**THE REPUBLIC OF UGANDA**

**IN THE TAX APPEALS TRIBUNAL OF UGANDA AT KAMPALA**

**APPLICATION NO. 114 OF 2020**

**UNILEVER UGANDA LIMITED.................................................. APPLICANT**

**VERSUS**

**COMMISSIONER GENERAL, UGANDA REVENUE AUTHORITY....RESPONDENT**

**BEFORE: DR. ASA MUGENYI, DR. STEPHEN AKABWAY, MR. GEORGE MUGERWA.**

**RULING**

This ruling is in respect of an income tax assessment of Shs. 4,676,873,257 arising from variances in sales figures in the applicant's Value Added Tax (VAT) returns and its financial statements.

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The applicant is a member of Unilever Global dealing in distribution of detergents, and petroleum products such as Vaseline and spices such as 'Royco'. The respondent conducted a comprehensive audit on the applicant for the period January 2011 to December 2014 which established that the sales declared by the latter for VAT were higher than those declared for corporation tax by Shs.18,018,850,127. On 19th February 2020, the respondent issued VAT and Income Tax assessment of Shs. 10,527,518,346 on the applicant for the said period. The applicant objected to the assessments and the respondent partially allowed the applicant's objection thus resulting in a principal tax liability of Shs. 4,676,873,257 for the period 2011 to 2013. However, following mediation between the parties the tax liability was revised to Shs. 2,242,507,611 from Shs. 4,676,873,258.

Issues

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

The applicant was represented by Mr. Joseph Luswata while the respondent by Mr. George Ssenyomo.

The applicant's first witness, Mr. Bernhard Mwangi its Tax Manager for East Africa testified that the applicant is a distributor of fast-moving consumer goods. It filed VAT returns for 2011 to 2013. The respondent compared the sales in its income tax and VAT returns for the said period and noted that they exceeded those disclosed in the financial statements. The respondent assumed the variances was undeclared income and imposed 30% corporate tax of Shs. 4,676,873,258 for the period 2011 to 2013. The witness stated that the variances in the sales of the VAT returns and of the financial statements were not caused by failure to disclose but by entries in the VAT returns being considered as sales whereas they were not. These entries were correction of discounts, correction of supplier values, and trade discounts. Mr. Bernhard Mwangi testified that for the period 2011 to 2012 the applicant made several adjustments in its VAT returns. He indicated such adjustments in the VAT returns of January, February, May and August 2011 and January 2012 in columns which showed corrections in the output tax schedules. Similar correct entries were made in the corresponding input schedules. He stated that the said corrections were not sales nor purchases. They were corrected by credit notes from suppliers. When explained to the respondent it accepted the explanations and adjusted the variance figures stated above. The variances in the returns were reconciled as per the table below.

**TABLE A**

| YEAR | AMOUNT Before | Amount After |
|---|---|---|
| 2011 | 12,009,496,008 | 11,528,219,385 |
| 2012 | 4,676,442,156 | 3,852,946,355 |
| 2013 | 1,395,911,963 | 208,411,787 |
| **TOTAL** | **18,081,850,127** | **15,589,577,527** |

Mr. Bernhard Mwangi stated that the respondent had not accepted the same explanation for similar entries where the amounts were not matching. The respondent had declined the reconciliation. These included the VAT returns of March, April, and November 2011. The output tax did not match the input tax. He contended that the said entries were not sales though they were entered in the output schedule. When the respondent declined to reconcile those entries there was a sales variance. The correction of the suppliers' values

reduced the variances. He stated that as a result of mediation the respondent accepted the applicant's explanation. What remained were trade discounts.

Mr. Bernhard Mwangi testified that the applicant granted trade discounts to customers who achieved targets. The discounts took form of a credit note. For example, if a discount was 10% of sales, a customer would get a full invoice amount of Shs. 100 million for purchases and a credit note of Shs. 10 million from the applicant. The applicant would enter the full invoice amount of 100 million in the VAT returns for instance in March 2012 but record the credit note as a reduction of sales in April 2012. The applicant granted discounts ranging between 4 to 10 %. A percentage would be out of range, over 10%, where there was an aggregation of discount bi-monthly, quarterly, or bi-annually. He testified that the applicant also issued free market samples as part of its marketing and promotional activities. The VAT Act requires that such free issues should be included in the returns and the requisite VAT charged and paid to the respondent. The discounts granted caused a variance of Shs. 6,000,000,000 for 2011 and Shs. 1,491,937,950 for 2012. The applicant was able to avail credit notes of Shs. 1,758,357,755. The respondent reduced the variance arising from discounts to Shs. 5.6 billion. He stated that some documents to support the trade discounts could not be found due to the passage of time. These activities showed the variances. Mr. Bernard Mwangi confirmed that there was a variance in sales between the VAT returns and financial statements for 2011, 2012 and 2013 even after all the adjustments. There was still a variance after making the adjustments.

