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Income Tax

Tax Exemption

Tax Exemption Clauses Under Project Development Agreements

Kasese Cobalt Company Limited v Uganda Revenue Authority: TAT Application No. 28 of 2018.

On the 21st of January, 2020, the Tax Appeals Tribunal delivered a ruling in Application No. 28 of 2018 whereby it dismissed an application by Kasese Cobalt Company Limited (Applicant) challenging a decision by URA (Respondent) not to consider an exemption granted to it by the Minister of Finance as provided under the Project Development Agreement.

Background

The Applicant was incorporated as a project company pursuant to a Kasese Cobalt Project Development Agreement in 1992 between the Government of Uganda and other parties. The Government provided that the non- resident staff of the Applicant would not pay income tax. On 17th March, 1997, the Minister of Finance confirmed the exemptions provided in the agreement. The Income Tax Act 1997 required all exemptions to be confirmed by the Minister by 31St December, 1997.

By a letter dated 26th June, 2002 the Minister of Finance, confirmed that the Applicant's income tax incentives were to continue in accordance with S. 166(26) of the Income Tax Act (ITA). The Applicant commenced business and did not withhold PAYE for the payments to its non-Ugandan staff. The Respondent raised an administrative assessment of UGX. 8,159,350,625 (Uganda Shillings Eight Billion One Hundred Fifty Nine Million Three Hundred Fifty Thousand Six Hundred Twenty Five Only) for non-remittance of PAYE to which the Applicant objected.

Applicant's Arguments

The Applicant submitted that:

- It was exempt from withholding PAYE under the Project Development Agreement and that the Respondent raised the assessment under a repealed legislation.
- The additional assessment was time barred;
- there was no discovery of new information; and
- The assessments were without basis and no detail was given in respect of them.

Respondent's Arguments

The Respondent submitted that:

- The Applicant was liable to pay taxes because it is not entitled to any tax exemption.

- The letter dated 26th June, 2002 was issued after the statutory deadline of 31st December, 1997 before which the Minister should have concurred in writing.
- The additional assessments were made on discovery of new information and the Applicant had not raised an objection regarding the basis of the assessments.

The Tribunal's Ruling

The Tribunal dismissed the Application with costs by holding that the Project Development Agreement did not create a tax exemption under the tax law, the additional assessment was not time barred as the Respondent had discovered new information and that the assessment being issued under a wrong law is a mistake which does not make it void. In dismissing the Application, the Tribunal noted as follows:

- Its job was to look at the tax implications of the Agreement and not to delve into the contractual rights of the parties.
- The Agreement merely created contractual but not statutory obligations. The Tribunal stated that any tax exemption must be provided for by law, as provided under Article52 (2) of the Constitution.
- The Income Tax Act had set 31st December, 1997 as the deadline for the Minister to confirm the exemption. Since the Minister validated the exemption 5 years later, the exemption ceased to have effect as the Minister did not have powers at that time to waive tax.
- The additional assessments were not time barred as there was no evidence adduced to assist the Tribunal to make a conclusive finding on that argument. The Respondent was justified in issuing additional assessments as the evidence of the Respondent that the additional assessments were raised based on new information was not controverted by the Applicant. The Applicant's argument that the assessments issued by the Respondent had no basis was rejected as this was not raised in the Applicant's objection or in the Respondent's objection decision.
- Even though the assessments were issued under the wrong law, the Applicant was not prejudiced and the assessments being issued under a wrong law was a mistake which does not make them void.

Educational Institution- as a Public Character for Tax Exemption

International School of Uganda Limited v

The Commissioner General Uganda Revenue Authority: High Court Civil Appeal No. 3 of 2018

On the 10th of June 2020, the High Court delivered a ruling reversing the decision of the Tax Appeals Tribunal by clarifying the essential elements of an educational institution of a public character for tax exemption purposes.

