THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

COMMERCIAL DIVISION

CIVIL APPEAL NO 7 OF 2009

(ARISING FROM TAT NO 28 OF 2007)

KAMPALA NISSAN UGANDA LIMITED}…….. APPELLANT

VERSUS

UGANDA REVENUE AUTHORITY}…….. RESPONDENT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA

JUDGMENT

This judgment arises from the appellant's appeal from the judgment and award of the Tax Appeals Tribunal in **TAT No 28 of 2007** which decision was delivered at Kampala on the 14th of July 2009. The Tax Appeals Tribunal dismissed the appellant's application for review of a taxation decision of the Respondent which had assessed the appellant to pay VAT amounting to **Uganda Shillings 180,901,363** together with a penalty of **Uganda Shillings 99,220,699** totaling to **Uganda Shillings 280,122,062/=** The assessment in question is dated 7th of June 2007 and received by the appellant's lawyers on the 8th of June 2007.

The assessment was made by the respondent pursuant to an audit of the appellant for VAT for the period January 2005 to December 2005. From the correspondence based on the objection of the appellant dated May 27th 2007, at page 42 of the record of Appeal, the appellant's lawyers held a meeting with the respondent's officials on the 24th of April 2007 following the audit of the appellant. In the letter dated May 7th 2007 the Appellants Lawyers Messrs Birungye, Barata and Associates lawyers for the appellants note at page 1 of their letter that the tax in dispute was shillings 180,901,363/- and the period of the tax was January 2005 – December 2005 for VAT as the tax in issue. The lawyers wrote and I quote:

> "The tax in question arises from transfer of motor vehicles in bond sales to customers who pay their import taxes directly to URA. Kampala Nissan Limited invoices its Customers an amount that is higher than the CIF value on which import duties are paid.
>
> Issues:

1. Whether the tax assessment by Customs Department cleared all the VAT due to the imported vehicles.

2. Whether the figure referred to as KNL mark up in the URA computations is separately liable for VAT.

Opinion

It is a long held view of both URA and Kampala Nissan Limited that bond sales are imports of the beneficial owner in whose names the motor vehicles are registered.

The position of URA which KNL has applied all along is contained in the directive of the Commissioner, Large Taxpayers department on 17th January 2001 to our associate, NIS Uganda, to wit:

"VAT due shall be computed by our Customers Department and payable by your customers in cases of bond sales". We shall not impose on you additional VAT liability resulting from the said review".

The mark up on in the URA computation was the subject of consideration before the Commissioner's decision and as such no extra liability arises to Kampala Nissan Limited.

Accordingly, Kampala Nissan Objects to the assessment of Shs. 180,901,363= (…) dated 18th April 2007."

The letter dated 18th of April 2007 by the respondent is at page 41 of the record and gives the VAT payable according to an attached schedule. The letter however invites the appellant to a reconciliation meeting on 25th of April 2007. Apparently the meeting took place though the lawyers of the appellant in their objection letter of May 7th 2007 refer to a meeting that took place on the 24th of April 2007. The penalty applied seemed not to be in dispute as the penalty only arises if the appellant is liable to pay the assessed VAT. The Respondent's objection decision pursuant to appellant's objection to the said assessment is at page 15 of the record in a letter dated 24th of July 2007 signed by the Commissioner General of the respondent. The respondent decided that the issue for determination is whether URA is barred by the doctrine of estoppels from raising an assessment contrary to its earlier decision communicated in its letter dated 17th January 2001. The respondent opined that URA was not barred by the doctrine of estoppels from reviewing its earlier decision on VAT on bond sales where it believes that the earlier decision of its Commissioner was erroneous in law. It decided that the value of supplies to the clients of the appellant as per the appellants local tax invoices were higher than the ones used to transfer units to the appellants clients in the customs bonded warehouses. VAT was therefore charged on the difference. The Commissioner General decided that the VAT assessed was proper and should be paid to the respondent.

The appellant applied for review of the assessment to the Tax Appeals Tribunal. The application before the Tax Appeals Tribunal was filed on the 24th of September 2007. The statement of facts before the tribunal was that the applicant had made an enquiry of the respondent on how to treat motor vehicles supplied on ex-bond basis. They state that they received directives from the Commissioner responsible for VAT and relied on them since. They further plead that the respondent subsequently disregarded the earlier departmental position and raised assessments for VAT. The appellant objected to the assessment on the ground that a precedent had been set by the Respondent, Uganda Revenue Authority. The appellant also asserted that the respondent did not respond to issues raised in its objection letter of May 7, 2007 contrary to section 34 B of the Value Added Tax Act. The issues pleaded for trial before the Tax Appeals Tribunal were the following:

1. Whether the respondent was in order to disregard the directives in the manner they did?

2. Whether the respondent is deemed to have accepted the objection of 7th of May, 2007?

3. Whether the respondent's computation was correct?

4. Whether the additional assessments were made illegally?

5. Remedies and costs.

The decision of the tribunal is found between pages 268 – 282 of the record of appeal. The Tax Appeals Tribunal noted at page 2 of their judgment that the issues agreed before the tribunal by both parties were:

1. Whether the respondent was justified in reviewing the position in the letter dated 17th January 2001 signed by the Commissioner Large Tax Payers Department.

2. Whether the assessment of U. Shs. 280,122,062/= by the respondent as tax payable was proper.

3. What remedies are available?

However more issues had been pleaded in the application for review of the objection decision of the respondent. The issues in the appellants written submissions before the tribunal on page 58 of the record is word for word the issues as recorded by the Tax Appeals Tribunal on page 2 of their decision.

The Tribunal answered issue No. 1 above in the affirmative and held that the respondent was justified in reviewing its decision contained in the letter dated 17th January 2001. On issue No. 2 the Tribunal set aside the computation of VAT by the respondent and directed that it be

recomputed using 17% VAT for transaction up to June 2005 and 18% VAT for transaction starting 1st July 2005 up to December 2005. They noted that the appellant had not raised the issue of proper assessment with the tribunal. They accordingly dismissed the appellants application for review with costs save for remitting the question of proper assessment back to the respondent according to their directives quoted above. The decision of the Tax Appeals Tribunal is dated 14th July 2009. The Appellant then filed an appeal to this court pursuant to section 34D of the Value Added Tax Act cap 349 2000 laws of Uganda.

The grounds of the appeal set out in the notice of appeal are:

1. The honourable members of the tribunal erred in law when they held that the relevance of the applicants witness testimony was minimal because she was not working for the applicant.

2. The honourable members of the tribunal erred in law when they held that the letter of 17th of January 2001 was erroneous, illegal and not binding on the Commissioner.

3. The honourable members of the tribunal erred in law when they held that the letter of 17th of January 2001 addressed to NIS (U) Ltd and the VAT waiver therein was not applicable to Kampala Nissan.

4. The honourable members of the tribunal erred in law when they held that the applicant/appellant admitted liability to pay VAT on the imported cars.

5. The honourable members of the tribunal erred in law when they failed to properly interpret section 23 of the Value Added Tax Act chapter 349, thereby coming to an erroneous decision that VAT was chargeable on the markup.

6. The honourable members of the tribunal erred in law when they failed to properly evaluate the evidence on record and thereby came to an erroneous decision.

The appellant seeks for orders that the judgment of the Tax Appeals Tribunal dated 14th of July 2009 is set aside and judgment is entered in favour of the appellant with costs of the appeal.