The respondent's witness, Ms. Brenda Onega, an officer in its Domestic Tax department testified that the respondent conducted an audit in the affairs of the applicant for the period January 2011 to December 2013. It established that sales declared by the applicant in its VAT returns were higher than those declared in the Corporation tax by Shs. 18,018,850,127. It was further established that the declarations of international payments made in the monthly withholding returns exceeded the amounts declared as imported services by Shs. 4,937,857,257 in the VAT returns. As a result, the respondent issued VAT and income tax assessments totalling to Shs. 10,527,518,346.

Ms. Brenda Onega testified that the applicant admitted that the VAT in its returns was higher than the gross sales in its income tax returns due to non-taxable items such as correction of discounts, debit notes to suppliers and discounts to customers. The applicant issued discounts to its customers and the revenue reported was net of discounts allowed while VAT sales included discounts. The respondent partially concurred with the applicant and allowed the objection for the months of January, February, March, and May 2011.The amounts for April, July, August to December 2011 were rejected as there was not enough evidence. She stated that the applicant did not provide supporting source documentation for the discounts granted in the form of credit notes and a detailed breakdown of the customers who benefited from the discounts for 2012 and 2013. Ms. Brenda Onega stated that upon review of the reports, the respondent allowed negative input tax declared for the period as verified discounts and duly considered the amount in adjustment of the applicant's tax liability. Only a few of the applicant's customers had reduced their input VAT by credit notes. The objection was partially allowed, and the principal tax liability reduced to Shs. 4,676,873,257. Following mediation between the parties the tax liability was revised to Shs. 2,242,507,611. She stated that the applicant has failed to provide any credit notes and any other evidence to justify the outstanding variances. There are unexplained variances in the VAT returns which are higher than the sales declared for purposes of corporate tax. There are unexplained variances in the monthly WHT returns where declarations of international payments exceed the amount declared as imported services in the VAT returns. Ms. Brenda Onega confirmed that the discounts constituted the biggest amount of the variance.

In its submissions, the applicant disputed the income tax assessment of Shs. 2,242,507,611. It stated that it offers discounts and free market samples. In July 2020, the respondent determined that the sales declared by the applicant for January 2011 to December 2013 in the VAT returns exceeded the sales declared in the financial statements for the same period by Shs. 18,081,850,127. The respondent treated this variance as under declarations of sales by the applicant and imposed income tax at 30%. The applicant disputed that the variances resulted from undeclared sales but were caused by human errors in the VAT returns. The applicant contended that some entries recorded as sales not sales. These included correction of supplier values, correction of discounts and trade

discounts: The applicant submitted that the variances were caused by differences in the tax treatment of certain transactions such as marketing samples or free issues given to customers during promotions. The applicant submitted that in the objection decision, the respondent accepted the market samples and free gifts caused a variance. The discounts effect on the variances was partially allowed. The respondent reduced the taxes assessed to Shs. 4,676,873 as at July 2020.

The applicant submitted that the respondent examined its VAT returns and accepted its explanations on the matching entries and reduced the variances but rejected those that were not matching. It submitted that the assessed tax reduced from Shs.4,676,873,258 to Shs. 2,242,507,611. The remaining variance was caused by discounts given by the applicant in 2011 of Shs. 6,050,159,296 and Shs. 1,491,937,950 for January to March 2012. The applicant submitted that it recorded sales of the actual amount due, and credit notes would be recorded in the input schedules in the months they were given. The discounts would be recorded in the financial statements. The applicant cited *EnviroServe Uganda Limited v Uganda Revenue Authority* Application 24 of 2017, where the Tribunal noted that "Tax periods under the income tax Act are not synchronized with those under the VAT Act and that a variance may occur because a transaction of June is recorded in July". It submitted that in reviewing its VAT returns, the respondent only considered the output entry against the discounted ones in the financial statement which created the variance. The applicant submitted that that the respondent looked at the output schedule in isolation, while it is required to review the VAT return for any cancelling or reducing entries in the input schedule. The applicant submitted that in 2011 and January to March 2012, its turnover was Shs. 86,647,103,651 and Shs. 26,704,612,706 and discounts were Shs. 6,050,159,296 and Shs. 1,491,937,950, respectively.

