**THE REPUBLIC OF UGANDA**
**IN THE SUPREME COURT OF UGANDA**
**AT KAMPALA**

**CORAM:** (Tumwesigye, Mwangusya, Opio Aweri, Mwondha, Tibatemwa- Ekirikubinza, JJSC)

**CIVIL APPEAL NO 13 OF 2015**

**Between**

UGANDA REVENUE AUTHORITY ............................................ APPELLANT

**And**

UGANDA TAXI OPERATORS & DRIVERS ASSOCIATION........ RESPONDENT

*(Appeal against the decision of Court of Appeal of Uganda at Kampala before Kavuma DCJ, Nshimye, Remy Kasule JJCA Civil Appeal No. 15 of 2013 Uganda Tax Operators and Drivers Association Vs Uganda Revenue Authority)*

**JUDGMENT OF MWONDHA, JSC**

The appellant, Uganda Revenue Authority dissatisfied with the judgment and decision of the Court of Appeal, appealed to this Court on one ground as follows:-

The Learned Justices of the Court of Appeal erred in law and fact when they held that the provision by the Respondent of Management of Taxi operators and Taxi Parks in and around Kampala City is incidental to the principal service of passenger transport services and hence exempt from tax.

The appellant proposed to ask this Court to make the following orders:

(i) To allow the appeal and set aside the order of the Court Appeal in Civil Appeal No 15 of 2013

(ii) Order the respondent to pay costs of this Court and the Court below:-

**Background**:

The Respondent Association, a Company Limited by guarantee sued the appellant for refund of monies retained by the appellant as Value Added Tax (VAT) since 2001 in

respect of the Respondents taxi parks operations which the respondent carried out at the material time for and on behalf of the then Kampala City Council (KCC) now Kampala Capital City Authority. By 2010 the appellant had retained from the Respondent Uganda Shs.3, 903,136,565/= as VAT. The issue at High Court was "whether the respondent was liable to pay VAT for its services of management of taxi parks and Taxi Operators in Kampala City. This question was answered in the affirmative consequently the respondent appealed to the Court of Appeal. The Court of Appeal resolved the appeal in favour of the respondent. The appellant in this appeal was ordered to refund all moneys that had been collected as VAT amounting to shs3,903,136,565/= with interest at the rate of 2% per month compounded from the time it was paid until the date of judgment. Further the Court of Appeal ordered, thereafter that the decretal amount shall carry interest at the rate of 10% p.a. from the date of 15th June 2015 till payment in full. The respondent (herein) was awarded costs of the appeal and the costs in the Court below.

**Representation**:-

Mr Sekatawa, Mr. George Okello and Mr. Habibu Alike represented the appellant. Mr. Sirage Kanyesigye Asst. Commissioner General URA was present in Court. Mr. Musa Kabega & Mr. Sekaana Musa were Counsel for the respondent. Mr Deogratious Kigozi was representative of Respondent and present in Court.

**Appellant's submissions**:-

Counsel for the appellant submitted that the learned Justices of Court of Appeal failed to apply the law which it cited, to determine the principle supply of the respondent under its contract. He argued that the Court lumped up the legal mandate of the respondent as a body corporate and the individual taxi operators and drivers who provided transport services. He submitted that the law cited by the Court which was Halsbury's Laws of England Vol. 49 (I), the Court found that when goods/services provided under a contract consist of a number of different elements, it is a question of law, which has to be determined objectively. Whether the supply has made a single supply or a number of separate supplies.

The distinction is only of significance where the different elements would, if separately supplied, be subject to different tax rates. He therefore submitted that the Court of

Appeal failed to apply the law cited to determine the Customers to whom a taxable supply or supplies were being made. He argued, the Court erred in law when it held that the management of taxi parks is incidental to the principal service of passenger transport and hence exempt from VAT.

On taxable supply it was submitted that VAT is a tax transaction, so the VAT treatment of a supply can only be decided by analysing the transaction. S. 18 of the VAT Act provides:-

**(1) "A taxable supply is a supply of goods and services other than an exempt, supply made (in Uganda VAT Act 2011 amendment) by a taxable person for consideration as part of his or her business activity."**

It was also submitted that given that an exempt supply such as transportation services cannot be a taxable supply within the ambit of S. 18 it remained to be determined what taxable supply the respondent was providing for which it was required to register for VAT. He argued that this was especially true as persons dealing in exempt supplies such as Taxi operators are not required to register for VAT. He submitted that a close examination of the Respondent's contract with KCC reveals that whereas the Council (KCC) was required to provide the service of managing taxi operations it contracted the respondent to provide the service of managing taxi operations.

