THE REPUBLIC OF UGANDA

IN THE TAX APPEALS TRIBUNAL AT KAMPALA

APPLICATION NO. 21 OF 2019.

AVIATION HANGER SERVICES LTD:: APPLICANT

VERSUS

UGANDA REVENUE AUTHORITY :: RESPONDENT

BEFORE: DR. ASA MUGENYI, MR. GEORGE MUGERWA, MR. SIRAJI ALI

RULING

This ruling is in respect of an application challenging a Value Added Tax (VAT) assessment of Shs. 384,025,308 arising after the respondent disallowed the applicant's VAT refund claim of Shs. 122,671,551.

The agreed facts giving raise to this application are: The applicant is a company duly incorporated in Uganda carrying on the business of providing maintenance services to foreign operated aircrafts. The applicant services aircrafts that do not operate on any routine route to Uganda. The aircraft only fly to Uganda for purposes of being serviced. The applicant applied for a VAT refund of Shs. 122,671,551 which the respondent rejected and issued an additional VAT assessment of Shs. 384, 025,308 on ground that the services of the applicant were standard rated.

The following issues were set down for determination.

1. Whether the services by the applicant to foreign operated aircrafts attracts standard rated or zero rated VAT?
2. What remedies are available to the parties?

The applicant was represented by Mr. Festus Akunobera and Ms. Jemima Mushabe from ABMAK Associates Advocates and Legal Consultants while the respondent by Mr.

Donald Bakashaba and Ms. Patricia Ndagire from Legal Services and Board Affairs Uganda Revenue Authority.

The dispute of the parties revolves around the VAT treatment of aircraft serviced in Uganda. The applicant contends that the aircraft fly to Uganda for purposes of only being serviced but operate outside Uganda. It argued that such services should be treated as an export hence attracting a VAT rate of zero. On the other hand the respondent contends that the services are a local supply and hence carry the standard VAT rate.

The applicant's first witness, its director, Mr. Pascal Lee Choong Tong testified that the applicant is a 100% owned subsidiary of Intra-Ocean Aviation Finance Corporation (IOAFC), a Mauritian registered company, that provides aircraft leases to various NGOs such as World food Program, Red Cross, Medicine San Frontier and United Nations. He further testified that the said humanitarian Aid agencies require IOAFC services in various countries in Africa such as Central African Republic, South Sudan, Mali, Algeria and others. The applicant is a registered VAT payer. The applicant provides aircraft maintenance to only IOAFC operated aircraft pursuant to a Service Level Management Agreement. The aircrafts are flown into Uganda for service by the applicant and thereafter are flown out of Uganda. He informed the tribunal that none of the aircrafts operate a route in Uganda. He deponed that the applicant considers these services as an export to IOAFC as the use and consumption of its services is done in other countries. He testified that the applicant did not charge VAT for maintenance and repair services it offers to IOAFC. The service and maintenance is completed in Uganda. The applicant applied for a VAT refund of Shs. 122, 671,751 which was rejected by the respondent and a VAT assessment of Shs. 384,025,308 was issued.

The respondent's sole witness was Mr. Abdallah Tembo, an officer in its Objections and Appeals unit who testified that an audit was conducted on the applicant to verify the validity of its claim for a VAT refund of Shs. 122,671,751. The audit established that the applicant was purportedly misclassifying services offered to IOAFC as zero rated

exports yet they should be standard rated supplies. The applicant provides maintenance services in Uganda for use and consumption by IOAFC aircrafts. The applicant was charging a fee for the services offered under the agreement between it and IOAFC. The applicant was invoicing IOAFC and filing the services in its e-tax returns as zero rated sales. The applicant's explanation that the services are used and consumed outside Uganda did not convince the respondent. The respondent rejected the claim for the VAT refund and recomputed VAT payable on the invoices and raised an assessment of Shs. 384, 025,308.