The applicant submitted further that the respondent refused without reason to look at the information in its VAT returns and insisted on documents such as credit notes which were issued a long time ago. The applicant submitted that it provided some credit notes but could not find the others because of passage of time. Under S. 15 of the Tax Procedures Code Act, a taxpayer is required to keep records of a fiscal year for five years. This assessment for the period 2011 to 2013, was done in 2020, which is outside the time required to keep

records under the Act. It was also contended that it was wrong for the respondent to reject the applicant's explanation on the ground the discounts had not been declared by applicant's customers in their returns. The applicant contended that the respondent relied on returns of its customers such as Capital Shoppers Limited to ignore its discounts. The applicant submitted that the decision in*Target Well Control Uganda Limited v Commissioner General of Uganda Revenue Authority* HCCS 751 of 2015 is to the effect that a taxpayer should not suffer for the omissions of a fellow taxpayer. In *Enviroserve v Uganda Revenue Authority (supra)*, the Tribunal found that it was bound by Target Well. If the applicant reported the discounts in its returns, the discounts should not be rejected because Capital Shoppers and other customers of the applicant did not report the same. The applicant submitted that in the *Target Well case*, the trial Judge held that-

> "The tax law makes it clear that the collection of tax is the sole responsibility of the defendant. Where taxable person claimed for VAT, it was the defendant's duty to take on the party that received the money from the person. It, as I said before could never be the duty of the payer to ensure that the money was remitted...."

The applicant submitted that the respondent cannot reject the applicant's discounts on the ground that third parties had not made similar declarations.

In reply, the respondent submitted that the applicant is liable to pay the income tax and VAT assessed of Shs. 2,242,507,611. The respondent conducted an audit on the applicant for January 2011 to December 2013 which established that the sales declared by the former in its VAT returns were higher than its sales declared for corporation taxes. This was admitted by the applicant's witness Bernhard Mwangi.

The respondent submitted that the applicant did not provide supporting documentation and a detailed breakdown of customers that benefited from the discounts for 2012 and 2013. The applicant failed to provide any other evidence to justify the outstanding variances. The respondent submitted that according to the *Black's Law Dictionary* 8th Edition at pg. 498, 'discount' is defined as; "a reduction from the full amount or value of something". "Trade discount' is defined as a discount from list price offered to all customers. The respondent cited *Southern Motors v State of Karnataka & Others* Civil Appeal 0972- 10978 of 2016, where the Indian Supreme court observed that.

"It is a matter of common experience that in the present contemporary competitive market, trade discounts not only are dependent on variable factors but also might be strategically not disclosable at the time of the original sale/purchase so as to be coevally reflected in the tax invoice or the bill of sale as the case may be. The actual quantification of the trade discount, depending on the nature of the trade and the related stipulations in any contract with regard thereto, may be deferred till the happening of a contemplated event, so much so that the benefit thereof is extended at a point of time subsequent to that of the original sale/purchase. That by itself, subject to proof of such regular trade practice and the contract/agreement entered into between the parties, would not render the trade discount otherwise legal and acceptable, either non est or fictitious for evading tax liability".

The respondent also cited *Maya Appliances (P) Ltd. v Commissioner of Commercial Taxes Civil Appeal 357-367 of 2018*, where the Indian Supreme Court held that.

"The liability to pay tax is on the taxable turnover. Taxable turnover is arrived at after making permissible deductions from the total turnover. Among them are 'all amounts allowed as discounts.' Such a discount must, however, be in accord with regular trade practice of the dealer or the contract or agreement entered into in a particular case".

The respondent submitted that, the common thread in the above authorities is they emphasize proof of documents such as agreements/ contracts entered between parties to enable the respondent act on the same when it comes to verification of claimed credits and discounts. In *Red Concepts Ltd v Uganda Revenue Authority* Application 36 of 2018, the tribunal emphasized the crucial necessity of information and documentation when it observed that.

"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 the information is false or misleading, the tribunal cannot turn a blind eye to it as this would be tantamount to condoning an illegality and perpetrating fraud."

The respondent submitted that, where the applicant seeks to obtain a benefit arising out of invoices, trade discounts and credit notes the latter is under a duty to provide such documentation and agreements to prove so. The respondent was lawfully justified in upholding the assessments due to failure to adduce documentation to substantiate its claims for credits and discounts. In support, the respondent further cited *Airtel Uganda Limited v Uganda Revenue Authority* Application 10 of 2019, where the tribunal stated that.