Further that the management of taxi operations at the taxi parks was distinct supply from the provisions of transport services. It followed that the principal supply by the respondent under the Contract leading up to the VAT assessed was not and could not have been transport services but management of taxi operations and operators at Benedicto Kiwanuka Taxi Park, Namirembe Road Taxi Park, Special Hire Taxi Operators and all other taxi operations in Kampala.

It was argued by Counsel for the appellant that the Court of Appeal relied on **Section 16 (3) of the VAT Act which stated that a supply of services of or incidental to transport takes place where the transport commences] (Para. 335, page 556). The amended VAT Act Section 16 was done away with so today the VAT Act does not recognise incidental services (pars 370 page 557) The Court of Appeal held that the Respondent services were incidental to the principal service of passenger transport and are exempt from VAT under law in place (Para 390 page 558)**

Counsel submitted that when the Court of Appeal held that there was a composite supply or one supply with two components with the management of parks services it was incidental to transport services, it erred.

He referred to the case of **Card Protection Plan Ltd Vs Commissioners Customs and Excise [2001] UKHL 4** where Lord Slynn of Hadley held that:

> **"..... every supply of a service must normally be regarded as distinct and independent and secondly that a supply which comprises a single service from an economic point of view should not be artificially split so as not to distort the functioning of the VAT system, the essential features of the transaction must be ascertained in order to determine whether the taxable person is supplying the customer, being a typical customer with several distinct principal services or with a single service. .... a service must be regarded as ancillary to a principle service it does not constitute for customers an aim in itself but a means of better enjoying the principal service supplied."**

He submitted that the Court of Appeal didn't address the different components of the supply made by the respondent, but was quick to subject management of taxi operations to provisions of the transportation services simply because of S.16 of the VAT Act (supra)

He compared KCC with the Civil Aviation Authority which manages air transport operations in Entebbe. He argued that it can't be said that getting access to and from the Airport leads to air transport which is exempt from VAT among others.

He asserted that the Court of Appeal failed to recognise that VAT is paid by the final consumer of the service, who is a paying traveller who receives the transport service but has no right to enter the taxi park and the right to use certain taxi stages was paid by the taxi operators not to tax passengers. He said the same analogy is applied to air transport. He concluded by submitting that not only was there a distinct and separate supply of management of taxi operations within the two taxi parks as contracted by KCC which is standard rated for VAT purposes, but that supply was the principal supply under the contract. He argued that if the Court was to find that there was a composite supply by the Respondent with more than one element, a different tax treatment would apply for management of taxi operations in the city parks from the supply of transport services. Counsel prayed that Court finds that the supply of management of taxi park services by the Respondent as per the

contract with KCC was an independent principal supply with a different tax treatment from the provision of transport passenger services.

**Respondent's submissions**:

**Counsel submitted that the learned Justices of Appeal properly applied the law to the facts of the case . He argued that Section 19 (1) of the VAT Act provides that:-**

> **"a supply of a goods or services is an exempt supply if it is specified in the 2nd schedule and under paragraph I (n) of the 2nd schedule to the Act: A supply of passenger transaction services (other than tour and travel operations) is exempt supply"**

S. 16 (3) of the VAT Act (operating at the material time) stated in respect of exempt service when it provided:-

> **"A supply of services of or incidental to transport takes place where the transport commences"**

He referred to page 556 of the record of appeal) and submitted that in the instant case passenger transport business commences from either the taxi parks where the passengers embark or disembark and also along various taxi stages on the routes used by the taxis. He referred to the copy of the contract at page 58 of the record of appeal paragraphs 1. 14 of the contract. It is stated there that:

> **"Service means the management of Taxi operations at the Benedicto Kiwanuka Taxi Park, Namirembe Road Taxi Park, Special Hire taxi operators and all other taxi operations in Kampala District. This does not include any other business on or about the Taxi Park"**