Background

The Appellant is licensed by the Ministry of education and Sports to provide educational services to children in Uganda. According to its Memorandum and Articles of Association, no member of the Appellant is entitled to any benefit by way of bonus or dividends distributed by the Appellant and the Appellant is a non-profit making organization. The board members are not entitled to any salary or under compensation for something as members of the board of the Appellant.

In April, 2005 the Respondent ruled that the Appellant was an exempt organization as envisaged by Section 2 (bb) of the ITA. The exemption certificate was expressed to be valid for a period of two years from 1st January, 2004 to 31st December, 2005.

In 2008, the Income Tax Act (“the Act) was amended exempting schools including the Appellant from the payment of income tax. The general exemption was then repealed in the amendment to the Act in 2014. The Appellant accordingly fell back to section 2 (bb) of the Act and lodged an application for renewal of the exemption on 18th February, 2015.

On 30th October, 2015 the Respondent rejected the application for renewal of exemption. The Appellant then lodged an objection against the refusal to grant of exemption but the Respondent maintained its decision.

The Appellant filed a suit in the Commercial Division of the High Court, which referred the matter to the Tax Appeals Tribunal.

The Tax Appeals Tribunal ruled against the Appellant on the basis that being a privately owned, funded and managed, it could not be an institution of a public character.

The Appellant appealed to the High Court on the following issues:

Whether the Appellant was an educational institution of a public character;

Whether the Commissioner had the discretion to grant or not to grant the exemption certificate; and

Whether the certificate of exemption was time bound.

Appellant's Arguments

The Appellant submitted that;

The Tribunal erred in finding that it was not an educational institution of a public character yet the Appellant had previously applied for and been granted a certificate of tax exemption by the Respondent.

The grant was based on the fact that its business as an education institution was not intended to confer any private benefit to any individual and that the board members were not entitled to any salary for services rendered.

The requirement to pay fees at whatever rate did not change the position as long as the Appellant was open to all members of the public.

Respondent's Arguments

The Respondent argued that:

It sought to tax the Appellant's surplus income which was not being reinvested in the school.

The Respondent relied on the Education Act to define a public school as opposed to a private school and argued that the Appellant is not an educational institution of a public character because it is not a public school within the meaning of the Education Act.

That since the Appellant was a private school not funded by government, it could not be an institution of public character.

High Court's Ruling

The Court Ruled as follows:

- The Respondent was faulted for relying on the Education Act which was repealed.
- The Respondent departed from defining an institution of a public character and dwelt on that of a public school. It narrowed down the definition to only government funded schools leaving out private schools and disregarded the parameters given under S.2 (bb) of the ITA.
- After analyzing the meaning of an educational institution of a public character, reiterated the principle that where an institution renders services to the general public and there is no beneficial interest in it vested in any private person, that institution can be regarded as being public or of a public character although it is privately owned.
- All the Appellant needed to prove was that none of its income or assets conferred or may confer a private benefit on any person.
- There was no evidence that the surplus income was for the private benefit of the members, board members or any other individual.
- The Appellant is an institution with a membership that has no private interest in the company residue, which they hold only on behalf of the students and members present at a given time. The beneficial interest is not vested in any private person but belongs to the public as users.
- The Appellant's reserves could be taxed only if the Appellant attempted to put the reserves to use outside the objectives of the company.
- The Court agreed with the Respondent that the Appellant was doing business by deriving income from fees. However, the Court noted that while the Appellant does educational business and derives income from it, the law exempted that income from tax.
- The Appellant retained the same character as in 2005 when it had been granted an exemption certificate and there was no proof that it had or intended to divert from those characters that qualified it to be an educational institution of a public character. It had met all the requirements and was manifestly an educational institution of a public character and was declared as such.
- The requirement for an exemption ruling from the Commissioner is not merely an administrative requirement but a mandatory requirement for one to be exempted under S. 2(bb) of the Income Tax Act. Since the process involves vetting, the Commissioner is obligated to give a result after vetting.