"If a taxpayer adduces evidence that an invoice was issued, and payment was made, it is entitled to input VAT. The respondent cannot chase a supplier when no payment was made."

The Tribunal also stated that.

"For the tribunal to order the respondent to pay input VAT because invoices were declared but where suppliers may not be in existence would be to encourage trading in fictitious invoices.".

The respondent further submitted that the tribunal with approval cited *Rubya Investors v URA* Application 105/2020, where it disallowed input credit claimed where there is no evidence. The respondent submitted that, the applicant's witness admitted that the returns filed had discrepancies and the applicant took no steps to rectify the said discrepancies. In *Airtel Uganda Limited v Uganda Revenue Authority* Application 10 of 2019, the tribunal succinctly dealt with the aspect of discrepancies when it ruled that.

"The respondent contended that there was no proof of payment. The respondent stated that it could not trace the suppliers. Such evidence cannot be ignored especially where the information supplied by the taxpayer has discrepancies where the information in the invoices in different from the returns".

The respondent submitted that the admission by the applicant confirms that the latter is guilty of dilatory behaviour and the application is without merit.

The respondent contended that the law grants the tribunal powers to exercise its jurisdiction and enter judgement upon admission by the adverse party to proceedings under O. 13 of the Civil Procedure Rules. The respondent submitted that admission by the applicant's witness strengthens the respondent's case that the applicant undeclared its sales for April to December 2011. The respondent contended that the applicant had failed to discharge its burden on explaining the variance.

The respondent contended that S. 4 (1) of the Income Tax Act which provides that.

"Subject to, and in accordance with this Act, a tax to be known as income tax SHALL be charged for each year of income and is imposed on every person who has chargeable income for the year of income."

It submitted that the use of the word "SHALL" in tax matters is couched in mandatory terms. It cited *Kampala Nissan v URA* High Court Civil Appeal 7 of 2009 where Justice Madrama, held that.

> "I must add that what Parliament Directs in mandatory language by using the words "SHALL in a tax law should generally be obeyed."

The respondent submitted that it is trite law that unless exempt, the taxpayer always has an obligation to pay taxes. In *Siraje Hassan Kajura v URA,* Civil Appeal 9 of 2015 Supreme Court stated that.

> "In conclusion, the duty to pay taxes is sanctioned by the Constitution. Unless exempted, the obligation to pay income tax is mandatory."

The respondent submitted that the applicant having obtained income is liable to taxation under S. 4 of the Income Tax Act. The respondent submitted that it is trite law that where a taxpayer falls within the ambits of the law, they ought to be taxed unless expressly exempted. It also cited the Kenyan case of *Primarosa Flowers Limited v The Commissioner of Income Tax Income* Tax Appeal 18 of 2013 where it was noted that.

> "...it is a general principle of fiscal legislation that to be liable to tax the subject must fall clearly within the words of the charge imposing the tax, otherwise he goes free; .... "

The respondent submitted that the assessment clearly fell within the ambits of S. 4 of the Income Tax Act. The applicants under declaration of its income does not vitiate the fact that the applicant is liable to be taxed for income tax.

The respondent submitted that the interpretation of S. 15 of the Tax Procedure Code Act by the applicant is erroneous and misleading. It ensures that where a tax obligation arises, the taxpayer is mandated to retain such records for a period of five years but does not state that after the five years the obligation is extinguished. The respondent submitted that the obligation and duty to maintain records arose when the applicant became liable to pay the taxes as assessed and the obligation still exists given the dispute is yet to be disposed of as the applicant has to pay the taxes assessed.

The respondent contended that the burden of proof is on the applicant. S. 18 of the Tax Appeals Tribunal Act, it provides that "The burden of proving that assessment issued by the respondent is excessive or erroneous lies on the taxpayer.' The respondent cited *John*

*Livingstone Okello v Commissioner General,* U.R.A. HCCS 229 of 2010 where court held that:

> "According to case law, the Commissioner's determination of tax liability is ordinarily presumed correct. See the case of Nelson M. Blohm & Joann M Blohm -V- Commissioner of Internal Revenue, 994 F.2d 1542 (11th Cir. 1993. The taxpayer, therefore, bears the burden of proving that the determination is erroneous or arbitrary. For the presumption to adhere in cases involving the receipt of unreported income, however, the deficiency determination must be supported by "some evidentiary foundation linking the taxpayer to the alleged income-producing activity. Once the Tax Court has found that this minimal evidentiary showing has been made, the deficiency determination is presumed correct, and it becomes the taxpayer's burden to prove it as arbitrary or erroneous".