He contended that there was no definition of supply of incidental services but case law has set tests to that effect. The tests help to determine incidental services vis-a-vis the principal services. **Black's Law Dictionary 8th Edn**. page 777 defines incidental services to mean subordinate to something of greater importance, have a minor role. In the case of **Uganda Revenue Authority v. Total Uganda Limited HCCA No. 11 of 2012** the Court defined it as follows:- "**happening in connection with something greater in importance. The Court**

**also cited the Card Protection Plan Ltd case** (supra) where it was noted:- **" where a transaction comprises a bundle of all circumstances in which the transaction in question takes place in order to determine, firstly, if they were two or more distinct supplies or one supply and secondly whether in the latter case the single supply is to be regarded as a supply of services ...."**

Counsel argued that the circumstances within which the transaction took place have to be examined by Court to establish the characteristics of the transaction. After examination then it assists Court to establish whether it was separate or severable or ancillary to the main supply so as to share the same tax treatment. He referred to the case of **Commissioner Customs and Excise v. Madgett and Baldwin [1998] STC 1189** para 25 where it was stated:- **"A service must be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself but a means of better enjoying the service supplied"**

He contended that following the above case the Tax Tribunal applied the principles therein in the case of UTODA Entebbe Branch Ltd Vs Uganda Revenue Authority – Application No TAT 8 of 2009 at page 7 of the Ruling. It stated thus:-

> **"can the provision of the services by the tax payer be independent of the exempted supply? In other words can taxi parks operate independently of the provisions of passenger transport services? No they cannot. There is need for the provision of transport services in order to have a taxi park. The operation of taxi parks is incidental and ancillary to the provision of passenger transport services."**

A question that arises, he asserted, is whether the supply of services or a taxi park is incidental to the supply of transport services. Taxis have to park in order for the passengers to get on and off. The more important goal is the provision of transport i.e. passengers getting to their destinations. Therefore the provision of taxi parks is incidental to the provision of transport services. Passengers transport services commences from the place where the passengers get on taxis or other vehicles. This includes taxi parks and or taxi stages.

He argued that if the above principles are applied to the instant case it becomes clear that the management of taxi parks and tax operations is incidental to the supply of passenger transportation services which is an exempt supply under section 19 of the VAT then.

Counsel also cited the case of **Total Uganda Ltd Vs. Uganda Revenue Authority No. TAT 09 of 2010**, **AON Uganda Limited Vs. Uganda Revenue Authority HCOS No 04 of 2008**. **Diamond shipping Vs. Uganda Revenue Authority TAT 21 of 2008**.

He submitted that the management of taxi parks and taxi operations by the Respondent was not a business venture, they were collecting a fee set by KCC which did not attract VAT payment (Contract at page 51 – 67) of the record of Appeal). He argued that the appellant could not impose VAT on taxi owners as the nature of business of passenger transport services is exempt supply.

He further submitted that the services rendered under the contract between the Respondent and KCC was intended to improve on the service delivery of passenger transport services and creating orderliness in the passenger transport sector and not to derive earnings. The direct benefit to the respondent is increased turn over for its members as a result of the organised transport system.

He pointed out that the wording of the VAT Act for the exempt supply is drafted in plural and the same should be understood as such. He further argued that, the above being the case passenger transport services envisages many services that fall in this category and its is no wonder that both the supply of passenger transport services and supply of services incidental to transport were all provided for in the same one provision. This means that you can't split them as the appellant wants this Court to do. He referred to Halsbury's Laws of England Volume 49 (I) 4th Edn. Re – issue pages 70 – 71 para 50 which provides:- **where a supply consists of ancillary transport service it is treated as made where the services are physically performed...** note 5 which defines ancillary transport services to mean <u>loading, unloading, handling similar activities</u>.

Counsel cited the case of :- **CIT Vs. Vegetable Product Ltd (1973) ITR 192 it was held "if the Court finds that the language of the taxing provision is ambiguous or capable of more meaning than one, then the Court has to adopt the interpretation that favours the assessee (taxpayer)**

He further argued that, S. 16 of the VAT Act was amended and deleted by S. 8 of the VAT (Amendment) Act 2011 . It was not substituted and or replaced. So the law currently did away with the recognition of incidental services to transport.