- On the period of exemption, the Court held that since the matter involves vetting and remains in place only if the beneficiary stays within the provisions of the law, it is necessary for the authority granting the certificate of exemption to review and monitor the conduct and status of the Applicant from time to time so as to be sure that the exempted institution still qualifies to remain so.
- From the time that the Appellant filed the appeal it was an educational institution of public character and was therefore entitled to the exemption it sought.
- The High Court ordered the Respondent to re-assess the Appellants current application for exemption to ascertain whether it still qualifies for exemption.

Allowable deductions

Tax Treatment of Premium and Rent on Leasehold Land and Amortization of Such Expenses

Vivo Energy Uganda Ltd v Commissioner General URA: High Court Civil Appeal No. 1 of 2019

The High Court delivered a Judgment on 9th March, 2020 in which it held that the rent expenditure incurred by Vivo Energy (Appellant) is a deductible expenditure.

Background

The Appellant had acquired several leases for placement of their fuel stations for which they paid premium and rent.

TheAppellant amortized these expenses claiming these rent and premium payments as deductible recurrent revenue expenditures in its books of accounts.

The URA conducted an audit and disallowed the premium and rent expenses as not being deductible expenses because the expenses are capital in nature.

The Appellant filed an application with the Tax Appeals Tribunal, seeking determination as to whether premium and rent paid in respect of its lease is a deductible expense.

Appellant's Arguments

- The Appellant conceded to premium being a capital expense but maintained that rent was a revenue expense for which it could claim a deduction.
- Rent is not a capital expenditure and should not have been included in the cost base of the leases and is therefore a deductible expense.

Issue for determination

The issue for court's consideration was whether the payment incurred in respect of rent is a capital or revenue expenditure.

The High Court's Ruling

The High Court held that:

- Rent is revenue expenditure and as such the Appellant was entitled to a deduction.
- The definition of rent in the ITA limits its meaning to consideration for occupancy and usage of rented property, and is therefore incurred to produce income included in gross income, thus making it revenue in nature. This is because it is a recurrent expenditure that is periodically paid to maintain occupancy of the leased property and by extension to maintain the revenue generating capacity derived from possession of the lease.
- There is no statutory definition of the capital or revenue expenditure categorization. The ITA does not define a revenue or capital expenditure and yet there is a thin line between the two.
- Regard must be had to case law to determine their meaning and character. The Court referred to the case of Atherton V British Insulated and Helsby Cables Ltd (1925) 107.c 115 where it was held that capital expenditure is a thing that is going to be spent once and for all and income expenditure is a thing that is to recur every year.
- A distinction was made between rent and premium by finding that rent as expenditure is a recurrent expenditure that is periodically paid to maintain occupancy of the leased facilities or premises. It is paid to maintain the revenue-generating capacity derived from the possession of the lease. In a lease, the appellants acquire an income-earning asset and in paying rent, they sustain the process of earning the income. It is unlike a premium which is incurred to acquire the lease and is therefore not a part of the cost base of the lease stipulated under Section 52(2) ITA. Consequently, it is not a capital expenditure.
- The lump-sum advance payment does not qualify rent into a capital expenditure.
- The Court reached the conclusion that although the Appellant had paid rent in a lump-sum and in some cases done so together with the premium, the premium and the rent had to be segregated.
- Whereas the premium is a once for all capital expenditure, rent is a recurrent revenue expenditure and as a result, the Appellant was allowed to deduct that expense from its chargeable income.
- The Court held that the Tribunal erred in law when it held that rent paid in respect of the Appellant's leases is not a deductible expense. The Appeal partially succeeded.

Mukwano Enterprises v URA: TAT Application No. 06 of 2018

Background

Mukwano Enterprises Ltd (Applicant) is a company incorporated in Uganda carrying on the business of property development and real estate. The URA (Respondent) carried out an audit on the Applicant and disallowed expenses claimed by the Applicant for the amortization of lease premiums. The URA issued an assessment of Ugx. 3,250,011,968 to which the Applicant objected. The URA maintained the assessment and the Applicant filed an application for review at the Tax Appeals Tribunal.