The respondent also cited *Airtel Uganda Limited v Uganda Revenue Authority* Application 10 of 2019, where the tribunal expounded that.

> "In *Target Well Control v Commissioner General Uganda Revenue Authority* HCCS 751 of 2015, the High Court stated that; it was the defendant's duty to take on the party that received the money from the person. The defendant cannot execute its duty if there is no evidence that the person received money. Therefore, the applicant by not availing evidence of payment has not discharged the burden that it is entitled to input VAT".

The respondent submitted that the applicant did not avail credit notes and invoices to the Tribunal. The respondent submitted that the applicant needed to provide source documents and having failed to provide the same, it did not discharge its burden of proof. The respondent also cited Mulindwa *George William v Kisubika* Civil Appeal 12 of 2014, where the Supreme court held that; "Justice must be administered according to the law, not on the basis of sympathy." In *Advocates Coalition for Development and Environment & 4 Others v Attorney General & Another Constitutional* Petition No. 14 of 2011, the Supreme Court held that: "Courts of law act on credible evidence adduced before them and do not indulge in conjecture, speculation, attractive reasoning or fanciful theories."

Having listened to the evidence, perused the exhibits, and read the submissions of the parties, this is the ruling of the tribunal.

The applicant is a distributor of fast-moving goods in Uganda. It is not in dispute that it runs promotions and undertakes various marketing activities which involve giving discounts and



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offering free market samples. The respondent conducted an audit on the applicant for the periods January 2011 to December 2013. In July 2020, the respondent issued the applicant with VAT and income tax assessments totalling to Shs. 10,527,518,346 on the ground that the sales that were declared by the applicant for VAT purposes were higher than those declared for corporate tax by Shs. 18,018,850,127. The respondent's witness, Ms. Brenda Onega, testified that the audit further established that the declarations of international payments made in the monthly withholding returns exceeded the amounts declared as imported services by Shs. 4,937,857,257 in the VAT returns. She stated that the discounts constituted the biggest amount of the variance.

The applicant did not tender in its objection as an exhibit. However, the objection decision stated that the taxpayer's ground of objection was that the variance was due to credit notes the applicant provided to its customers that were not recorded in the VAT returns. In the objection report it was noted that the applicant offers items at a discount and free market samples and promotional items to its customers. The objection was partially allowed, and the tax was adjusted to Shs. 4,676,873,257.98. The amount of tax in dispute filed by the applicant's application is Shs. 4,676,873,258. Following mediation between the parties the tax liability was revised to Shs. 2,242,507,611. There was no partial consent filed by the parties. However, the respondent's witness admitted that the amount was revised to Shs. 2,242,507,611. Order 13 of the Civil Procedure Rules provides for admissions. O. 13 rule 6, reads.

> "Any party may at any stage of a suit, where an admission of facts has been made, either on the pleadings or otherwise, apply to the court for such judgment or order as upon the admission he or she may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon the application make such order, or give such judgment, as the court may think just".

While Order 13 Rule 6 provides for judgement upon admission, there was no application for judgement. However, the Tribunal notes that the respondent admits that the tax liability of the applicant in dispute has reduced to Shs. 2,242,507,611.

The Tribunal also notes that the parties have had reconciliations. The respondent accepted the applicant's explanations as regards adjustments made in the VAT returns. The

variances were stated in the applicant's evidence. There do not seem to be any longer in dispute. What remains in dispute is the issue of discounts offered to the applicant's customers. The applicant's witness, Mr. Bernard Mwangi confirmed that there was a variance in sales between their VAT returns and financial statements for the years 2011, 2012 and 2013. He stated that as a result of mediation the respondent accepted the applicant's explanation. What remained were trade discounts. He admitted that even after all the adjustments, there was still a variance. The respondent contends that the applicant did not provide the necessary documents such as credit notes and a detailed breakdown of customers who benefitted from the discount facility for 2012 and 2013. The applicant contends that the respondent refused without reason to look at the information in its VAT returns and insisted on documents in form of credit notes issued by the applicant long ago. The applicant submitted that it provided some credit notes but could not find the others because of passage of time. Therefore, the Tribunal has to ask itself whether the applicant is liable to pay the tax assessed.