In its submission, the applicant argued that the services it offered to IOAFC are export services within the meaning of the VAT Act and therefore qualify for the zero rate. The applicant cited S. 24 (4) of the VAT Act which provides that the rate of tax imposed on taxable supplies specified in the Third Schedule is zero. The applicant argued that for a service to be classified as an export to qualify for zero rate it must be consumed or used outside Uganda. The applicant cited also Regulation 12 of Value Added Tax (VAT) Regulations which requires a taxpayer to show evidence that the services are consumed outside Uganda. The applicant provided the respondent with evidence in the form of a contract showing that her services were consumed outside Uganda. The said contract, Exhibit E7 clearly shows that the aircraft are flown into Uganda solely for purposes of repair, maintenance, service and overhaul to keep the aircraft airworthy and in good condition.

The applicant submitted that the terms 'export', 'use' and 'consumption' are not defined in the VAT Act. The applicant submitted that the maintenance service it provides qualify for classification as an export as they satisfy the conditions of the VAT Act; as they are consumed outside Uganda. The services only have to be exported as part of a supply. The applicant cited **Commissioner of Domestic Taxes v Total Touch Cargo Holland** *Income Tax Appeal No.17/2013* where court held that the location where the service is provided does not determine the question of whether the service is exported or not. The relevant factor is the location of the consumer of the service and not the place where the service is performed. The applicant further cited **FH Services Kenya Ltd v**

Commissioner Domestic *Taxes Appeal No.6/2012* and argued that what is material is a place where the use of consumption of the service takes place, not the place of service. The applicant also cited **Coca Cola Central East and West African Ltd v Commissioner of Domestic taxes** *Appeal No.11/2013* where it was stated that to consume means to "use up" while use means to "put to a particular purpose or to use up something". The applicant submitted that the place of consumption or use is the place where the benefit of the services accrues. This may in some instances be different from the place of performance of the service. The applicant argued that if the tribunal finds that the service is zero rate then the input tax credit for November and December for 2017 should be allowed as the output VAT was zero.

The applicant submitted that the respondent's assessment of Shs. 384,025,308 was based on an allegation that the former's services are performed in Uganda is erroneous. The applicant cited **Uganda Revenue Authority v Kajura** *CA No.09/2015*, where the Supreme Court relying on the case **Cape Brandy Syndicate v Inland Revenue Commissioners** [1920] 1 KB 64 argued that "in a taxing Act, one has to look at what is clearly said. There is no room for intendment as to a tax. Nothing is to be read in, nothing it to be implied. One can only look fairly at the language use". If a person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free.

In reply, the respondent submitted that the applicant applied for a VAT refund for November 2017 to June 2018. The respondent as per its procedures of refund commenced a mandatory audit to verify the authenticity of the refund claim. As a result of the audit, the respondent classified the sales relating to maintenance and servicing of aircraft worth Shs. 2,039,393,650 as standard rated thereby raising an assessment of Shs. 384,025,308. The respondent rejected the claim for the refund of input tax credit on ground that the services the applicant offered to IOAFC are standard rated services and therefore taxable. The respondent argued that in order to resolve the issue, the

tribunal has to look at the nature of the services offered by the applicant. The respondent submitted that the applicant is involved in the business of repair, maintenance, service and overhaul of aircrafts to keep them in an airworthy and good condition. These services are performed in Uganda. The respondent cited Sections. 4 (a), 5(1), 6(1), 11, 18 and 19 of the VAT Act and argued that the applicant is a taxable person as it performs maintenance works and servicing of aircrafts which qualifies to be a supply of service. The respondent cited **Uganda Revenue Authority v Total Uganda** *Civil Appeal No.08 of 2009* where Justice Madrama and held that VAT is a consumption tax. It does not depend on the where a taxpayer consumes the subject goods. It is more concerned with transactions. The respondent contended further that under S.14 (1) (c) of the VAT Act the services the applicant provided to the applicant were completed in Uganda, at the applicant's premises. The respondent cited S.16 (1) and (2) of the VAT Act and argued that the place of supply of services is in Uganda and the recipient of the supply is not a taxable person in Uganda.

The respondent cited **Card Protection Plan Ltd. v Customs and Excise Commission** *[2001] UKHL 4* and ***Uganda Revenue Authority v Uganda Taxi Operators & Drivers Association*** *SCCA No.13/2015* and argued that every supply of service must be regarded as distinct and independent. The essential features of the transaction must be ascertained in order to determine whether the taxable person is supplying the customer with several distinct principal services or with a single service. The 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 service.