Applicant's Arguments

Applicant submitted that:

- The expenses are deductible as revenue expenditure since it is in the business of property development and real estate by buying, selling, leasing and letting out property.
- The leases it obtains are operating and not finance ones and it sought to rely on the International Financial Reporting Standards (IFRS) as of January 2019 for the amortization of operating leases.

Respondent's Arguments

In reply, the Respondent argued that;

- Payment of premium and rent for the acquisition of leases is a capital expense and forms the cost base of the Applicant's assets hence it is non-deductible.

The Tax Appeal's Tribunal's Ruling

The Tribunal held that the Applicant was entitled to have the rent and premium paid by it deducted as allowable expenses. However, the Applicant was not entitled to have the said expenses amortized based on the following:

a. The Applicant is a dealer in land as it is in the business of real estate and property development. Land transactions are its modus operandi. The land or leases it obtains are its stock in trade or circulating capital. Any expenses it incurs in acquiring the said leases, that is the rent and premium paid, should be considered as revenue expenditure and are therefore allowable deductions.

b. On application of accounting standards with regard to amortization of premium and rent of operating leases, the Tribunal reasoned that where the Income Tax Act does not provide for financial and operating leases, one cannot read them into the Act by applying accounting standards which have not been passed by the legislature.

The Tribunal in reaching its decision relied on the precedent set in *Vivo Energy v URA* to the effect that expenses on leases are of a capital nature and any deduction on them should be disallowed save for persons dealing in land as their business.

The Tribunal went ahead to hold that as long as the accounting principles applied by the tax payers are in conformity with the Income Tax Act, they shall be inadvertently applied.

NOTE; that the High Court later on ruled that lease rental expenses (unlike premium) are of a revenue nature and hence deductible as per the Vivo Energy case above.

Deduction of Interest on Contribution Funds; Relationship Between NSSF and its Members; Waiver of Penal Interest.

National Social Security Fund v Uganda Revenue Authority TAT Application No. 3 of 2019

On 27th March, 2020 the Tax Appeals Tribunal delivered a ruling in respect of an application challenging an income tax assessment in respect of interest paid to members' accounts by the National Social Security Fund (NSSF) Act.

Background

The Applicant is a statutory body established under the NSSF Act to receive contributions from its members and pay out benefits as required by the Act. In 2013, an audit by the Respondent revealed that the Applicant claimed as an allowable deduction, interest paid to members. The Respondent disallowed the said deduction and issued an assessment of UGX. 30,521,703,065 as principal tax, and penal interest of UGX. 12,196,875,941 to the Applicant. The Applicant objected to the said assessment on the ground that it was entitled to deduct such interest under the Income Tax Act. The Respondent made an objection decision maintaining its position that the Applicant was not entitled to make the said deduction.

Applicant's Arguments

The Applicant submitted that:

- The interest it pays to its members is an allowable deduction. This is because the Applicant incurs interest as a result of a debt obligation which is incurred in the production of income included in the gross income as required by S.25 of the Income Tax Act.
- The decision to deduct interest expense was based on the advice in the Respondent's letter which stated that interest to member's accounts was an allowable deduction. That the letter created a legitimate expectation in its mind that interest expense was an allowable deduction.
- The Applicant argued that it was not liable to pay penal interest since the interest paid to its members is a deductible expense and had relied on the Respondent's advice.

Respondent's Arguments

- The Respondent maintained that the interest paid to members by the Applicant is not an allowable deduction since it is not a debt obligation incurred by a person in the production of income.
- The Respondent contended that there is no debtor-creditor relationship but rather a trust and fiduciary relationship between NSSF and its members.
- The Respondent further contended that it was not bound by its earlier letter allow-

ing thededuction since it followed it by another letter disallowing the deduction. The Respondent submitted that the law does not permit it to waive penal interest.