S. 26 of the Tax Procedure Code Act which is similar to S. 18 of the Tax Appeals Tribunal Act places the burden of proof on the taxpayer. In this case, there was an assessment and an objection decision. S. 26(a) of the Tax Procedure Code Act provides that for a tax assessment, the burden is on the taxpayer to prove that the assessment is incorrect. S. 18 (a) of the Tax Appeals Tribunal Act provides that where the taxation decision is an objection decision in relation to an assessment, the taxpayer has to prove that the assessment is excessive. An assessment may be excessive but is correct. S. 18(b) requires the applicant to prove that taxation decision should not have been made or should have been made differently. Therefore, the burden is on the applicant to prove that the objection decision should not have been made or made differently or is incorrect.

Ms. Brenda Onega testified that the audit also established that the declarations of international payments made in the monthly withholding returns exceeded the amounts declared as imported services by Shs. 4,937,857,257 in the VAT returns. S. 126 of the Income Tax Act provides that.

> "1) A withholding agent shall maintain, and keep available for inspection by the commissioner, records showing, in relation to each year of income—

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(a) payments made to a payee; and

(b) tax withheld from those payments.

(2) The records referred to in subsection (1) shall be kept by the withholding agent for five years of income

(3) The commissioner may call upon a withholding agent to allow an auditor to examine the agent's records to verify their accuracy against the agent's tax credit certificates".

The issue of declarations made in international payments in the withholding returns exceeding the amount in the VAT returns was not stated in the objection report nor did come up during the scheduling. The Tribunal will ignore it. We shall stick to the variances in the applicant's VAT returns and income tax returns. The dispute still outstanding after mediation is in relation to discounts.

It is not in dispute that the applicant provided discounts to its customers. *Black's Law Dictionary* 10th Edition p 564 defines discount as; "a reduction from full amount or value of something" The Cambridge Advanced Learners Dictionary p. 432 defines a discount as a "Reduction in the usual price" The applicant stated that it issued discounts to its customers that caused the variance. It is against this variance that a dispute arose when the applicant was assessed additional income tax. In *Tugende Ltd V Uganda Revenue Authority* Application 42 of 2021, the tribunal stated that.

"...where a person has included discounts used in the production of income in its gross income, they should be allowed to make adjustments to its deductions to as to arrive at the chargeable income."

So it is not in dispute that if the applicant offered discounts to its customers in the production of income it is entitled to them. However, the dispute is that the respondent contends that there is no evidence that the applicant provided the discounts it claims to have made.

The problem created by discounts for the taxman is that a taxpayer can exaggerate the discounts it has offered in order to reduce its tax liability. In the objection review report, REXHI, page 547, the respondent wrote-

"The review team analyzed discounts for 2011 since a detailed breakdown of the customers was availed. A sample of one of the company customers (Capital Shoppers Limited) indicated that there was a gross variance between what Unilever reported as discounts given and the amount the customer Capital Shoppers. Limited) declared. This is an

indication of overstatement of discounts amounts reported...Therefore, in absence of source documents and detailed breakdown of discounts given for the period 2012 and 2013, the team resolved to rely on the customers information/purchases...."

A discount can be difficult to prove. Whereas a receipt is issued for items purchased, none is issued for discounts. A discount maybe shown on a receipt or in the books of accounts of a taxpayer, which may not always be the case. In this case the applicant stated that it issued credit notes to customers for discounts issued. The applicant also stated that it issued free samples during promotional and marketing activities. It is not clear whether the applicant issued credit notes to customers it offered free samples. Where credit notes were not issued or a taxpayer is not able to do, other circumstantial evidence should be allowed to prove the discounts. The dates when the promotional activities and marketing activities took place and the discounts given would be helpful.

The applicant presented a table of the discounts it granted as below.