At the hearing the Appellant was represented by Counsel Cephas Birungye while the Respondent was variously represented by Ali Sekatawa, Habib Arike and Ote. Final arguments were made on the respondent's behalf by Ali Sekatawa. On the 15th of March 2011 the Counsel Terrence Kavuma held brief for Mr. Habib Arike when he informed court that the parties had agreed out of court to file written submissions. The court then gave a schedule of dates for the parties to file written submissions. The appellant was to file written submissions on the 24th of March 2011 while the respondent was to file on the 5th of April 2011. The Appellant filed written submissions on the 24th of March 2011 but the respondent delayed. The appellant filed a supplementary record

of appeal on the 29th of March 2011 which record was accepted. On the 12th of April 2011 the court extended time for the respondent to put in its written submissions. The respondent eventually filed its written submissions on the 11th of May 2011 after further delay.

I have carefully considered the record of appeal, the supplementary record of appeal, the written submissions of the parties, oral clarifications of the written submissions and the authorities cited.

As far as the grounds of appeal are concerned, an appeal from a decision of the Tax Appeals Tribunal to the High Court is made on questions of law only, which questions of law are to be stated in the notice of appeal. This implies that the questions of law arise only from the issues for trial before the tribunal. Apart from the remedies on record there were only two other issues for trial before the tribunal. These were whether the Respondent could lawfully review its decision contained in its letter dated 17th of January 2001 signed by the Commissioner of the Respondent and secondly whether assessment of the Appellant for the tax objected to before the respondent was proper.

Grounds number 1, 2 and 3 of the notice of appeal all address the same issue before the tribunal which culminated in a decision on the first issue. The decision on this issue only leads to a main question of law which is "whether the tribunal erred in law to hold that the respondent was justified in reviewing its decision contained in the letter dated 17th January 2001". The crux of the matter is whether the decision was lawfully reviewed. There is no need to specifically set up the other grounds which support arguments that the tribunal erred in law to hold that the respondent was justified to review its decision or that they lawfully departed from the position stated in its letter dated 17th January 2001. For that reason grounds 1 and 3 of the notice of appeal support in the appellant's case reasons why the appellant thinks that the tribunal erred too depart from the letter of the 17th of January 2001 referred to above and therefore addresses in the main ground 2 of the notice of appeal.

Grounds 4 and 5 deal with the decision of the tribunal on the second question of law namely whether the computation of VAT in the assessment objected to was lawful or proper. This question of law can only be argued in the alternative to the first question of law I have set out above. Lastly ground 6 on evaluation of evidence is general and can be applied to all the grounds and need not be specifically argued as a separate ground. The appellant however merged grounds 2 and 3 of the notice of appeal into ground 2 and argued it under this head. Consequently ground 4 became ground 3 in the written arguments and the last ground is ground 5.

I will deal with ground 1 separately and grounds 2 and 3 as a question of law challenging the legality or propriety of the respondent's departure from a decision embodied in a letter dated 17th January 2001 signed by the Commissioner, Large Tax Payers department which letter is at page 1 of the supplementary record of appeal. This is argued as ground 2. The letter of the respondent is dated 17th of January, 2001 and is addressed to the Finance Manager NIS Uganda which letter reads as follows:

"RE: VAT TREATMENT OF BOND SALES

I refer to your letter dated 12th of January, 2001 on the above subject which is in response to mine dated 31st of August, 2000.

The view communicated in my letter of 31st of August, 2000 is under review by us and so; in the meantime please disregard its contents. The VAT due should be that computed by our Customs Department and payable by your customers in cases of bond sales.

We shall not impose on you any additional VAT liability resulting from the said review.

We sincerely apologise for any inconveniences caused."

The above quoted letter is signed on behalf of the respondent by the Commissioner Large Tax Payers Department. As noted in the facts of the appeal, this letter is the same letter referred to by the Commissioner General in her objection decision. In the objection decision letter dated 24th of July, 2007 the Commissioner General of the respondent decides as follows:

"Reference is made to your objection letter dated 5th of July, 2007. We have also noted the contents contained therein and wish to respond as follows:

In the above mentioned letter, a reference is made to the letter ref. URA/LT D/B94-1004 -6855 – U dated 17 January, 2001, in which the commissioner large tax payers department stated that the VAT due should be that computed by the customs department on cases of bond sales. The issue for determination is whether URA is estopped from raising an assessment contrary to its earlier decision communicated vide letter dated 17th of January, 2001.

Our opinion is that Uganda Revenue Authority is not estopped from reviewing an earlier position on VAT on bond sales where it believes that the earlier decision of the Commissioner was erroneous in law. There is case law to the effect that corporations cannot be estopped from carrying out statutory duties.

The principle is that estoppels is incapable of putting aside or overriding provisions of an Act as enacted by Parliament.

Our position on VAT on bond sales is that since the value of the supplies as per your local tax invoices was higher than the one used to transfer units to your client's in the Customs bonded warehouses, therefore the variance represents value added which is chargeable to VAT.

In light of the above, the audit of April 2006 carried out by the Department of Audit and Tax Investigations, and the subsequent findings resulting into an assessment of shillings 280,122,062/= was in line with the VAT Act cap 349.

Henceforth the assessment is proper and should be duly paid.

If you feel dissatisfied with the above decision you may appeal to the Tax Appeals Tribunal and should you decide to take up that option, please pay 30 per cent of the tax assessed before lodging the application to the tribunal as required by section 33 C (3) of the VAT act cap 349."

The Appellant made lengthy written submissions on ground 1 of the notice of appeal which addresses the holding of the Tribunal that the value of the testimony of the appellants witness AW1 Mrs. Makada was minimal because she was not an employee of the appellant. Counsel for the appellant referred to page 3 of the ruling of the tribunal where they state:

> "… apart from the witness telling the Tribunal what bond sales are in light of the fact that she is not an employee of the applicant the relevance of her testimony is minimal. … it is trite law that companies are separate legal entities from one another. A manager from one company cannot testify for another unless there is a power of attorney or authorization to that effect. The letter of 17th of January 2009 referred to, was addressed to NIS Uganda Ltd which is not Kampala Nissan limited. The said letter was not even copied to the Applicant. Can one rely on a letter which is not addressed to it? The tribunal cannot make assumptions where actual facts are needed… If there was any assurance it was given to Nis Uganda and not Kampala Nissan, the Applicant…"

Counsel referred to section 4 of the **Evidence Act** for the proposition that any facts in issue or relevant facts may be adduced by a party seeking judgment in his or her favour. He contended that admissibility is based on relevance of evidence. Counsel referred to the cases of **DPP VS KIBOURNE [1973] AC 729** that relevant evidence is that with probative value. Secondly he submitted on the competence of a witness under section 117 of the Evidence Act contending that all persons are competent witnesses unless otherwise disqualified. He further on submitted that Mrs. Makada was in the same business with the appellant endowed with special skill acquired through experience and her testimony was therefore relevant.

In reply the Respondent supported the decision of the Tax Appeals Tribunal on the grounds that the letter in question adduced by Mrs. Makada was addressed to NIS Uganda and not the appellant. It was not even copied to the appellant. That NIS Uganda was a separate legal entity. As far as questions of customs or right are concerned, the respondent's counsel submitted that there was no right or custom in issue as the letter concerned NIS Uganda.