The Tax Appeals Tribunal's Ruling

- The Tribunal held that the interest payable to the NSSF members is not a deductible allowance under the Income Tax Act. The Tribunal reasoned that;
- The relationship between NSSF and its members is that of trustee-members or beneficiaries. The relationship is not one of debtor/creditor relatiofnship for a debt obligation to arise.
- The contribution by the NSSF members does not constitute a debt obligation within the meaning of S. 25 of the Income Tax Act
- The amount referred to as interest in the NSSF Act does not qualify as interest for purposes of the Income Tax Act.
- The interest paid by the Applicant is a return on investment which is not incurred in the production of income included in the gross income.
- The doctrine of legitimate expectation does not apply where there is a statutory obligation.
- The Tribunal further held that the Applicant was liable to pay penal interest which is a sanction imposed by law, and noted that it is the Minister and not the Respondent who could waive payment of penal interest.
- The Tribunal upheld the assessment and dismissed the Application with costs to the Respondent.

This decision was appealed to the High Court in; ***Civil Appeal No. 29 of 2018 National Social Security Fund v Uganda Revenue Authority TAT Application No. 3 of 2019***

On 2nd November, 2020, the Commercial Court put this debate to rest in its judgment on an appeal in which the NSSF challenged the decision of the Tax Appeals Tribunal. The Commercial court overturned the ruling and found in substance that the Interest paid by the NSSF to members is a deductible expense for income tax purposes and the Appellant is not liable to the Principal Tax and penalty.

Below are the findings of the Commercial Court on the various grounds raised.

Ground 1: That the learned members of the Tribunal erred in law when they found that the contributions made by the Applicant's members do not create a debt obligation within the meaning of Sections 25(1) and 2(s) of the Income Tax Act and therefore found that interest was not a deductible expense.

On this ground, the Court held as follows:

- It is clear that the phrase "an obligation to make a repayment of money to another person" constitute the general words in that phrase. The phrase "including accounts payable and the obligations arising under promissory notes, bills of exchange and bonds" are specific words and indeed examples of what is included in the general words. Such a provision does not call in the application of the ejusdem generis rule. The rule was therefore wrongly applied by the Tribunal which may have led the members to arrive at a wrong conclusion as to the meaning of debt obligation.
- Looking at the provision in Section 2(s) of the ITA, the words are clear and unambiguous. Use of the literal rule coupled with a purposive approach is capable of delivering appropriate meaning of the term debt obligation.
- From the very definitions from the Black's law dictionary and the Collins concise dictionary cited by the Respondents counsel, it is clear that "payment" may include a "repayment". When a person performs an obligation by delivery of money (which is a payment), the person may be doing so in repayment of money they received from the other and are refunding it. In that way, the payment is in fact a repayment or refund.
- From the operations of the Appellant as provided for under the NSSF Act, it is clear to me that the employers and employees make payments to the Fund and at the appropriate time, the fund repays

those contributions plus interest to the members. I do not see how such a transaction does not amount to a repayment.

- Although the employers make contributions to the Fund, it is clear to all the relevant stakeholders in that regard that the money remitted to the Fund by the employer belongs to the employee…the obligation to repay this money with interest is therefore toward the employee who is the beneficiary; and not the employer even when the latter is the one who actually remitted the contributions.

- It was shown that the "balance standing" as used under Section 34 of the Act refers to money on the employee's account and not on NSSF account. As such, when the Appellant uses the said monies to invest, it is equivalent to borrowing the employees money upon which the Appellant has to pay interest at the end of the year. I agree with this representation of the nature of the business of the Appellant. Contrary to the argument of the Respondent, the arrangement does not have to include an express loan agreement so as to amount to a debt obligation. A debt obligation may a rose by operation of the law or by business operations. That is the case with the Appellant.