**TABLE B Unilever Analysis of VAT returns January – December 2011**

| | **Out Put VAT** | **Discounts** |
|---|---|---|
| Jan | 6,250,244,549.00 | 381,341,468.00 |
| Feb | 5,512,989,065.00 | 431,112,367.00 |
| Mar | 9,001,541,048.00 | 495,062,321.22 |
| April | 6,057,417,836.33 | 306,279,961.00 |
| May | 6,882,176,077.78 | 368,378,100.00 |
| June | 7,252,521,872.22 | 296,303,372.22 |
| July | 6,309,873,737.00 | 497,790,291.22 |
| Aug | 8,135,440,167.44 | 599,943,071.00 |
| Sep | 8,593,611,236.22 | 1,137,752,072.00 |
| Oct | 7,774,858,338.33 | 403,483,812.45 |
| Nov | 7,359,458,338.33 | 423,442,501.78 |

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| Dec | 7,516,970,904.00 | 709,269,958.11 |
|---|---|---|
| **Total** | **86,647,103,651.43** | **6,050,159,296.66** |

**TABLE C January – March 2012**

| | **Output VAT** | **Discounts** |
|---|---|---|
| Jan | 9,709,838,526.55 | 405,208,396.00 |
| Feb | 6,796,016,981.11 | 497,208,089.78 |
| Mar | 10,198,757,197.45 | 589,521,464.00 |
| **Total** | **26,704,612,706.11** | **1,491,937,950.22** |

The said tables are not in the witness statement of Mr. Bernard Mwangi. The exhibit though wrongly referred to as AEX1 the applicant alleges that refers to the tables is not part of the joint trial bundle. The applicant's counsel was giving testimony in its submissions which was not part of the evidence adduced during the trial. The applicant's witness was not cross examined on the tables. The Tribunal cannot rely on them.

The applicant's witness testified that the revenue reported in the income tax returns did not include the discounts it issued while the sales in the VAT included them. Discounts were issued in the credit notes. If the applicant issued credit notes, it should be reflected in the VAT returns. One would be able to notice the discounts the applicant granted using the credit notes. A perusal of the monthly VAT returns filed by the applicant in Section C- Sales of goods and services on adjustment of output tax using debit and credit notes shows zero. So, while the sales in the VAT returns included discounts, the applicant was not adjusting the output VAT using the credit notes issued. If the VAT returns show that the applicant was not adjusting output tax using credit notes, why should the Tribunal dispute the returns, unless they are amended. If the applicant was adjusting the output tax in its VAT returns using credit and debit notes, this dispute would not have arisen. The variance in the income tax returns and VAT returns would if it is there, at least be minimal. The minimal variance



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would arise from the timing of issuing tax invoices and payments of amounts in the invoices. For instance, an invoice maybe issued in one financial year, but the supply or payment is made in another financial year creating a variance between the VAT returns and financial statement, which is explainable. Apart from such minor variances, there should be no big variance between the figures in the VAT returns and the financial statements unless some goods and or services supplied were VAT exempt or had zero rated VAT.

The applicant's witness, Mr. Bernard Muhangi testified that the discounts were 4 to 10% as in the trade policy statement. The applicant in its submission put the discount at 10%. The financial statement of 2011 at p. 163 and the one of 2012 at p. 314 puts the discount rate at 15%. The financial statements are audited. Both financial statements do not mention discounts in the deductible losses, impairments, or risks. Such discrepancies and omissions to include credit notes in the VAT returns make the evidence of the applicant's witness unreliable.

The respondent contended that the applicant failed to provide the credit notes it issued to its customers. In *Red Concepts Ltd v Uganda Revenue Authority* Application 36 of 2018, the tribunal emphasized the crucial necessity of information and documentation when it observed that.

> "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 the information is false or misleading, the tribunal cannot turn a blind eye to it as this would be tantamount to condoning an illegality and perpetrating fraud."

Mr. Muhangi testified that the applicant was able to avail credit notes worth Shs. 1,758,357,755 to the respondent. It could not avail others due to passage of time. The applicant did not adduce any other documentary evidence to show the outstanding discounts in dispute. It alleged it could not do so because of passage of time. The applicant cited S. 15 of the Tax Procedure Code Act which reads.

> "**15. Accounts and records**
>
> (1) Subject to subsections (2) and (5), every taxpayer shall for the purposes of a tax obligation-

(a) Maintain, in the English language, records including in electronic format, as maybe required to determine the taxpayers tax liability under a tax law.

(b) maintain the record so as to enable the taxpayer's tax liability under the tax law to be readily ascertained; and

(c) retain the record for five years after the end of the tax period to which it relates or other period as specified in the tax law.

(2) Where at the end of the time specified in subsection (1)(c), a record is necessary for a proceeding commenced before the end of the five-year period, the person shall retain the document until all proceedings have been completed."