As far as the ruling of the Tax Appeals Tribunal is concerned, I find that they did not rule that the evidence of the witness is irrelevant. They ruled that the value of the testimony was minimal. The issue of how much weight to give an admitted fact is within the discretion of the tribunal. In any case the letter dated 17th of January 2001 was admitted and speaks for itself. Admissibility is a different question from the weight of evidence. The submission of counsel addresses admissibility of evidence. The tribunal further admitted the testimony of AW1. Probative value

given to admitted evidence by a tribunal or court is based on the assessment of the relevant evidence by the trial court taking into account all relevant factors. In the case of **Noor Mohamed v The King [1949]** AC 182 Lord du Parcq notes at page 192 that weight given to evidence should not be confused with admissibility of evidence:

> "… the judge ought to consider whether the evidence which it is proposed to adduce is sufficiently substantial, having regard to the purpose to which it is professedly directed, to make it desirable in the interest of justice that it should be admitted. If, so far as that purpose is concerned, it can in the circumstances of the case have only trifling weight, the judge will be right to exclude it. To say this is not to confuse weight with admissibility. The distinction is plain …"

Furthermore the rules of evidence quoted by the Appellants counsel are not binding on the Tax Appeals Tribunal in proceedings conducted by the Tribunal. Section 22 (1) and (2) of the Tax Appeals Tribunal Act cap 345 2000 Laws of Uganda, confers discretion on the Tribunal to adopt appropriate rules of procedure. It provides:

> "22. Procedure
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> (1) In any proceeding before a tribunal, the procedure of the tribunal is, subject to this Act, within the discretion of the tribunal.
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> (2) A proceeding before a tribunal shall be conducted with as little formality and technicality as possible, and the tribunal shall not be bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate.
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> (3) The proceedings of a tribunal shall be conducted in accordance with such rules of practice and procedure as the tribunal may specify, and the tribunal may direct the application of the rules of practice and procedure of any court subject to such modifications as the tribunal may direct.

Last but not least the decision of the Tax Appeals Tribunal on the question of whether the respondent had a right to review its decision did not depend on the testimony of AW1. Moreover the Tribunal took into account the evidence that the letter of the 17th of January 2001 from the respondent was applied to NIS Uganda Ltd. The evidence that the letter of the 17th of January 2001 was applied to other Motor Vehicle dealers was not given mush weight because the issue before the tribunal was not whether URA was applying the tax law arbitrarily or selectively or discriminatorily. The Tax Appeals Tribunal addressed the question of whether the doctrine of estoppels barred the Respondent from reviewing the said letter. In short the tribunal addressed the relevant questions of law when considering whether the respondent could review its own decision. In addition the Tax Appeals Tribunal noted that the letter was addressed to Messrs NIS Uganda Ltd, and not the appellant and any assurances in that letter was given to the said company and not the Appellant. They also considered the question of whether the Commissioner

Large Tax Department had powers to exempt anybody from tax where there was a statutory provision which provided for it. In other words the decision of the Tribunal to give minimal weight to the testimony of Mrs. Makada did not affect the final result of their decision on the question of whether the respondent could depart from its decision embodied in its letter dated 17th January 2001 in light of the questions of law they decided. Therefore whether they gave little weight to the testimony of AW1 or not would not have affected the final outcome of their decision. Moreover the objection decision of the Commissioner General implied that the letter of the 17th of January 2001 was being implemented and that the respondent had a right to review this earlier decision and was not barred by the doctrine of estoppels from reviewing its decision. Why should it be reviewed unless the objection decision admits implicitly that it was a policy being applied whether to the appellant or other motor vehicle dealers? The question of whether this decision was being applied to other motor vehicle dealers or the appellant as a question of fact would not materially affect the position that the earlier decision or position was reviewed and departed from. Whether this applied across the board does not prejudice the appellant's arguments. Consequently the wording of the objection decision is sufficient to argue that the position of the respondent was that embodied in the letter dated 17th of January 2001 prior to review of that position. The question of whether the letter was binding can still be argued separately of the alleged minimal effect of the testimony of AW1. For the reasons stated above, ground 1 of the notice of appeal lacks merit and stands dismissed.

As I have noted above the crux of the appellants appeal on grounds, 2, and 3 of the notice of appeal rests on ground 2 on whether the tribunal erred in law to hold that the letter of the respondent dated 17th of January 2001 was illegal and not binding on the tribunal.

Grounds 2 and 3 of the notice of appeal are merged as ground 2 and will be considered together. On these questions of law the appellant's counsel referred court to the decision of the Tax Appeals Tribunal at page 273 of the record of appeal where they stated that:

> "… A question also arises as to whether once a tax has been imposed by statute if (we are to assume) an erroneous letter by the Commissioner may override the imposition by law".

Counsel submitted that the appellant did not charge VAT on her clients. Moreover members of the motor vehicle association such as NIS Uganda Limited did not charge VAT on ex bond sales. Section 15 of the evidence act provides that when there is the question whether a particular act was done, the existence of any course of business, according to which it is naturally have been done, is a relevant factor. The appellant did not charge VAT on its clients. More so the members of the motor car vehicle Association for example NIS the company dealing in the same business as the appellant company. In clarification to the written submissions counsel for the appellant submitted that the appellant is a company dealing in the importation and sale of motor vehicles. The company was previously known as Crane Autos Ltd and was an agent of Motor Care Uganda which is also known as NIS Uganda. The issue in the appeal is about the treatment of sale of vehicles in bond. The Appellant sells both in bond and outside bond.

The appellants counsel contended that the laws relating to taxation of sales of motor vehicles in bond and outside bond are distinctly different. Sale outside bond attracts VAT. The only dispute is about sales made in bond as to the amount on which VAT should be charged, who bears the VAT, and when it is paid. He submitted that this matter has been controversial and the appellant inquired from the respondent when its name was still Crane Autos about what happens when vehicles are sold in bond. Counsel referred to page 8 and 4 of the supplementary record of appeal. Together with 2 letters, NIS Uganda asked the same question as to how VAT should be treated for purposes of clarity. The Respondents response is embodied in the letter dated 17th January 2001. Counsel referred to another letter dated 25th June 1999 from the Assistant Commissioner Technical and Registration of the respondent whose subject is VAT ON GOODS SOLD IN BOND AND TIME FOR ISSUING OF TAX INVOICES. This letter is at page 2 of the supplementary record. He submitted that the respondent made a different clarification about treatment of goods in bond.

Counsel for the appellant submitted that four years later, the respondent audited the appellant and charged VAT contrary to the directions in its letter of the 17th January 2001 and when they raised this issue with the respondent the Chief Executive Officer of the respondent replied that the letter of 17th January 2001 was issued in error. The Commissioner General of the respondent in her objection decision dated 24th July 2001 decided that the letter of 2001 about payment of VAT in bond was made in error and URA was not bound by it.

In their written submissions the appellants argue at page 2 that the tribunal ruled that the Commissioner who wrote the letter of the 17th January 2001 had no power to waive tax. He submitted that there were two interpretations on the treatment of VAT. He submitted that the letter was a practice direction of the Commissioner General and not a private ruling whose provisions came by amendment to the VAT Act later on.

Counsel submitted that the Commissioner Generals contention is that the earlier position was erroneous in law but does not explain the difference between customs taxation and VAT. He contended that there was a conflict as to which provisions prevail. This is based on sections 5, 18 (a) and section 23 of the VAT Act. The respondent's letter does not interpret the law. He submitted that once VAT is paid under the provisions of sections 5 and 15 of the Act, it is final VAT.

Counsel further contended that at this stage there is no final position as to the correct treatment of VAT tax in this category. The respondent should withdraw the letter and give another directive (Practice Direction). Illegality was not proved neither did the respondent prove that there was fraud. The appellant relied on sections 91 and 92 of the Evidence Act for the contention that the terms of the directive dated 17th of January 2001 cannot be varied. He further relied on the doctrine of estoppels under section 114 of the Evidence Act and criticized the tribunals ruling that for a party to rely on estoppels the representation relied on must have been addressed to it. Counsel further relied on equitable estoppels and cited the cases of **Premchandra Shenoi vs.**

Maximov Oleg Petrovic SCCA No. 9 of 2003, Century Automobile vs. Hutchings Biemar Ltd [1965] EA 034, Ajayi vs. R.T. Briscoe (Nigeria) [1964] 3 ALL E.R. 566.

The appellants counsel further contended that the appellant was mislead through information made by the respondent to its detriment and relied on the case of Hedley Byrne and Co. vs. Heller and Partners [1964] AC. He also contended that the respondent could have made a false representation.