In rejoinder, the applicant stated that the spare parts supplied to IOAFC are part of the maintenance services and therefore are ancillary to it and therefore constitute a supply of service. The applicant submitted that whereas the maintenances services are not expressly listed in the third schedule as zero rated the services in question would qualify for zero rate VAT where they are exported. The applicant argued that paragraph 2(b) of the Third schedule to the VAT Act provides that services are exported where the services are supplied for use and consumption outside Uganda. The applicant further

contended that the applicant's customer and final consumers are not aircrafts as alleged by the respondent.

The applicant submitted that it is IOAFC that contracted the applicant and stipulated the services to be provided. It therefore follows that the applicant's customer for maintenance services is IOAFC an entity situated outside Uganda. The applicant argued that the tribunal should disregard the respondent' submission that the tribunal should be guided by **Commissioner of Domestic Taxes v Total Touch Cargo Holland** (supra) to determine the outcome of this case. The said case only deals with handling of services. The case of **Uganda Revenue Authority v Total Uganda** (supra) relied on by the respondent does not apply to the issues at hand. The case dealt with supply and export of goods which is different from supply or export of services. The dispute in the present case is on the supply of maintenance services.

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

The applicant is a company incorporated in Uganda and is a 100% owned subsidiary of Intra Ocean Aviation Finance Corporation (IOAFC) a company registered in Mauritius. The applicant is engaged in the provision of aircraft maintenance services. IOAFC provides aircraft leases to humanitarian Aid agencies such as United Nations, International Red Cross, World food Program and Medicine san Frontiers. The applicant entered a Services Level Management Agreement with IOAFC to maintain and service its aircrafts. Article 2.4 of the Agreement provides that IOAFC flies its fleet/aircraft into Uganda solely for the purpose of maintenance. Article 1.3.10 states that services mean the services provided by AHS to IOAFC and as described in this Agreement. Article 4.1 states that AHS shall provide the services as set out in the Agreement. The agreement does not describe or set out the services provided by the applicant. So we shall go by the evidence of Mr. Pascal Lee Choong Tong who stated that the applicant provides maintenance services. According to the objection letter of 25th January 2019, Exhibit E4, the maintenance service include provision of labour in maintenance works and replacing

parts among others. The applicant applied for a refund of input tax credit for November 2017 to June 2018 of Shs 122,671,751 which the respondent rejected on the ground that the applicant was misclassifying its services as zero rated exports. The respondent re-classified the applicant's sales of Shs. 2,039,393,650 in respect of aircraft servicing and maintenance as standard rated supplies and imposed VAT of Shs. 311,093,947.

The applicant contends that the aircrafts it services operate outside Uganda. It also contends that VAT is a tax on consumption of goods and services. Once goods are consumed outside Uganda VAT is not chargeable. The Tribunal needs to clear the air on this. How one perceives VAT, as to whether it is a tax on consumption or on transactions, may affect taxable liability. While the applicant uses consumption as provided for in the Regulations as the basis for determining liability, the respondent is relying on the transactional aspect in the VAT Act, that if there is a supply of service locally VAT is due. In Uganda VAT replaced Sales tax and Commercial Transaction Levy. While VAT maybe considered a tax on final consumption of good or services it is a tax on transactions. In **Golden Leaves Hotels and Resorts Limited and Apollo Hotel Corporation v Uganda Revenue Authority** *Civil Appeal 64 of 2008* the Court of Appeal referred to the definition of VAT in *Black's law Dictionary* 6th Edition where VAT was defined as follows:

> "A tax assessed on goods and services on the value added by each producing unit. The value added is generally the sum of all wages, interest, rent and profits. Otherwise stated it is the total sale price of output minus the cost of raw materials and intermediate goods purchased from other firms. The amount of the tax is a percentage of the value of the goods or services."

The Court of Appeal concluded that it is a transaction tax. VAT is collected in installments. It is about value addition. VAT is charged on any transactions that adds value to goods and or services. In **Metcash Trading Limited v The Commissioner for the South African Revenue Service** CCT 3/200 the court said:

> "VAT is, as its name signifies, a tax on added value. It is imposed on each step along the chain of manufacture and distribution of goods or services that are supplied in the country in the course of business; and it is calculated on the value at the time of each step."