He submitted that the appellant failed to ascertain the essential features provided by the respondent otherwise he would have understood that the respondent's services did not constitute for customers an aim in themselves but was a means of better enjoying of the principal service supplied which was passenger transport services.

He challenged the example given by Counsel for the appellant of air transport operations and KCC. He submitted that the appellant's counsel used it out of context. He argued that air transport service is a highly regulated industry with defined players executing different roles guided by a regulatory framework comprised of both local and international legislations. For example air ticketing is zero rated as well as international transport of goods and passengers. He referred to the 3rd schedule (b) of the VAT Act.

He prayed that, Court finds that the management of taxi operations and parks by the respondent cannot stand on its own in absence of the principal services of passenger transportation services, and as such it is an incidental service aimed at smoothening the delivery of the principal service. It forms an integral part for which there is only one fare paid by the ultimate consumer who is the passenger and as such it is exempted from VAT. He prayed that the appeal be dismissed with costs for two Counsel.

**Consideration of the appeal:**

This is a second appeal and the law is clear S. 6 of the Judicature Act Cap 13 provides:- **"An appeal shall lie as of right to the Supreme Court where Court of Appeal confirms, varies or reverses a judgment and orders including an interlocutory order, given by the High Court in the exercise of its original jurisdiction and either confirmed, varied or reversed by the Court of Appeal**."

There was only one ground of Appeal to the effect that the learned Justices of the Court of Appeal erred in law and fact when they held that the provision by the respondent of management of taxi operators and Taxi parks in and around Kampala City is incidental to the principal services of passenger transport services and hence exempt from tax.

I have perused the record of proceedings and considered the submissions of both the appellant and respondent's Counsel. I noted that the issues for determination at the Court of Appeal were recorded on page 229 as here under:

(1) Whether the assessment by the Uganda Revenue Authority for payment of value Added Tax was proper based on the sum of taxable value.

(2) Whether actually the entire business transaction of the plaintiff (respondent) is one that attracts VAT.

The trial Court had found that the management of taxi operations and maintaining of taxi parks is not incidental to the passenger transport business which is exempt from VAT.

I carefully considered the evidence on record which was mainly contained in the contract between KCC and the respondent. The subject of the contract was the supply of management services of taxi operators and taxi parks in and round Kampala.

The contract among others specifically provided as follows:-

(1) The contractor shall provide the service of managing and maintaining the taxi operations and taxi parks respectively in the District of Kampala.

(2) The contractor shall pay to the Council a monthly contract fee of Shs 290,000,000 (Shillings two hundred and ninety million exclusive of VAT payable as follows:-

(3) The contractor shall provide the taxi service in accordance with the provisions of the contract and to the satisfaction of the Council

(4) The contract constitutes the sole contract between the Council and the Contractor for the performance by the contractor of the service.

(5) The contractor shall pay value added tax VAT directly to Uganda Revenue Authority

The two issues to be resolved in my view are inter related and they depend entirely on the law. The law is clear as to what supply of services is liable to VAT and those not liable.

**Section 19 (I) of the VAT provided**:-

**“A supply of goods or services is an exempt supply it is specified in the 2nd schedule. Under paragraph I (n) of the 2nd schedule to the Act provides: a supply of a passenger transportation service (other than tour and travel operation) is an exempt supply**.

With the above provision in the VAT Act, there is no where the appellant (Uganda Revenue Authority) could have based proper assessment at all on the sum of taxable value. This was the law versus the action of Uganda Revenue Authority. Besides S. 16 (3) of the then VAT Act provided:-

**A supply of services of or incidental to transport takes place where the transport commences**.

Needless to say that the VAT Act did not define what incidental services to transport were/ as correctly submitted by Counsel for the respondent.

So if S. 16 (3) provided as above, where is the demarcation which apparently was not provided in the said law. I am compelled to accept Counsel for the respondent’s submissions on the tests provided by case law which guide Courts in determining incidental services to principal service.