Counsel further contended that the appellant was been treated differently from other tax payers.

In reply the respondents counsel quoted the ruling of the tribunal that:

> "… The letter of 17th of January, 2011 by the commissioner of large taxpayers had the intention of not imposing value added tax on sales of vehicles at ex bond level, we would wish to clearly spell out that the commissioner does not have power to waive tax nor grant exemptions. The commissioner cannot give assurance to the taxpayer to evade taxes such an act is ultra vires and does not amount to any act at all…"

In his oral submissions the respondent's counsel Ali Sekatawa submitted that one cannot rely on a mere letter to claim a tax waiver. He contended that the Tax Appeals Tribunal held that the letter of 17th January 2001 by the Commissioner cannot give assurance to a tax payer to evade taxes. He supported the findings of the tribunal on ground that the applicant relied on the doctrine of estoppels. He contended that the Commissioners letter was not a private ruling neither was it a practice direction as at that time, that provision was not in the law. Secondly, for a private ruling to bind a commissioner it has to be inter partes. It is in persona and not in rem. The issue therefore does not arise. Estoppels cannot hold against a statutory obligation.

As far as the law is concerned the respondent's counsel further contended in his written submissions that the appellant's submission heavily relies on the argument that the respondent is barred by the doctrine of estoppels from denying that the letter of 17th of January waived the tax liability of the applicants. That once the letters were written and the appellants relied on them not to pay taxes, then the respondents are barred by the doctrine of estoppels from denying the existence of such letters and their effect.

The respondent submitted that whereas the letter dated 17th of January was written, it should be noted that the doctrine of estoppels cannot prevail as an answer to a claim that an act done by a statutory body was ultra vires, that the imposition of a statutory obligation cannot be waived on grounds of estoppels. Counsel relied on the case of **Pride Exporters Limited vs. Uganda Revenue Authority High Court Civil Suit No. 563 of 2006** were Hon. Justice Geoffrey Kiryabwire said that estoppels cannot hold if what a statutory body did was ultra vires. The respondents counsel further referred to the case of **KM Enterprises LTD and 2 Others vs. Uganda Revenue Authority HCCS 599 of 2007** where Hon. Justice Egonda Ntende held that:

> "though it is possible for the taxpayer and the defendant to reach an agreement in event of a dispute that agreement must be consistent with the applicable law. This is as much for the protection of the tax payer as it is for the public interest. The defendant or its officers cannot go outside the applicable law as applied by the defendant…"
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> "… The official is not capable of divesting itself of those powers or of fettering itself in their use, and an agreement by which it seeks to do so is ultra vires and void. Such an ultra vires agreement cannot become intra vires by reason of estoppels, lapse of time, ratification, acquiescence, or delay."

The respondents counsel further cited the case of **Maritime Electronic Company Ltd vs. General Dairies Ltd [1937] 1 ALL ER 748** where it was held that statutory powers and duties cannot be fettered or overridden by agreement, estoppels, lapse of time, mistake or such other circumstances. He submitted that the duty of Uganda Revenue Authority is to collect taxes as the fall due. Its officials therefore cannot breach duties imposed by statute, or agree to collect less tax or none at all from a particular tax payer by agreement as such agreement is void for being contrary to the statute. The applicant cannot claim that the respondents by reason of the Commissioners letter dated 17th of January, 2001 are barred by the doctrine of estoppels from paying the VAT that they should by law pay.

I have carefully considered the detailed submissions of the parties on this issue. As far as the doctrine of estoppels is concerned, the submission of the respondent and the decision of the tribunal is that estoppels cannot be pleaded as a bar overriding a statutory duty or obligation. Before we consider what the respondents statutory duties or obligations are in respect to the in bond sales of motor vehicles and collection of VAT, we need to assert for the sake of argument that the appellant's argument which asserts the doctrine of estoppels to bar the respondent from departing from its letter of the 17th of January 2001 assumes that the law permits the respondent to collect the taxes in issue. If the law does not enable the respondent to collect VAT then to argue estoppels is not necessary unless argued in the alternative to a legal position showing that collecting VAT for in bond sales if not authorized by law. For emphasis I need to state that no tax can be imposed except under the authority of an Act of Parliament neither can an authority waive tax except under a law enacted by Parliament. This is a constitutional imperative under article 152 of the Constitution of the Republic of Uganda which provides that:

> "152. Taxation
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> (1) No tax shall be imposed except under the authority of an Act of Parliament.
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> (2) Where a law enacted under clause (1) of this article confers powers on any person or authority to waive or vary a tax imposed by that law, that person or authority shall report to Parliament periodically on the exercise of those powers, as shall be determined by law.

(3) Parliament shall make laws to establish tax tribunals for the purposes of settling tax disputes."

The constitution of the Republic of Uganda firstly makes it imperative that only an Act of Parliament can authorize the imposition of a tax. It follows that the Respondent cannot impose taxes not authorized by law. To do so would be null and void and subject to a challenge on the ground that the law does not authorize it. It follows logically in my view that to raise a bar of estoppels can only arise where Parliamentary authority has permitted the imposition of a specific tax. Secondly the doctrine of the bar of estoppels assumes that the imposition of the specific tax may be waived and that the Respondent did waive the same by a binding act. In other words it assumes that the respondent may make binding rulings or directions on a particular transaction on whether taxes may be imposed or not from which it cannot depart.

Counsel for the appellant in his oral clarification conceded that there was no private ruling at the material time as the law did not enable it. He agreed that the letter of the 17th of January was not a private ruling. However the appellant made a very strong argument that the treatment of sales in bond and ex bond is not very clear. He suggested that once tax is assessed for goods in bond and the customs receives the tax, no further VAT may be imposed.

Starting with the question of evidence, I have already found that the letter of the 17th of January 2001 conceded the practice of the Respondent in the case on in bond sales prior to the change in its position and as also contained in the ruling of the Commissioner General when she made an objection decision in her letter dated 24th July 2007 found at page 15 of the record of appeal. Paragraph 4 of the letter reads as follows:

"Our opinion is that Uganda Revenue Authority is not estopped from reviewing an earlier position on VAT on bond sales where it believes that the earlier decision of the Commissioner was erroneous in law. There is case law to the effect that corporations cannot be estopped from carrying out statutory duties."

The letter concedes that URA has a position on bond sales as asserted in the letter of the Commissioner dated 17th January 2001. Secondly the letter decides that the earlier decision of the Commissioner Large Tax Payers Department dated 17th of January 2001 was erroneous in law. From the premises that the said position of URA on bond sales was erroneous in law, the Commissioner General further decided that the respondent was not barred by the doctrine of estoppels from assessing and collecting taxes from the Appellant under a law enacted by Parliament. Firstly it is crucial to determine whether the law enacted by Parliament authorizes the imposition of VAT as assessed by the Respondent.

Section 2 (1) of the **East African Community Customs Management Act, 2004** defines a bonded warehouse to mean:

> "... any warehouse or other place licensed by the Commissioner for the deposit of dutiable goods on which import duty has not been paid and which have been entered to be warehoused"

Further terms defined by the Act include the term "Customs" or "the Customs" which means the customs departments of the Partner States and a customs area means any place appointed by the Commissioner by notice in writing under his or her hand for the deposit of goods subject to Customs control. As noted above a customs bonded house is licensed by the Commissioner and is subject to customs control. Additionally it is relevant to quote section 2 (2) (c) which states that the time for importation of goods shall be deemed to be the time at which the goods come within the boundaries of the Partner States. Goods upon arrival to Uganda are classified by a customs official under section 34 of the East African Community Customs Management Act 2004 either for export transhipment, warehousing or transit and this enables the Respondent to apply the appropriate tax category to the goods.