The tax is charged on the value added by a taxable person on each stage in the course of production and distribution. This value can be anything from providing transport to advertising, delivery etc. It is not only about consumption which happens to be at the end of the value chain. It would be a fallacy for one to argue that no VAT should be charged where there is no consumption, or the consumption is outside jurisdiction of the taxing authority. VAT is imposed by the VAT Act. For a consumption of a good or service to be exempt or zero rated or standard rated, the VAT Act has to provide for it.

So the issue before the Tribunal is to establish whether the provision of the maintenance services by the applicant to IOAFC were standard rated ones or zero rated. Standard rated supplies are provided by S. 4 of the VAT Act which reads that:

> "A tax, to be known as valued added tax, shall be charged in accordance with this Act on-
>
> (a) every taxable supply in Uganda made by a taxable person.
>
> (b) Every import of goods other than an exempt import; and
>
> (c) The supply of imported services, other than an exempt service, by any person"

Under S. 4(a) VAT is charged on every taxable supply by a taxable person. The applicant is VAT registered and it is not in dispute that it is a taxable person. As regards "taxable supply", S. 1 of the Act provides that it has the meaning in S.18. The relevant clause in S.18 which is Subsection (1) reads "A taxable supply is a supply of goods or services, other than an exempt supply, made in Uganda for consideration as part of his or her business activities. The provision of maintenance service by the applicant to aircrafts of IOAFC locally for a fee would qualify to be a taxable supply under S. 18 of the Act.

However the applicant contends that its supply of maintenance services to the respondent should be considered as an export and therefore attract VAT at a rate of Zero. S. 24(4) which deals with zero rate supplies provides "The rate of tax imposed on taxable supplies specified in the Third Schedule is zero." The relevant provision in the Third Schedule the applicant is relying on is Clause 1(a) which reads:

> "1. The following supplies are specified for the purposes of Section 24(4) –

(a) a supply of goods or services where the goods are exported from Uganda as part of the supply."

This is where the crack of the matter is. The applicant contends that the services it provides are an export which the respondent objects to. Is the supply of the services by the applicant to IOAFC an export? The applicant provides maintenance services while IOAFC provides aircraft leasing. Are they distinct services or one supply?

The applicant contends that it services are consumed outside. Regulation 12 of VAT Regulations provides that

> "Where services are supplied by a registered taxpayer to a person outside Uganda, the services shall qualify for zero rating only if the taxpayer can show evidence that the services are used or consumed outside Uganda, which evidence can be in the form of a contract with a foreign purchaser and shall clearly specify the place of use or consumption of the service to be outside Uganda or that the service is provided for a building or premises outside Uganda."

The Regulations are clear. The question is: did the applicant provide the said evidence? It does not seem so. A perusal of the Service Management Agreement between IOAFC and the applicant is silent on where the services provided by the latter are going to be used or consumed. Neither the applicant nor IOAFC is a party to the Aircraft Time Charter Agreement dated 3rd December 2008. Though Air-Tec Mauritius limited maybe a subsidiary of IOAFC it is a different legal entity. Referring to it may not help. Therefore there was no evidence furnished by the applicant to the respondent to show that its services to IOAFC are being used or consumed outside Uganda. It only came out in its objection that the services are provided to a registered person outside Uganda.

In order to resolve the dispute the Tribunal has to ask itself did the provision of maintenance service by the applicant amount to an export of services. When and where were the services supplied and when and where were they consumed? Is the supply or a service the same as its consumption or use? Is the maintenance service on or an operation of an aircraft the same as consumption of services? What happens when the service is partially consumed in Uganda and then another country? The VAT Act does

not elaborate on when a service is partially used or consumed outside Uganda. It is not denied that the supply of the maintenance service was done in Uganda. S. 16(1) of the VAT Act provides that a supply of services shall take place if the business from which the services are supplied is in Uganda. But what happens when the supply is in Uganda but the consumption is outside?