S. 15(1) is subject to S. 15(2). The audit period for the applicant was for the financial years 2011 to 2013. By the time the respondent conducted the audit in 2020, the applicant contends that the time under S. 15(1) required to keep the records for the financial year 2011 to 2013 would have expired. The Tribunal noted that the applicant did not indicate that the output VAT was adjusted by credit notes in its VAT returns. The VAT returns did not indicate the amount of the credit notes issued. Therefore, how would the applicant have kept credit notes when it did not mention their amount in its VAT returns? If there are not mentioned in the returns the tax liability of the taxpayer cannot be ascertained. Maybe if it had mentioned the credit that was used to adjust the output tax, the respondent would have requested for the credit notes at the time it filed the VAT returns to ascertain its liability. In order to synchronize S. 15(1) and 15(2) of the Tax Procedure Code Act, time should run from the time the amounts in or of records are stated in the returns for the tax authority to ascertain the tax liability of the taxpayer. S. 15(2) of the Tax Procedure Code Act states that a record is necessary for the proceeding to commence. The credit notes were necessary for the output tax to be adjusted. If a party does not mention the tax or adjustment affected by the records, it become difficult for a person to ask for the records. Time cannot start running when the tax authorities is not aware of the records as it is not aware that they are necessary for the proceeding. The applicant ought to have amended its returns to reflect the amount in the credit notes for the time to run.

The applicant application of S. 15 of the Tax Procedure Code Act is ambivalent. For the credit notes of Shs. 1,758,357,755 it availed to the respondent; the applicant seems to suggest that S. 15 does not apply. It only applies to those documents it cannot avail.

Weren't those credit notes of Shs. 1,758,357,755 also affected by the passage of time? Most importantly the parties admit they did reconciliation during mediation as a result the tax liability reduced from Shs. 4,676,873,257 for the period 2011 to 2013 to Shs. 2,242,507,611. If the parties conducted reconciliation, there must have had documents including the credit notes mentioned. The applicant does not explain why the passage of time was selective when it came to the other documentary evidence of discounts which it did not have. The credit notes the applicant had enabled the applicant to reduce its tax liability to a considerable amount but would not extinguish it. The Tribunal is left wondering whether the said other evidentiary documents on the discounts that is still in dispute ever existed.

Where an applicant cannot adduce primary evidence due to passage of time, secondary evidence may be adduced. The secondary evidence must be convincing. In this case, the applicant does not give a breakdown of the customers it gave discounts. It does not adduce evidence of the dates and places where the promotional activities took place. The amount claimed for the discount was high. The financial statements do not bring out clearly the issue of discounts. The VAT returns do not mention the credit or discount that was used to adjust output VAT. The respondent's decision to compare the discounts given by other suppliers like Shoprite was not irrational. The Tribunal can only find fault with it if it was grossly irrational.

Lastly the applicant stated that the returns were a result of human errors. The applicant submitted that AW1 stated that there were entries for values of suppliers captured either wrongly due to human error or that were corrected by credit notes received from suppliers. For instance, BT Solutions, the applicant's technology supplier for March 2011, entry 8, page 30, was made for Shs. 1,273,855,300. Where there is an error in a return the taxpayer should apply to make an adjustment in the return. S. 22 of the VAT Act which is to the effect that;

"(1) This section applies were, in relation to a taxable supply by a taxable person-

(a) the supply is cancelled.

(b) the nature of the supply has been fundamentally varied or altered.

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(c) the previously agreed consideration for the supply has been altered by agreement with the recipient of the supply, whether due to an offer of a discount or for any other reason; or

(d) the goods or services or part of the goods or services have been returned to the supplier, and the taxable person making the supply has-

(e) provided a tax invoice in relation to the supply and the amount shown in the invoice as the tax charged on the supply is incorrect as a result of the occurrence of any one or more of the abovementioned events; or

(f) filed a return for the tax period in which the supply occurred and has accounted for an incorrect amount of output tax on that supply as a result of the occurrence of any one or more of the above-mentioned events".

Therefore, if there are any errors in the returns the applicant should apply to amend the returns to rectify them so that there match with the financial statements. An amendment of returns cannot be done in court. The taxpayer should follow the procedure set out in the law.

Taking the above into consideration, the Tribunal holds that the applicant has not discharged the burden of proof placed on it. This application is dismissed with half-costs to the respondent. The Tribunal notes that applicant was able to reduce the tax liability to Shs. 2,242,507,611 from Shs. 4,676,873,258.

Dated this 17th day of February 2023.

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| **DR. ASA MUGENYI** | **DR. STEPHEN AKABWAY** | **MR. GEORGE MUGERWA** |
| **CHAIRMAN** | **MEMBER** | **MEMBER** |