The customs law which the appellants counsel invited me to examine deals with import duty on the vehicles and not VAT. VAT is provided for by another law. The East African Community Customs Management Act 2004 defines customs laws to include the Act, "Acts of the Partner States and of the Community relating to Customs, relevant provisions of the Treaty, the Protocol, regulations and directives made by the Council and relevant principles of international law. Last but not least section **47** of the EAC Customs Management Act provides that goods may be warehoused without payment of import duty but as soon as possible the proper revenue officer shall take an account of such goods and classify them for purposes of tax. The Act provides:

> **"47.-**(1) Subject to any regulations, goods liable to import duty may on first importation be warehoused without payment of duty in a Government warehouse or a bonded warehouse.
>
> (2) On, or as soon as practicable after, the landing of any goods to be warehoused, the proper officer shall take a particular account of such goods and shall enter such account in a book; and such account shall, subject to sections 52 and 58, be that upon which the duties in respect of such goods shall be ascertained and paid."

The EACCMA further provides under section 50 thereof that goods which have been warehoused may be entered either for (a) home consumption; (b) exportation; (c) removal to another warehouse; (d) use as stores for aircraft or vessels; (e) re-warehousing; (f) removal to an export processing zone; or (g) removal to a free port. As far as the appellant is concerned the goods were said to be in bond. This assumes that they had been assessed for import duty using the time of arrival as the date of importation into the country and hence its classification and valuation for purposes of tax.

The question that I must answer is whether the law imposes VAT on imported vehicles sold in bond. Counsel for the Appellant in his oral clarifications of the written submissions used the

terms ex bond and in bond. Ex bond value of any goods means the value before taxes are assessed. In cases of goods imported taxes to be assessed initially are the import duties determined under the East African Customs Management Act 2004 which Act was assented to on the 31st of December 2004 and came into force on the 1st of January 2005. As noted above the tax assessed in this matter was for the period January 2005 – December 2005. As we have noted the taxes to be paid in bond are the taxes assessed under the above Act. However the goods may have been imported for sale into the Domestic Market.

Taxes applied may then depend on whether there was a taxable supply within Uganda in addition to the import duty for which VAT may be allowed. Whether VAT was payable depends very much on the application of the definition of a taxable supply in Uganda under section 4 of the Value Added Tax Act. Under section 1 (y) "taxable supply" has the meaning ascribed by the Act in section 18 of the VAT Act cap 349. Section 18 defines it as a supply of goods or services, other than an exempt supply made by a taxable person for consideration as part of his or her business. Coming back to section 4 of the VAT Act, the language of the section is imperative. It commands that" "A tax, to be known as value added tax, *shall be charged in accordance* with this Act on (a) every taxable supply in Uganda made by a taxable person and (b) "every import of goods other than exempt import." Every imported vehicle is chargeable with VAT except those which are exempt imports. The taxable value of imported goods is provided for under section 23 of the VAT Act. Section 23 provides that:

> "23. Taxable value of an import of goods.
>
> The taxable value of an import of goods is the sum of—
>
> (a) the value of the goods ascertained for the purposes of customs duty under the laws relating to customs;
>
> (b) the amount of customs duty, excise tax and any other fiscal charge other than tax payable on those goods; and
>
> (c) the value of any services to which section 12(3) applies which is not otherwise included in the customs value under paragraph (a)."

Section 24 of the VAT Act further provides that the tax payable on a taxable transaction is calculated by applying the rate of tax to the taxable value of the transaction except where the taxable value is determined under section 21 (2) or (3) in which case the formula used is specified by section 1 (a) of the 4th Schedule to the Act. As noted above taxable value of an import of goods is the sum of the goods ascertained for purposes of customs duty under the laws relating to customs duty which laws are defined by the East African Customs Management Act 2004 quoted above and also the excise duty and other fiscal charge payable on the goods. At this level the Value Added Tax Act is harmonized as far as customs law is concerned, with the East

African Community Customs Management Act 2004. Section 23 (c) of the Value Added Tax Act includes the value of any services to which section 12 (3) applies. Section 12 (3) provides that:

> "A supply of services incidental to the import of goods is part of the import of goods".

Turning to the evidence, the letter of the 17th of January 2001 provides that:

> "RE: VAT TREATMENT OF BOND SALES
>
> I refer to your letter dated 12th of January, 2001 on the above subject which is in response to mine dated 31st of August, 2000.
>
> The view communicated in my letter of 31st of August, 2000 is under review by us and so; in the meantime please disregard its contents. The VAT due should be that computed by our Customs Department and payable by your customers in cases of bond sales.
>
> We shall not impose on you any additional VAT liability resulting from the said review.
>
> We sincerely apologise for any inconveniences caused."

It is important to note that the above letter deals with sales of vehicles in the bonds as defined in 2001. However we are now dealing with the law in 2005 which law has been defined above as the East African Community Customs Management Act 2004. The said Act takes precedence over any domestic legislation in conflict with it. Secondly the letter specifically notes that another view in a letter dated 31st of Augusts 2000 was under review. I have failed to trace the letter of the 31st of August 2000 which by the above letter was under review. Thirdly the letter states that the VAT due should be computed by the customs department and payable by the customers in bond sales. My understanding of the letter in its strict interpretation is that VAT is computed and paid together with import duty assessed and which had not yet been paid as the goods were still in bond. It is assessed by the customs department. Consequently both the import duty and VAT are payable by the person to whom the vehicle is sold and transferred to by the Appellant. The payment is made by the customer of the appellant to the Customs Department (or Bank of URA) which assesses the totality of the taxes in an aggregate sum. The administrative implications of this arrangement on the management of tax collection in terms of the VAT component together with the other forms of taxes on imported goods is unknown and cannot be considered at this stage.

As far as the review is concerned, the letter writes that no additional VAT would be imposed. As noted, we do not know which review was being written about as the letter referred to which letter is expressly the subject of the review and is dated 31st of August 2000 is not on the record of appeal or supplementary record. I may ask the hypothetical question, why should the importer pay any additional VAT if the sale is in bond, taxes are assessed by the customs officials and is paid by the customer or final buyer of the goods? The second scenario is where the customs officials do not include VAT in the taxes assessed on the goods in bond. We further need to

assume that the letter of the 17th of January 2001 implies that the sale of the motor vehicle by the appellant or any dealer in Motor vehicles does not include any taxes in the price. The third problem is the obligation to pay VAT is upon the supplier of the goods. In this case the supply of the taxably supply is the appellant or importer of the goods. The letter of the respondent dated 17th of January 2001 transfers the payment to the consumer of the taxable supply direct to the respondent. This has implications on how the taxable supplier would make its monthly tax returns on VAT. What was the practice in this case? The above scenario is further complicated by the definition of the term importer. Section 1 (k) of the VAT Act defines the term "importer" to mean:

> "..In relation to an import of goods, includes the person who owns the goods, or any other person for the time being possessed of or beneficially interested in the goods and, in relation to goods imported by means of a pipeline, includes the person who owns the pipeline."

The definition section of the VAT Act further defines "import" to mean "to bring, or cause to be brought, into Uganda from a foreign country or place;" The person who brought the goods into the country in the case of the appellant is the appellant. However if we take the letter of the 17th of January 2001 as reflecting the practice of the respondent, the customer who pays the duties and VAT is the owner or importer for purposes of tax collection. This ambiguity cannot in my view confuse the process of tracing whether taxes are payable in any particular transaction and who is liable to do so.

A further additional hurdle is the fact that VAT is statutorily charged by the supplier of the taxable supply who has a statutory obligation to include VAT in its monthly returns prescribed by the VAT Act.