- The NSSF Act is clear as to the operations of the fund. What is paid is interest and the way it is arrived at is clearly set out under the Act. It was uncalled for in my view for the Tribunal to import into the Act the aspects of profit or dividend where the express provisions of the law say otherwise.

- There is also nothing in the Act that defines or represents the Appellant as a Trust. The decision in NSSF v Makerere University Guest House (supra) was cited by the Respondent out of context.

- The words "interest" as used both in the ITA and the NSSF Act on the one part, and the term "debt obligation" as used in the ITA are clear and unambiguous. The intention of the legislature is also clear to me that the law intended to create a debt obligation as between the Fund and its members.

- It was therefore an error on the part of the Tribunal in interpreting Section 2(s) and Section 25 of the ITA to conclude that the term "debt obligation" only applies to debts payable by a company within a short period or namely, to the company's current liabilities. That way, the Tribunal wrongly concluded on that basis, the contributions by the Appellant's members do not constitute a debt obligation within the meaning of the said provisions of the ITA and were therefore not a deductible expense.

Ground 2: That the learned members of the Tribunal erred in law when they held that the said interest is not a payment of an expense of income of capital nature but a return of investment.

On this ground, the Court held as follows:

- Having found that a debt obligation exists between the Appellant and its members, I find the wording of section 2 (kk) is plain and unambiguous. Interest is any payment made under a debt obligation which is not a return of capital; or any other payment that is functionally equivalent to interest; or any commitment paid in respect of a debt obligation.

- I am in agreement with the Appellant that the claim by the Respondent that what is paid by the Appellant to the members is a profit or dividend is not borne out of the provisions of either the ITA or the NSSF Act.

- The members are not shareholders in the Appellant, whose 100% shareholding belongs to Government.

- The Appellants members cannot therefore be entitled to dividends, profit or return on investment or of capital over a business that does not belong to them. What is paid to the members clearly is interest for use of the member's money by the Appellant to make earnings.

- I find that the payment made by the Appellant is capable of being described as "any payment made under a debt obligation which is not a return of capital"; "any other payment that is functionally equivalent to interest"; or "any commitment paid in respect of a debt obligation."

- Therefore the payment made by the Ap-

pellant to its members is a payment of an expense of income, thus interest, in respect of a debt obligation not being a return of capital or a return of investment.

Ground 3: That the learned members of the Tribunal erred in law when they held that the annual interest paid by the Appellant to its members was not incurred in the production of income included in the gross income.

On this ground, the Court found that follows:

- As shown by the Appellant, the interest is an expense which, if not made the Appellant would be acting in contravention with the provisions of the NSSF Act. I agree that savings are made in the fund for social security and the only way the members savings keep meaningful and growing is through the payment of interest. It is therefore true that payment of interest is part and parcel of the Appellant's business and would, on that ground, qualify to be an expense made in the production of income.
- It is clear from a reading of Section 35 of the NSSF Act that although the interest is declared at the end of the year, the obligation to pay interest on the part of the Appellant accrues at the beginning of the year. Similarly, to the members, the right to interest accrues at the beginning of the year.
- As submitted by the Appellant, the fact that the payment of interest is effected the following year is merely an accounting issue and not a legal issue. I agree that it changes neither the obligation to pay interest nor the accrual of interest for the benefit of the Appellant's members.
- I am therefore satisfied upon the law and facts before me that the interest paid to the Appellant's members is incurred during the year of income. Clearing incurring and effecting payment are different aspects under the law.
- As a consequence of the use of the contributions to make the earnings, the Appellant incurs the obligation to pay interest to the owners of the money (the members). It is therefore clear that the interest deducted by the Appellant is part of the production process of the income that ultimately becomes the chargeable income of the Appellant. I do not find it disputable that the earnings made by the Appellant from using the said contributions for investment form part of the gross income of the Appellant. As such, the interest payable to the members is incurred in the production of income included in the gross income.