The applicant contended that IOAFC is located outside Uganda. A service is deemed to be exported when the consumer is outside Uganda. Courts have developed jurisprudence relating to the use or consumption of a service outside a country where it was supplied. In **Commissioner of Domestic Taxes v Total Touch Cargo Holland** *Income Tax Appeal No.17/2013* the court held that the location where the service is provided does not determine the question of whether the service is exported or not. The relevant factor is the location of the consumer of the service and not the place where the service is performed. The court noted that:

> "the scanning, cooling and palletizing services provided by KAHL were performed in Kenya. However the user and consumer of these services being TTC-H and their European customers were based outside Kenya. The services were aimed at ensuring that the horticultural produce and flowers reached Europe in a fresh state fit for consumption by these foreign buyers. Accordingly despite the services being performed within Kenya it was in actual fact an exported services."

In **F.H. Services Ltd v Commissioner of Domestic Taxes** *Appeal No.6 of 2012* it was held:

> " The benefit of the services offered by the Appellant accrues outside Kenya for the simple reason that the beneficiary of this service is the final consumer of the flowers who is located far away from Kenya, in Holland, the destination jurisdiction ....It is for this reason that it is very clear in our minds that these services and all services that accompany and occasion exportation are provided of the sole purpose of benefitting the final consumer who is not in Kenya, the origin jurisdiction, but the final consumer who is located in the destination jurisdiction and therefore provided for the use or consumption outside Kenya...."

This argument was further reinforced in **Panalpina Airflo Limited V Commissioner of Domestic Taxes income** *Tax Appeal No. 5 of 2018* the court used the precedence

that internationally traded services should be taxed in line with the destination principle. The ultimate consumer of the impugned services was not in Kenya. The taxpayer was held to be entitled to VAT refunds.

However in **Coca-Cola East and West Africa Ltd v Commissioner of Domestic Taxes** *Appeal No. 11 of 2013* Coca-Cola entered into a contract with CCEC to promote the Coca-Cola brand in Kenya, Eritrea, Somalia, Uganda, Burundi, Reunion, Djibouti, Rwanda, Madagascar, Congo, Seychelles. Mayotte, Democratic Republic of Congo, Malawi, Mozambique, St. Helena, Zambia and Zimbabwe. In respect of the promotional services Coca-Cola organized various functions and promotional activities geared toward the promotion and marketing of the Coca-Cola Brand. KRA issued an assessment on the grounds that these services were local supplies for which Coca-Cola ought to have charged VAT. Coca- Cola appealed on the grounds that the services were consumed by CCEC which was domiciled in the United States. It was held that: "....consumption or use of services is not determined by reference to the location of the payer or a person requisitioning the service but the location of the consumer of the service. The location of the payer is immaterial." The court noted that "what is material is whether the supplier of the services has established a business or permanent establishment in Kenya and whether the services are consumed in Kenya." The Tribunal held that the households in Kenya were the final consumers.

We have conflicting decisions. In the first two decisions it is not difficult to discern that IOAFC is located outside Uganda. However the said decisions did not address associated companies. The applicant is an agent of IOAFC. In respect of the second two decisions it is not difficult to discern that the IOAFC through the applicant has a permanent establishment in Uganda. The Tribunal is at crossroads. However we have to make a decision.

When one talks of permanent establishment international law of taxation comes into play. The jurisdiction in which the customer is located has the taxing rights over internationally traded services or intangibles. A permanent establishment of a principal

can be established by the activity of an agent or associated company. .An office, workshop or premises for the maintenance of aircraft can constitute a Permanent Establishment. The applicant is 100% owned by IOAFC. An enterprise will have a Permanent Establishment if there is a certain person acting for it. Such persons that may create Permanent Establishments are dependent agents. The applicant solely provides maintenance services to aircraft of IOAFC.

From an angle of municipal law or under the VAT Act to establish tax liability one has to look at the customer's status, the nature of supply, the elements of determining the place of taxation.