The Tribunal ruled at page 272 that:

> "VAT in a common man's language is a charge on value added on any product or service. The price paid by the customers of the applicant was higher than the custom values of the goods. The difference in the values represents value added which is chargeable to VAT. AW1 Ms. Makada stated that in bonded warehouses additional services are provided to imported cars such as the process of transportation up to bond level. There are expenses incurred from the supplier to the bond. This service takes place before the sale of the vehicle. She stated that this value is realized at the sale of the vehicle. Such additional services increase the price of the vehicle as value is added. That value added which is reflected in the price attracts VAT."

According to AW1 at page 236 of the record, goods in bond are in a pre – tax position. She stated that in their meetings with URA officials, they insisted that VAT be paid on the markups (which, is the difference between the import value and the sales price). When goods are sold in bond tax liabilities are transferred to the buyer of the goods. Suffice it to say that where the customs

officials assess taxes on the date of arrival of the goods, the question is whether they would have included VAT on the value added up to the time the goods are stored in bond. Secondly, whether the appellant included such VAT in the cost price for transfer of the good or goods in bond and before taxes. Further matters are facts referred to in the objection decision of the respondent; a different scenario as far as facts are concerned is presented. The objection decision of the Commissioner General states in part and I quote:

> "Our position on VAT on bond sales is that since the value of the supplies as per your local tax invoices was higher than the one used to transfer units to your client's in the Customs bonded warehouses, therefore the variance represents value added which is chargeable to VAT.
>
> In light of the above, the audit of April 2006 carried out by the Department of Audit and Tax Investigations, and the subsequent findings resulting into an assessment of shillings 280,122,062/= was in line with the VAT Act cap 349."

The Commissioner General noted that the value on the appellants local tax invoices were higher than the one used to transfer units into a customs bonded warehouse to the clients or customers of the appellant. If the letter of the 17th of January 2001 was taken to be the practice, the transfer value of the vehicles would be less the import duty and VAT which were to be paid direct by the client who buys the vehicle in bond but inclusive of the value added or mark up additional to the import value or costs of the vehicle at the date of entry into the country. There should be no variance in the value of the vehicle save it would only be less taxes paid to the respondent by the customer. The import value of the vehicle plus some profit would be included in the sale. Theoretically the amount transferred to the customs is less VAT but VAT as indicated in section 23 and 12 (3) read together include in the taxable value of the goods ascertained for the purposes of customs duty under customs laws, the amount of customs duty, excise tax and any other fiscal charge other than tax payable on those goods; and the value of any services to which section 12(3) of the VAT Act applies which is not otherwise included in the customs value. Having a higher value for the goods than that indicated in the transfer means that URA would collect less VAT than they would have had all the taxable value indicated in section 23 been assessed to arrive at the VAT chargeable.

As far as estoppels is concerned I need to first note that under the VAT statute the payment of VAT on a taxable supply is couched in mandatory language (see section 4 of the VAT Act supra). It has generally been stated by **MAXWELL ON THE INTERPRETATION OF STATUTES pp 362 and 363** that there is no hard and fast rule as to the consequences for non-compliance to a statute requiring something to be done, or to be done in a particular manner or form, without stating the consequences of non compliance. At page 364 the learned authors state:

> "as been said that no rule can be laid down for determining whether the command is to be considered as mere direction or instruction involving no invalidating consequence in its

> disregard, or as imperative, with an implied nullification for disobedience, beyond the fundamental one that it depends on the scope of the object of the enactment. It may perhaps, be found generally correct to say that nullification is the is the natural consequence of disobedience, but the question is in the main governed by considerations of convenience and justice, and when the result would involve general inconvenience or injustice to innocent persons, or advantage to those guilty of neglect, without promoting the real aim and object of the enactment, such intention is not to be attributed to the legislature. The whole scope and purpose of the statute under consideration must be regarded"

In examining a statute it has often been noted that a statute enacted in the public interest and which is couched in mandatory language intends what is done in disobedience of it to be a nullity as a matter of public policy. In the case of **Vita Food Products Inc v Unus Shipping Co Ltd (in Liquidation) [1939] 1 All ER 513**, the Privy Council comprised of LORD ATKIN, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, LORD WRIGHT AND LORD PORTER observed in the lead judgment of Lord Wright at pages 520 – 523 particularly page 523 that:

> "Nor must it be forgotten that the rule by which contracts not expressly forbidden by statute or declared to be void are in proper cases nullified for disobedience to a statute is a rule of public policy only..."

To my mind the question here is whether the public policy in the construction of a tax law is that section 4 of the VAT Act should be held to be imperative or obligatory or mandatory because it is couched in mandatory language and whether disobedience to it renders the act done in disobedience thereof a nullity.

In the case of **Pope V Clarke [1953] 2 ALL E.R. 704** It was held that the rule that a notice of intended prosecution should be served on the defendant was mandatory. Lord Goddard CJ held at pages 705 – 706 that generally the consequences of disobedience of a statute couched in mandatory language renders whatever is done in disregard of the statute null and void. Further in the case of **Agricultural, Horticultural and Forestry Industry Training Board v Kent Same v Tawell & Sons (a firm) [1970]** 1 All ER 304, a judgment of the Court of Appeal of England, a similar question arose as to consequence of the use of the word "shall" in a statutory provision. LORD DENNING MR at page 304 noted that in 1964 Parliament enacted the Industrial Training Act 1964. Section 4(3) of the Act provided that the levy order shall give any person assessed to the levy a right of appeal to an appeal tribunal constituted under this Act. He held that:

> "I think art 4(3) is mandatory; so that the failure to comply with it makes the notice bad."

Salmon LJ also noted that the appeal turned on the true construction of art 4(3) of the Industrial Training Levy (Agricultural, Horticultural and Forestry) Order 1967 (SI 1967 No 1767) which was couched in the terms

> ‘An assessment notice shall state the Board’s address for the service of a notice of appeal or of an application for an extension of time for appealing.’

Further on in the judgment CROSS LJ held referring to the judgment of Lord Denning MR at page 308 that:

> it is plain that the words in question are mandatory and not simply directory.

According to **MAXWELL ON THE INTERPRETATION OF STATUTES** Penal and Tax laws are generally strictly construed and it is my judgment that the provisions of section 4 by its use of the imperative word “shall” makes the charging of VAT on taxable supplies on the items specified by the Valued Added Tax Act cap 349 mandatory, imperative or obligatory and therefore acts done in disobedience of the provision are generally null and void. (I must add that what Parliament Directs in mandatory language by using the words “shall” in a tax law should generally be obeyed)

I have further considered the essence of the appellants submission that the law does not impose such a duty to collect VAT on in bond sales and because the letter dated 17th of January 2001 provides that no VAT would be paid for in bond sales, and the appellant relied on this letter, that the respondent cannot turn round and impose VAT notwithstanding what the law says. I agree with the law as stated in the case of **Maritime Electric Co Ltd v General Dairies Ltd [1937] 1 All ER 748** and I wish to refer to a passage in the judgment by LORD MAUGHAM who read the decision of the Privy Council in the above case at pages page 753 – 754 where he said:

> The sections of the Public Utilities Act which are here in question are sections enacted for the benefit of a section of the public, that is, on grounds of public policy, in a general sense. In such a case—and their Lordships do not propose to express any opinion as to statutes which are not within this category—where, as here, the statute imposes a duty of a positive kind, not avoidable by the performance of any formality for the doing of the very act which the plaintiff seeks to do, it is not open to the defendant to set up an estoppel to prevent it….”