The authority of **Card Protection Plan Ltd v. Customs and Excise Commissioners** (Supra) gives an elaborate exposition of what incidental services can be for tax purposes. In this case a one Dr P. R. Howell paid to the appellants (CPP) a fee of £16 for the services to be provided. The question on appeal, among others, was whether that payment was wholly liable for VAT as the commissioners contended and as the London VAT Tribunal and the Court of Appeal held or was exempted as constituting the making of insurance arrangements for the carrying of insurance business (as CPP contended) or partly liable since some of the services were and some were not exempt. The questions had to be decided in light of the European Court of Justice answers to questions referred by the House of Lords pursuant to Article 177 (now 234) of the European Community Treaty.

The questions referred to the European Court of Justice by the House of Lords were:-

(1) **Having regard to the provisions of the sixth VAT Directive and in particular to article 2(1) thereof what is the proper test to be applied in deciding whether a transaction Consists for VAT purposes of a single composite supply or of two or more independent supplies.**
(2) **Does the supply by undertaking of service or services of the kind provided by Card Protection Plan Ltd (CPP) though the Card protection plan operated by them constitute for VAT purposes a single composite supply or of two or more independent supplies. Are there any particular features of the present case such as the payment of a single price by the customer or the involvement of continental Assurance Co. of London PLc as well as Plc that affect the answer to that question etc.**

(3) **Do such supply or supplies constitute or include insurance ……… transactions including related service performed by insurance agents with the meaning of article 13(B)(A) of the sixth VAT Directive?**
**In particular, for the purpose of answering that question(a) does "insurance" within the meaning of article 13(B)(a) of the 6th- VAT directive include the classes of activity in particular assistance activity listed in the annex to council Directive (73/239/EEC) etc. (b) do the related services of ……..insurance agents in Article 13(B)(a) of the 6th VAT Directive Constitute and include the activities referred to in Article 2 of council Directive……..**

It was held among other things that:- "in deciding whether the transaction which comprises of several elements is to be regarded a single supply or as two or more distinct to be assessed separately, regard must first be had to all circumstances in which that transaction takes place taking into account:- first, that it follows from Article2 (1) of the 6th Directive that every supply of service must normally be regarded as distinct and independent, and secondly that a supply which comprises a single service from an economic point of view should not be artificially split so as not to distort the functioning of the VAT system, the essential features of the transaction must be ascertained, in order to determine whether the taxable person is supplying the customer, being a typical consumer, with several distinct principal services or with a single service. There is a single supply in particular in cases where one or more elements are to be regarded as constituting the principal service, whilst one or more elements are to be regarded as ancillary services which share the tax treatment of the principal service.

A service must be regarded as ancillary to the principal service if it does not constitute for customers an aim in itself but a means of better enjoying the principal supplied.” The case of **Customs and Exercise- Commissioners V. Madgett and Baldwin (trading as Howden Court Hotel) (Joined cases C-308/96 and 94197) (1998) STC 11,1206, PARA 24(P.627)** Another case which was persuasive is **British Airways Plc v. Customs and Excise Commissioners Simon Tax cases 1990(CA) 643** where it was held (I) the question was whether British Airways had made one supply or two supplies, was a question of law on which the Court was entitled and bound to form its own view. (this was the same question posed in the case of **British Railways Board v. Customs and Excise Commissioners (1977) STC 22.** It was held that:

**(2)** In-flight catering was an integral part to the supply of air transportation. Accordingly British Airways had made only one supply namely that of air transportation.

I am convinced that the test is as stated by the European Court of Justice, and the authorities cited above, that regard has to be taken to all the circumstances in which that transaction took place. The supply which comprises a single service from an economic point of view should not be artificially split so as not to distort the functioning of the VAT system. The essential features of the transaction must be ascertained in order to determine whether the taxable person is supplying the customer being a typical consumer with several distinct principal services or with a single service.

The appellant had to ascertain the essential features of which it failed to do when it taxed the fee payable to KCC. One of the terms of the contract was that the contract constituted the sole contract between the council and the contractor for the performance by the contractor of the service. In view of the above, it followed that it was a single supply of services. The management of taxi operators and taxi parks could not exist without passenger transportation services.

The Black’s Law Dictionary 9th Edn. defines incidental services to mean subordinate to something of greater importance: having minor roles. It has to be pointed out that the issue of incidental to transport taking place where the transport commences is a creation of the law, which law did not define its extent.