The tribunal notes that the word "use" or consumed outside Uganda" is not defined. *Black's Law Dictionary* 10th Edition p.1774 defines "use" as "the application or employment of something". The word "consume" for our purposes is defined "to use up (time, resources, etc.)" In **Coca-Cola East and West Africa Ltd v Commissioner of Domestic Taxes** (supra) it was stated that "To consume means to "use up" while use means to "put to a particular purpose" or "to take up something". In **Uganda Revenue Authority v Siraje Hassan Kajura** Civil Appeal no. 9 of 2015 where the Supreme Court relying on the case on Rowlatt **in Cape Brandy Syndicate v IRC** *(1921) K.B 64* stated:

> "In a taxing Act, one has merely to look at what is clearly said. There is no room for an intendment. There is no equity about tax. There is no presumption as to a tax. Nothing is to be read in it, nothing is to be implied. One can only look fairly at the language used. The principle is the literal rule which is to the effect that when words of a statute are clear and unambiguous, they should be given their plain meaning and that Courts should not read into the Sections of a taxing statute words that are not there so as to meet the minds of the legislators."

Taking the above definitions and decisions into consideration, the Tribunal has to ask itself: When the maintenance services were done on the aircraft by the applicant was that not the moment the services were used up or applied to the aircraft?

In order to make a decision, the Tribunal has to look at the circumstances of the case and determine where the consumption was made. In **Uganda Revenue Authority v Total Uganda Limited** *Civil Appeal No 11 OF 2012* Justice Madrama observed that

> "Where a transaction comprises a bundle of features and acts, regard must be made to all the 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..."

The applicant is in the business of provision of maintenance services to aircrafts. These services include provision of labour in maintenance work, replacement of parts and maybe overhauling of engines. It is not like in **Commissioner of Domestic Taxes v Total Touch Cargo Holland** (supra) and **F.H. Services Ltd v Commissioner of Domestic Taxes** (supra) where the services were aimed at ensuring that the horticultural produce and flowers reached Europe in a fresh state fit for consumption by foreign buyers. The foreign buyers were the ultimate consumers. In this case the consumer of the service is not the passengers who would use the aircraft when it is leased, nor IOAFC which operates the aircraft but the aircraft itself. At the time of service the aircraft was located in Uganda.

In **Uganda Revenue Authority v Total Uganda Limited** (supra) jet fuel was being pumped into the fuel tanks of aircrafts and was not put in the cargo compartments of the aircrafts in Uganda. Justice Madrama noted:

> "I agree with the ruling of the chairperson of the tribunal that VAT deals with value added and not consumption. The fuel is supplied at Entebbe airport and is not exported. This is based on the wording of section 15(1) which provides that the supply of goods takes place where the goods are delivered or made available by the supplier. In this case the goods are consumed at the airport by refueling. Secondly section 14 of the VAT Act specifies the time of supply. Section 14(1)(c) is relevant. It provides as follows: (1) Except as otherwise provided under this Act, a supply of goods or services occurs (c) in any other case, on the earliest of the date on which (i) the goods are delivered or made available, or the performance of the service is completed.

The goods were made available at Entebbe airport. The burning of the fuel is irrelevant as the transaction was completed at the airport. The consumption is complete upon the vehicle being fuelled with the supply i.e. diesel. The same analogy applies to jet fuel. The transaction is completed with the filling of fuel in the consumption tank of the craft. I also agree that for it to qualify to be an export, it has to be loaded in a fuel tanker or in the cargo hold of a plane for delivery to another country.

This is because it is not an export but a supply of goods to an international carrier and the consumption is complete upon filing what the plane needs. What is uses to fly is not consumption in another country but burning what has been consumed. That analogy that it is an export would be absurd if the plane files to Mozambique and flies back on the same fuel consumed at Entebbe to Uganda.

A vehicle which is on transit to another country and fuels near a border point cannot be said to be exporting the fuel for consumption in another country. The vehicle is merely on transit and consumes whatever fuel it needs for the journey. It consumes what it needs and late on burns it to move until it needs more."

S. 14(1)(c) of the VAT Act provides that a supply of service may occur where the performance of the service is completed. The provision of maintenance services is a one-off activity. It is not a continuous process which starts in Uganda and ends outside Uganda There is no evidence that the service was ever completed outside Uganda. On completion of the maintenance service the aircraft were able to fly in Uganda up to the border. In essence there was an element of local use of the maintenance service. If we are also to use the logic of Justice Madrama, the consumption of the maintenance service is completed when the supply or delivery is made. Once spare parts are replaced, oil is changed or engines are overhauled the maintenance service is complete and the supply is deemed to have been consumed. A plane that is in transit to another country for operation and is serviced in Uganda cannot be said to be exporting the maintenance service to another country. It is a single supply of maintenance service which is distinct from that of leasing aircraft. In the cases involving flowers, the flowers being treated inside one county are the same flowers consumed in another country. It is one supply.