I agree with the authorities cited by the respondents counsel that the duty to collect tax is a public duty and enacted by Parliament in the public interest. Moreover the provision that VAT be charged on taxable supplies is couched in mandatory language. Disobedience to a statute enacted in the public interest and couched in mandatory language in terms of what it commands to be done renders anything done in disobedience of the statute null and void ab initio. This leaves the question of fact addressed in the 5th ground as to whether in the circumstances VAT was properly charged. For the reasons stated above I cannot fault the tribunal in its conclusion that the doctrine of estoppels cannot be applied in the circumstances of this case and that VAT as imposed by a statute cannot be waived by the Commissioner. I agree with the finding of the tribunal that to

disregard the imperative directive of the statute so as to evade the tax imposed by it would be an illegality. Consequently grounds 2 and 3 of the notice of appeal which has been consolidated into ground 2 in the arguments of counsel lacks merit and stands dismissed.

Turning to ground 4 of the notice of appeal but argued as ground 3 by the parties, the ground pleads that "the honourable members of the tribunal erred in law when they held that the Applicant/Appellant admitted liability to pay VAT on the imported cars". Little was said on this ground by the appellant and little can be decided on it. The respondent maintained silence on this ground of appeal.

The complaint of the appellant is based on page 272 of the record of appeal and page 5 of the judgment:

> "applicant does not dispute that it is liable to pay VAT on the imported cars. It contends its liability to pay any additional VAT was waived by the letter of 17th of January, 2001. The letter written by the commissioner does not state the law on VAT. In the absence of evidence from either the author of the letter or the recipient it is not clear what additional VAT liability was. Was it a larger amount of money payable as VAT or a new imposition of VAT tax? What was the review mentioned by the commissioner? A question also arises as to whether once a tax has been imposed by statute (we are to assume) an erroneous letter by the commissioner may override the imposition by law."

The tribunal made no holding that the appellant admitted its tax liability. It is the underlying assumption in relying on the doctrine of estoppels that leads to the inference that, save for the doctrine of estoppels, VAT was payable on in bond sales. The doctrine of estoppels was based on the letter of 17th of January, 2001. They noted that it is the submission by the appellant that the respondent is barred by the doctrine of estoppels from imposing additional VAT from that computed by the customs department. Their observations do not amount to a ruling that the appellant admitted any tax liability but merely leads to an inference that tax could not be imposed in view of the letter relied upon to advance the doctrine of estoppels. For the above reasons ground four of the notice of appeal stands dismissed.

Ground 5 of the notice of appeal now argued by the parties as ground 4 is that "the honourable members of the tribunal erred in law when they failed to properly interpret section 23 of the value added tax act cap 349, thereby coming to an erroneous decision the VAT was chargeable on the markup".

Referring to page 11 of the record of appeal the appellants counsel submitted that the tribunal in holding that the appellant was taxable stated as follows:

> "section 12 (3) states that a supply of services incidental to the import of goods is part of the import of goods. As long as there is a charge, whether on services or not, by a taxable person it means that there is a taxable person. Section 4 of the VAT act imposes a tax to

be known as VAT on every taxable supply in Uganda made by a taxable person. The applicant is a taxable person and made taxable supplies."

To my mind the question of whether the appellant made any taxable supplies is a question of fact that ought to be proved or disproved through the audit process. Counsel referred to sections 4 and 5 of the VAT Act and I do not need to repeat these sections here. He contended that the tribunal held that the price paid by the customers of the applicant was higher than the customs values of the goods. That the differences in the values represent the value added which is chargeable to VAT. The appellants counsel noted that the tribunal found that if the service provided for fell within section 23 (c) of the VAT Act then the calculation fell within section 24 (2) which will leads to section 21 (3) of the VAT Act. He submitted that in finding that the applicant was liable to pay tax; the tribunal disregarded the **TATA Uganda Ltd versus Uganda revenue authority case TAT No. 35 of 2006.** The appellants submitted that the **TATA versus URA case** was very relevant and that it was wrongly disregarded by the tribunal. The issue in that case was whether the tax was correctly assessed on the sale of goods imported by the applicant but sold in bond. Quoting from the case:

> "the tribunal further notes and agrees with counsel for the applicant that the respondent has not bothered to explain the circumstances which differentiates circumstances of NIS and those of the applicant in the treatment of the bond sales. Both entities deal in motor vehicle importation. Besides the respondent has not disputed the applicant submission that other taxpayers in similar circumstances that are selling goods while in bond did make use of A 28 (now A3 (a)) in handling the applicant matters and it is only the applicant who was singled out.
>
> A 28 in part reads as follows "the VAT due should be that computed by our customs Department and payable by the customs in case of bond sales."

The tribunal ruled that the documents exonerated the importers whose goods the customs Department gave explicit authority to be released without payment of taxes, including VAT.

The appellant further submitted that the calculation of tax payable falls within the provisions of section 24 (2) which leads to section 21 (3) of the VAT Act. Counsel referred to section 23 of the VAT cut which deals with ascertainment of the taxable value of goods. Finally submitted that the charge on the markup is illegal as the computation fell within section 23 of the VAT Act.

In reply the respondent associated himself with the findings of the tribunal on page 10 paragraph 2 of their ruling. He submitted that the only instance where a taxable person is exempted from the VAT on imports is when the imported goods are tax exempt.

He submitted that the appellant performs services incidental to the import of goods. The markup is a monetary value of a taxable supply. The appellant’s invoices for ex-Bond services showed values higher than the sales prices used to transfer vehicles to buyers. The variance is the markup

which was subjected to VAT. Finally counsel submitted that the tribunal correctly evaluated the evidence to that effect that the appellant is a taxable person, is an importer and makes taxable supplies. That the value of the taxable supply is the variance between the invoice at importation and the final sales invoice.

I have carefully considered this last ground argued and I need to assert from the outset that the tribunal set aside the computation of VAT by the respondent and requested the respondent to re-compute the VAT using dates when the law was amended providing for VAT at a rate of 18% from 17% prior to July 2005 so that two rates are applied according to two rates of VAT in the year 2005. Secondly I have already analyzed the various scenarios arising from the interpretation of the letter of the respondent dated 17th August 2001 concerning the implications of payment of customs duty and VAT by the customers of the Appellant set out in the letter of the respondent referred to above.

I also asked the hypothetical question as to why an importer such as the appellant should pay additional VAT if the sale is in bond and all relevant taxes are assessed by the customs officials, which taxes include VAT and are paid by the customer or final buyer of the goods. However the question as to whether the customs officials assessed the correct VAT for payment by the customer is a question of fact that can be revealed by an audit exercise. I further set out the assumption that the letter of the 17th of January 2001 implies that the sale of the motor vehicle by the appellant or any other dealer in motor vehicles in bond (or before payment of taxes) does not include any taxes in the sale price as the customer to whom a transfer is made in bond gets a transfer together with the tax liability on the vehicle or goods. According to the letter of 17th January 2001 this should include the VAT liability.

I further set out the troubling administrative issues that arise from transferring VAT liability to the final customer who buys in bond. The administrative problem is that firstly VAT is collected by the supplier of the taxable supply on behalf of the respondent. If it's liability to collect and pay VAT is transferred to the buyer in bond, then it distorts the way VAT is administered or accounted for. VAT tax returns are filed by the supplier with the respondent and not by the customer or consumer of the product irrespective of whether the customer or consumer buys in bond or not. Furthermore, the customs department may not be the department that assesses VAT tax and their returns might introduce administrative bottlenecks in accounting for VAT as a separate and distinct tax. This administrative issue includes the administrative arrangement for the administration of the VAT Act as opposed or harmonized with the Administration of the East African Community Customs Management Act which came into force on the 1st of January 2005 and covers the assessment in dispute in this matter. However in the absence of evidence this remains a hypothesis concerning administrative bottlenecks. The hypothetical issue remains how much VAT is finally assessed by the customs official in charge of the bonded warehouse where the in bond vehicles of the appellant were kept and transfer to the final consumer or customer by the appellant thereby transferring tax liability to the consumer.