Ground 4: That the learned members of the Tribunal erred in law when they found that the Respondent's letter dated 23rd August, 2001 did not create a legitimate expectation for the Applicant.

Court held that:

- As seen from the facts before the Court and legal authorities, there is no dispute that the letter of 23rd August, 2001 from the Respondent to the Appellant created an expectation on the part of the Appellant. The only dispute is whether the expectation was lawful and within the confines of the Respondent's statutory authority to make.
- The authority holds the function of administering and giving effect to the relevant laws and to assess, collect and account for all revenues to which the said laws apply.
- That, in the course of execution of the said mandate and specific function, the authority has the power and mandate to interpret the relevant laws. A particular interpretation assigned by the Authority to a particular provision of the law is a lawful construction of such a provision unless and until otherwise changed by them or by a higher authority. The Authority has the power and mandate to enforce and mandate to enforce and adhere to such an interpretation of the law in a bid to give effect to a relevant provision of the law. It may be a wrong construction of the law but as long as it is made through the right channels and in a proper exercise of jurisdiction, it is lawful and binding upon not only the people who receive and rely on it but also on the authority itself.
- It is therefore not a correct position of the law if the Authority later on discovers that it was wrong in a previous interpretation of the law, and as a result chang-

es its position, that the earlier position is deemed illegal and unreliable.

- The authority has the right and power to change its position on a particular interpretation, but when it does so, their new position takes effect from the time it is made and does not render the earlier position illegal or unreliable.
- The Respondent has power to administer and enforce tax laws and in doing so, to interpret specific provisions of the laws. The positions reached by the Respondent in 2001 and 2013 respectively was not a function of imposing a tax or taxes, it was a function of interpreting the ITA in order to give effect to its provisions; which is within the Respondent's power and mandate.
- As such, from the year 2001 to 2013, tax on interest could not be assessed in any other way other than in compliance with position of the Authority. It is therefore my conclusion that a legitimate expectation was created in favor of the Appellant upon which the Appellant was entitled to rely during the period of the assessment herein in issue.
- Even if I had not reached the conclusion that the interest in issue was an allowable deduction, I would have come to the conclusion that the interest would not have been subject to tax for the period 2005 to 2013 when the position changed. The appellant would have had no liability to pay the tax on the basis of the doctrine of legitimate expectation.
- Ground 5: That the learned members of the Tribunal erred in law in finding that the Appellant was liable for Penal tax.

On this ground the court held as follows:

- I agree with the position of the law cited by the Appellant that in order for a person to be subjected to a payment of penal tax, the tax must be due and payable and the person fails to pay the same in time or at all.
- For the person to be found to have failed to pay the tax in issue it has to be shown that the person was aware or ought to have been aware of the tax obligation and they either wilfully or negligently failed to make the payment. Where the tax is not due or there is no evidence that the tax payer knew or ought to have known that such tax obligation exists; or actually knew or believed that no such tax obligation exists, such a person cannot be subjected to penal tax if it is later found or decided that they ate after all liable to pay a particular tax.
- Penal tax is to penalize default and default is expected to be wilful or negligent conduct.
- In my view, the use of the word "fail" in section 136 of the ITA connotes conduct on the part of the tax payer. It does not envisage penalty where either the tax was due or the tax payer was not aware of the existence of the tax obligation or where they reasonably believed no such tax obligation actually existed.
- In the present case the, the Appellant showed that they reasonably believed no such tax obligation existed. They based their belief on a position communicated to them by a letter dated 23rd August, 2001. It cannot be said they failed to pay tax. They reasonably believed not tax existed. Further as found above, no tax was actually due and payable against the Appellant.
- ***Ground 5: That the learned members of the Tribunal erred in law in finding that the Appellant was liable for Penal tax.***

The High Court found as follows on this ground that:

- A question as to "whether the Tribunal failed to properly evaluate evidence on record" is a question of fact.
- As found above, an appeal such as this one must be based on questions of law only. This ground of appeal is rejected and struck out.
- The High Court therefore allowed the appeal and found that the interest expense paid to the members was deductible and set aside the assessments and interest thereon.