There is a local content of supply of services in Uganda which is similar to that in **Coca-Cola East and West Africa Ltd v Commissioner of Domestic Taxes** (supra) where the advertising which was intended for outside countries was listened to by Kenyans. The court concluded that there was a local consumption of the services in dispute. The VAT Act provides that VAT is due where there is a supply of goods or services. The VAT Regulations provides where services are used and or consumed outside Uganda the rate of VAT is zero. The Regulations do not clearly state the parameters on how use and consumption of services can be determined. For instance it is silent on where a service is partially used in Uganda and then consumed elsewhere, how is VAT chargeable? Courts have used the destination of services to determine liability or where the services have been consumed. However to reach that, it may be important to look at what service is being provided, why is the service being provided and who or what is consuming the service? Are the service in the country of supply the same as those where it is purported they are being consumed? Each case depends on its circumstances.

There is a disharmony between the Regulations and the VAT Act. The VAT Act is concerned with a supply of goods and services and looks at the transactional nature of them. The Regulations are concerned with use and consumption of goods outside Uganda. The Regulations are out of chord. The VAT Act is the principal legislation. In order to make the Regulations rhyme in harmony with the VAT Act the "use and consumption of the service" should be done wholly outside Uganda. If there is a local component on the use of consumption of the services it shall be deemed to be a supply of services in Uganda.

In the event the Tribunal is wrong and the provision of maintenance service is zero rated, the Tribunal notes the applicant did not adduce evidence to show that the aircrafts the applicant serviced for the period November 2017 to June 2018 were leased. The Tribunal already noted the agreement between the applicant and IOAFC did not specify the services the applicant was offering to IOAFC. Neither did the agreement state that the aircrafts that were being services were to be leased. The

respondent re-classified the applicant's sales of Shs. 2,039,393,650 as standard rated. Therefore there was need for the applicant to have availed to the respondent a breakdown of the applicant's sales showing which were aircrafts were serviced and which were eventually leased. The applicant ought to have availed the respondent with the invoices and the leases, which it did not. Since there is no evidence that those documents were availed to the respondent, the applicant ought to have availed them to the tribunal during the hearing. The Tribunal also notices that there was a mixed provision of goods and services by the applicant to IOAFC. The applicant provided spare parts to the aircrafts. The provision of the spare parts or goods should have been delineated from the provision of services and treated separately. In the event the provision of maintenance services was considered an export, it is only the services that are zero rated under the Regulations and not the provision of goods.

The tribunal having analyzed the evidence finds that the provision of maintenance services by the applicant is not a zero rated supply. The services are standard rated and therefore attract VAT. This application is dismissed with costs.

The Tribunal would like to thank the counsel of both parties for their hefty submissions and the time they took in preparing their cases. The Tribunal notes that this case was involving and the parties should feel free to take this matter to higher levels for better jurisprudence.

Dated at Kampala this ....30th....day ....March....2020.

DR. ASA MUGENYI
CHAIRMAN

MR. GEORGE MUGERWA
MEMBER

THE REPUBLIC OF UGANDA

IN THE TAX APPEALS TRIBUNAL

APPLICATION NO. 21 OF 2019

AVIATION HANGAR SERVICES LTD ==========APPLICANT

VS.

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

BEFORE: DR. ASA MUGENYI, MR. GEORGE MUGERWA, MR. SIRAJI ALI

RULING

I have read the ruling of my colleagues and wish to supplement it as follows:

The issue for determination is whether the services rendered by the applicant to a non-resident person, by servicing foreign operated aircraft, is an export of services and therefore zero-rated for VAT purposes. The determination of this issue turns on the interpretation of S. 16(2) (a) of the VAT Act and its effect on paragraph 2(b) of the Third Schedule of the same Act.