I noted that AW1 at page 236 of the record testified that goods in bond are in a pre – tax position. She stated that in their meetings with URA officials, the URA officials insisted that VAT should be paid by NIS on the mark – ups (which are the difference between the import value or cost and the sales price). She also confirmed that when goods are sold in bond tax liabilities are transferred to the buyer of the goods. I noted the facts stated in the objection decision of the respondent that the value of the appellants supplies as per their local tax invoices was higher than the one used to transfer units to the buyer of the vehicles from Customs bonded warehouses and that the Commissioner decided in her objection decision that the variance represents value added which is chargeable to VAT.

In my judgment I agree with the submissions of the appellant that the directives for reassessment of taxes issued by the tribunal to the respondent did not delve deeply enough on the actual problem before them.

As I noted in resolution of the issue of whether the doctrine of estoppels applied in this case, the matter in this ground would depend on what actually transpired in the circumstances of this case. The letter of the 17th of January 2001 suggests that the point of fact and practice was that the transfer value of the vehicles in bond would be less the import duty and VAT which were to be paid direct by the client who buys the vehicle to the customs department. However the sale price of the in bond sale would be above the cost price for importation of the goods and the variance according to the Commissioner General reflects the cost of value added and attracts VAT. The sale price is paid to the appellant less any tax liability which is transferred to the buyer of the goods. It is to be established as a question of fact whether the transfer value of the vehicle less VAT and the sale value of the vehicle are at variance with the sale value being higher. If this is the case, then the difference between the in bond transfer value without the taxes imposed added on and the sale value to the customer as reflected in the local tax invoices would have amounted to an evasion of VAT where there is a variance showing higher sale values than one used to assess VAT. This is simply a question of mathematics and not interpretation of the VAT Act. The transfer value plus the import duty and VAT paid by the customer or buyer would total to more money than the money received by the appellant from the customer. The difference thereof should be the tax paid to URA by the buyer. If this was the case the appellant would be absolved of any tax liability. The question of fact needs however to be assessed in the review. However if the appellant in its returns includes the taxes assessed but whose liability is transferred to the customer, then its tax returns would show a higher figure than the transfer value of the units, which transfer value would reflect the actual money received for sale of the vehicle less taxes assessed. As I have noted above this is a question of mathematics and should be left to the auditors. It however has implications on how the tribunal would deal with the application for review under the Tax Appeals Tribunal Act. In the case of **Uganda Revenue Authority versus Tembo Steels Ltd Civil Appeal No. 9 of 2006** decided in February 2011, I noted that the way a tribunal treats an application for review and the burden of proof of the applicant depends on what is being challenged in the decision of the respondent.

I noted that the burden of proof depended on the wording of section 18 of the TAT Act which gives a different legal consequence to cases where there is an application for review of an "objection decision" from cases where there is an application for review of a "taxation decision".

Section 18 of the TATA provides that:

> "In a proceeding before a tribunal for review of a taxation decision, the applicant has the burden of proving that—
>
> (a) Where the taxation decision is an objection decision in relation to an assessment, the assessment is excessive; or
>
> (b) In any other case, the taxation decision should not have been made or should have been made differently."

I held that under section 18 (a) of the Tax Appeals Tribunal Act where there is an objection to assessment lodged with the Commissioner and the Commissioner makes a decision, the applicant before the tribunal has to prove that the assessment was excessive. If the objection is on a question of principles the applicant has the burden of proving that the assessment should not have been made or that it should have been made differently under section 18 (b) cited above. The question of whether the assessment was excessive is therefore a question of mathematics that requires reassessment of the evidence to arrive at the correct figure. It implies that the principle that VAT is chargeable would not be in issue. Having dealt away with the question of the doctrine of estoppels operating as a bar to assessment the question left is whether the assessment was wrong on questions of fact.

For completeness of the conclusions on this question we may again refer to the law.

The conclusion of the law is that there should be no variance in the pre tax value of the vehicle save that it should only be less taxes assessed and paid to the respondent by the customer or transferee in bond of the goods. The import value of the vehicle plus some profit would be included in the sale value of vehicle in bond. VAT under section 23 and 12 (3) read together include in assessment of the VAT taxable value the following variables:

1. The value of the goods ascertained for the purposes of customs duty under customs laws, the amount of customs duty, excise tax and any other fiscal charge other than tax payable on those goods;

2. The value of any services to which section 12(3) of the VAT Act applies which is not otherwise included in the customs value. These are services rendered incidental to the import of goods up to the time of sale to the final customer which should amount to the transfer value of the goods less tax liability including VAT.

I have already concluded that transfer in bond in terms of the letter of the 17th of January 2001 meant that URA would collect less VAT than they would if all the taxable value indicated in section 23 of the Value Added Tax Act is included to arrive at the VAT chargeable on the same vehicle if the conclusion on questions of fact of the commissioner that there was variance between the local tax invoice and the transfer value is correct. I do not see any conceivable reason why the transfer value of the vehicle should be different from the sale value of the vehicle save for the amount of taxes yet to be paid by the buyer or final consumer of the goods to the respondent. If the evidence does reflect that there is a variance in the taxable value based on the transfer value with the sale value leading to a finding that the sale value was higher than the transfer value. That taxes were paid on the transfer value only which is a lower figure, the variance in values would mean that a lesser amount has been used to assess VAT and amounts to evasion of VAT. I must add that it is the customer to whom the tax liability has been transferred but the appellant retained the variance and therefore took the money without transferring any VAT chargeable there under to the customer. In other words the appellant did not collect any VAT on the alleged variance (if proved as a question of fact) on behalf of the respondent.

For the reasons stated above the appellants grounds argued as ground 4 succeeds only in part in that I agree with the conclusion of the Tax Appeals Tribunal that the assessed tax is set aside and reassessed following the interpretation of law I have ventured to give above. I will only vary the terms of their directive to the respondent as follows:

1. That the VAT for the period January 2005 – December 2005 be reassessed in the terms set out by the Tax Appeals tribunal in that prior to July 2005 the VAT rate is 17% and from July 2005 onwards the VAT rate is 18%.

2. The transfer value to each customer for each unit of vehicle for the period January 2005 to December 2005 should be computed.

3. The VAT assessed by the Customs Department for each unit as spelt out above should be determined whether it is based on the transfer value of the relevant unit.

4. The total transfer value in bond used by the customs department to assess tax plus the local tax invoice of the appellant should be compared to establish whether the local tax invoice for the sale/transfer value is higher than the transfer value of the unit in bond.

5. The respondent should ascertain whether the tax returns of the appellant include VAT liability which in practical terms was transferred to the customer according to the letter of the Commissioner dated 17th January 2001.

6. The auditors of the respondent should work out any other relevant variable and determine whether the appellant concealed any taxable value in its sale to the final consumer in addition to the above method.

7. The assessment should clearly indicate whether there is any variance in the values used for assessment which liability was not transferred to the customer or not used in assessing the VAT liability by the customs department for the period in question.

The above general guidelines do not preclude the auditors in the respondent in applying any other variable that are relevant in assessing the actual VAT due if any provided the general guidelines above are taken into account. The appellant's appeals embodied in grounds 1, 2, 3, and 4 in the notice of appeal irrespective of the order in which they were argued stands dismissed with costs. Ground 5 of the notice of appeal succeeds only in part as the decision of the Tribunal to reassess the VAT payable by the appellant is reaffirmed save that additional variables have been included for consideration in making the reassessment ordered by the Tax Appeals Tribunal. Each party shall bear its own costs of this ground. Ground 6 of the notice of appeal was taken into account in arguing and resolving the other grounds of appeal.

Judgment delivered in court this 22nd day of September 2011

Hon. Mr. Justice Christopher Madrama

Delivered in the presence of

Hon. Mr. Justice Christopher Madrama