There was certainly an ambiguity created, whose interpretation is left to Courts. Its trite that where there is any ambiguity in the legislation, the same is interpreted in favour of the tax payer or assessee. (See) CIT **v. Vegetable Production** (supra) where it was held: **"If the Court finds that the language of the taxation provision is ambiguous or capable of more meaning than one of them the Court has to adopt the interpretation that favours the assessee (tax payer)**. I am persuaded by the above, and hasten to add that if S. 16 (3) of the VAT Act was read together with S. 19 (I) and the 2nd schedule (n) it becomes apparent that the supply of transportation service was exempt and so the incidental issue would be irrelevant and not applicable to the facts of the instant case. It was therefore a redundant provision. It is no wonder that when the VAT Act was amended in 2011, S. 16 (3) was neither reworded or replaced by way of substitution but was repealed.

I was not persuaded by the appellant's Counsel's submissions for various reasons but most importantly:-

1. The submissions were not on the matter of law or fact which constituted the dispute. He argued that the learned Justices of the Court of Appeal lumped up the legal mandate of the respondent as a body corporate and the individual Taxi and Drivers Association. It is very clear that the respondent is a company limited by guarantee comprised of drivers, taxi owners and conductors. Their primary objective is the welfare of its members through entering into an arrangement or contract with persons, organisations, or local authorities in order to regulate, develop or coordinate the management and standards of taxi parks/services with a view of promoting the objectives of the Association, among others.

   Counsel raised irrelevant matters outside those needed to be determined before Court. The issues were about whether there was proper assessment of VAT basing on the sum taxable value and whether the respondent's business was a subject of VAT as far as the law is concerned. In other words was the respondent a taxable person in VAT in the context of the VAT Act? I have already answered this question in the negative.

2. It was not at all argued by the respondent, that it was hired to supply transport services by KCC. The argument which was maintained was that, the supply of passenger transportation service was exempt and management service was an

incidental service to the supply of passenger transportation service. What the Court of Appeal found which was in accordance with the law was that, management of taxi operations and taxi parks cannot stand on its own in the absence of the principal service of passenger transportation services. And so the management of contract was an incidental service to the principal service. Counsel for the appellant also argued in the submissions that the contract into parks was an arrangement to ease access to stages and general order in taxi parks. He went further and submitted, that the principal supply by the respondent under the contract leading up to the VAT assessed was not and could not have been transport services since it was not contracted to supply transport services

One wonders why the VAT was assessed on the sum of taxable value, which so called sum taxable value was the value determined by KCC at the time of execution of the sole contract as per the contract terms with the respondent.

Since the law had already exempted the supply of passenger transportation, the argument by the appellant's Counsel to the effect that it is not incidental was not tenable.

3. The case of Card Protection Plan Ltd (supra) was to the point. The Uganda case though it is of the Tax Appeals Tribunal, UTODA Entebbe Branch Ltd. (Supra) stated the proper position of the law as in the Card case. It was held as follows (UTODA Uganda case) "**...... the test which we rightly state, Can the provisions of the services by the taxpayer be independent of the exempted supply? In other words can tax parks operate independently of the provision of a passenger transport services? No they cannot. There is need for the provisions of transport services in order to have a taxi park. The operation of taxi parks is incidental and ancillary to the provision of passenger transport services**." (Emphasis is added)

**(4)** The comparison of Civil Aviation Authority to KCC as submitted by Counsel for the appellant, is not applicable here since KCC was a local authority while CAA much as it is in Uganda, its business is regulated in conjunction with International Convention on Air Transport. So they are not on the same footing much as they are both institutions in Uganda. I accept Counsel for the respondent's submissions that CAA

is a highly regulated industry with defined players executing different roles guided by a regulatory framework comprised of both local and international legislations and Regulations.

The respondent is a composition of tax drivers, owners and operators who are under an Association (UTODA) and they were licensed by KCC to provide passenger transport services and it is not in dispute. The service the respondent supplies is VAT exempt as already discussed in this judgment. I find no reason to fault the Court of Appeal. The judgment and orders of the Court of Appeal are upheld.

Accordingly, I would dismiss the appeal and award costs of this Court and Courts below to the respondent.

Dated at Kampala this .....05th .............day of ........May.................2017

Hon. Lady Justice Faith Mwondha
**JUSTICE OF THE SUPREME COURT**