The applicant's case is that the maintenance services that it supplied to aircraft belonging to IOAFC are exports within the meaning of S. 24(4) and Paragraph 2(b) of the Third Schedule to the VAT Act. The applicant contends that under the VAT Act, for services to be classified as exports and therefore qualify for zero VAT, they must be consumed or used outside Uganda. The applicant's further contention is that, there is no requirement, under the VAT Act that services must be performed outside Uganda. The only condition is that the services must be consumed or used outside Uganda. The applicant contended further that the assertion by the respondent that the services performed by the applicant are standard rated for the reason that they were performed in Uganda introduces a new condition in the law that services must be performed outside Uganda to be classified as exports.

The applicant cited the decision of the High Court of Kenya, in **Commissioner of Domestic Taxes v Total Touch Cargo Holland** *Income Tax Appeal No. 17 of 2013*, where it was held that the location where a service is provided does not determine the question as to whether the service is exported or not. The relevant factor in the opinion of the court was the location of the consumer of the services and not the place where the service was performed. The court also held that the term "use or consumption" outside Kenya denoted the place where the benefit of the service accrued.

The **Total Touch Cargo Holland** case involved the interpretation of S. 2 of the now repealed Kenyan Value Added Tax Act, 1990. Section 2 of the said repealed Act stated as follows;

> "Service exported out of Kenya means a service provided for use or consumption outside Kenya whether the service is performed in Kenya or both inside and outside Kenya." (emphasis added).

It will be observed that under the above section great care has been taken to emphasize that the place of supply of a service is immaterial. What was relevant is the place of use or consumption of the service.

What constitutes an exported service in Uganda is provided for under Paragraph 2(b) of the Third Schedule of the VAT Act which states as follows;

> *"For the purposes of paragraph 1(a), goods or services are treated as exported from Uganda, if;*
>
> *(b) In the case of services, the services were supplied by a person engaged exclusively in handling of goods for export at a port of exit or were supplied for use or consumption outside Uganda as evidenced by documentary proof acceptable to the Commissioner General".*

It is apparent, from a comparison of the two provisions that they are not in *pari materia*. The only thing they have in common is the term "*use or consumption*" outside Kenya or Uganda.

The conclusion, of the High Court of Kenya, that the relevant factor, in determining whether a service is exported or not, was the location of the consumer of the services

and not the place of performance of the service, is an accurate construction of S. 2 of the now repealed Kenyan Value Added Tax Act, 1990. If the instant case was considered, in light of section 2, of the said repealed Act, the same result would be achieved. The place of supply of the maintenance service would be immaterial.

However, in determining the question whether the maintenance services supplied by the applicant to IOAFC, were exported services, we are required to deal, not with S. 2 of the repealed Kenyan Act but with S.16(2)(a) of the Ugandan VAT Act and Paragraph 2(b) of the Third Schedule of the same Act. In Uganda, in certain circumstances, S. 16(2) (a) operates to override the provisions of paragraph 2(b), with the result that, a service will be rendered taxable, even though the service was supplied for use or consumption outside Uganda. S. 16(2) (a) provides as follows;

> "Notwithstanding subsection (1), a supply of services shall take place in Uganda if the recipient of the supply is not a taxable person and the services are physically performed in Uganda by a person who is in Uganda at the time of supply."

The conditions that must be met for the application of S. 16(2)(a) are the following:

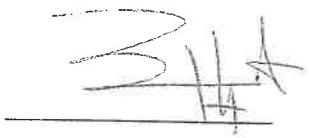
i. The recipient of the supply is not a taxable person.
ii. The services are physically performed in Uganda by a person who is in Uganda at the time of the supply.

In cases, where both the above conditions have been met, a supply of a service will be taxable in Uganda even though it is for use or consumption outside Uganda.

In the instant case, IOAFC, the recipient of the supply, is not a taxable person by virtue of S. 6 of the Value Added Tax Act. The services were physically performed in Uganda, by the applicant, who was in Uganda, at the time of the supply. The above facts, place the said services, within the ambit of S. 16(2)(a). The place of supply of the said service is therefore Uganda, meaning that the service is taxable in Uganda, although the service was supplied for use or consumption outside Uganda.

We accordingly find that the service rendered by the applicant, to IOAFC, a non-resident person, by servicing foreign operated aircraft, is not an export of services and therefore not zero-rated for VAT purposes.

Dated at Kampala this ....30th....day ....March....2020.



MR. SIRAJI ALI

MEMBER