement order.

Having listened to the evidence and read the submissions of both parties, this the ruling of the tribunal.

The applicant applied for a WHT refund of Shs. 261,127,178 for the period 2008 to December 2013. The respondent conducted an audit of the applicant and assessed it Shs. 395,090,510 which was later revised to Shs. 92,644,423. During the scheduling the parties agreed that the applicant did paid PAYE for the period 2013 and conceded to the penalty. The applicant conceded to paying VAT arising from the disposal of a vehicle which should be deducted from the refund. It was also agreed that the applicant is entitled to initial allowance from the purchase of a CCTV camera. Three issues were left for the determination of the Tribunal.

The first issue was whether goods sold by the applicant were VAT inclusive? The applicant submitted that there were undeclared sales of Shs. 156,823,407. The applicant also admitted that the VAT payable was Shs. 23,922,215. The respondent also admits the applicant is liable for the said VAT of Shs. 23,922,215. Since there seems to be no dispute that the applicant is liable for VAT of Shs. 23,922,215 it is ordered to pay the same. The Tribunal also directs that the respondent adjusts the WHT refund to offset the VAT liability of Shs. 23,922,215.

The second issue was whether the applicant is liable to VAT on imported services during the period? The respondent contends that the applicant imported services of Shs. 56,777,894 and VAT of Shs. 10,220,021 was payable. The respondent contended that

the applicant accessed an online media platform to access worldwide information. The applicant does not deny that it accessed information through a web portal. It argues that it did not constitute an import of services for VAT purposes.

S. 4 of the VAT Act provides that VAT shall be charged on every taxable supply made by a taxable person and on a supply of imported services, other than an exempt supply. Regulation 13 of the VAT Regulations provide that any person who imports a service into the country must account for VAT. S. 5(c) of the VAT Act provides that in the case of a supply of imported services other than an exempt service VAT is to be paid by the person receiving the same. S. 11 of the VAT Act stipulates that a supply of services includes the performance of service to another person, the making available of any facility or advantage. S. 1(i)of the VAT Act defines "import" to "mean to bring, or cause to be brought, into Uganda from a foreign country or place;" In *Mix Telematics East Africa Limited v Uganda Revenue Authority* Application 4 of 2018 the Tribunal held that services would be said to be imported if they are supplied from abroad but delivered locally or remotely. In this matter, the applicant was accessing information provided abroad, which it received locally. Therefore, there was an import of service and the applicant is liable to pay VAT of Shs. 10,220,021.Having found that the applicant is liable to pay VAT the respondent is ordered to offset the VAT payable from the WHT refund due to the applicant.

The last issue was whether the applicant is entitled to marketing expenses? The applicant submitted that it incurred Shs. 57,087,038 as marketing expenses for the fiscal year 2010 in generation of income. The respondent contended that the applicant received a grant of US$ 130,000 to promote and market the applicant's weekly magazines. The respondent disallowed marketing expense as the grant income was not included in the gross income. S. 22 of the Income Tax Act provides that a person shall be allowed as deduction all expenditures and losses incurred by the person during the year of income to the extent, they were incurred in the production of income included in the gross income. The audited financial statement for fiscal year 2010 exhibit A10 (p.116 of the supplementary joint trial bundle) shows that the applicant incurred marketing expenses of Shs. 57,087,380 for the

period 2010. The applicant is entitled to a deduction of the said Shs. 57,087,380 as stated in the audited financial statement.

The respondent had denied the applicant a chance to deduct its marketing expense because it received a grant which it did not declare in its gross income. A grant is not income. It is capital in nature and should be shown in the balance sheet.

Lastly, the applicant submitted that it was entitled to interest under S. 113(4) of the Income Tax Act which provides that:

> "Where the Commissioner is required to refund an amount of tax to a person as a result of a decision of the High Court or Tribunal… the Commissioner shall pay simple interest at a rate of two percent per month for the period commencing on the date the person made the application and ending on the last day of the month in which the refund is made."

The Tribunal notes that there are adjustments that have to be made by the parties. The Tribunal orders the adjustments agreed by the parties and those ordered to be made. Because the parties agreed on certain position where figures were not given the Tribunal is not in a position to declare the WHT refund payable. The applicant is entitled to a refund after the adjustments, that is, if there is any refund. It is also entitled to interest of 2% from the date it made its application for refund. Both parties have been successful to a certain extent. Each party will bear its costs. The matter is remitted back to the respondent for reconsideration under S. 19(c) of the Tax Appeals Tribunal Act.

Dated this day of 2022.

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