NOTE; At the time of reporting, URA is seeking leave to appeal the above decision to the Court of Appeal.

Charging of interest on outstanding tax payments.

Medical Equipment Consultants Limited v Uganda Revenue Authority: TAT Application No.17 of 2015

On the 15th March 2019, the Tax Appeals Tribunal delivered a ruling relating to the late payment of Pay as You Earn Tax (PAYE) and the obligations on the taxpayer.

Background

The Applicant was informed in February 2015 that it owed UGX. 62,731,416 as PAYE arrears for the period up to 31st December 2014. The Applicant made a payment of UGX. 55,000,000. Around 28th September 2015, the Respondent issued a third party agency notice on the Applicant's banker for UGX.91,140,613 being PAYE arrears but no recovery was made.

Dispute

The dispute revolved around the time of filing returns and late payment of PAYE which resulted into penalties and interest. The Applicant usually paid the principle amount without paying the penalties and interest which attracted more interest and penalties. The dispute was what the exact tax payable was.

The Tax Appeals Tribunal's Ruling

- The Tribunal held that interest will always accrue on every amount which remains outstanding. The failure of the Applicant to pay the taxes and penalties in time attracted interest which compounded the amount payable.
- The Tribunal noted that the burden was on the Applicant to show that it is not liable to pay PAYE. This would require the Applicant to adduce evidence of payments of PAYE, which in this case the Applicant failed to do.
- The Application was accordingly dismissed with costs to the Respondent.

Withholding Tax

Withholding Tax on Interest; Time When Tax Should be Withheld.

The Cooper Motor Corporation (U) Ltd v Uganda Revenue Authority: TAT Application No. 67 of 2018.

On 17th March 2020, the Tax Appeals Tribunal delivered a ruling in respect of an application challenging the Respondent's computation of withholding tax in respect of interest on related party loans.

Background

The Applicant, a local company supplies motor vehicles, spare parts and provides motor vehicle after sale services to its customers.

The Applicant was wholly owned by CMC Holdings Limited which gave it a loan. It was agreed that the Applicant pay interest on the said loan. On 31st March, 2014, CMC Holdings Limited was acquired by AI-Futtaim in a 100% Acquisition.

Following the said acquisition, the shareholders of AI-Futtaim Group purportedly agreed to take over the debt purportedly under an arrangement of recapitalization. As a result the debt was purportedly converted to equity in 2017. The Respondent audited the Applicant for the period January 2013 to December 2016, and raised income tax, value added tax and withholding tax (WHT) assessments of UGX. 3,018,722,532

The Applicant had in the financial statements expensed interest payable qualifying them as a paid amount. The Respondent contended that the Applicant ought to have withheld taxes on the dates the interest accrued and not the date of payment that is the time of conversion of the loan into equity.

The Applicant paid WHT taking into consideration the time of payment but objected to the penalties that the Respondent contended arose from the late payment.

On 7th August 2018, the Applicant objected to the said assessments and an objection decision revising the tax liability to UGX. 2,935,562,315 was issued by the Respondent on 1st November 2018. The Applicant paid UGX. 2,404,641,572 leaving a balance of UGX. 503,230,799 unpaid.

The said amount was due to penal tax and the Respondent contended that the Applicant ought to pay late payment of withholding tax on interest.

The issue for determination was whether the period considered by the Respondent when computing withholding tax arising from the interest on related party loans was lawful?

Applicant's Arguments

The Applicant's arguments were that:

- The loans and interests on related party loans were deemed paid on the re-capitalisation of the Applicant in December 2017 which was the month WHT on the interest due arose.
- The penal interest ought to have been computed starting from the period that interest was actually paid up to the date when the administrative assessment was issued namely from December 2017 to June 2018.

Respondent's Arguments

- The Respondent argued that the Applicant failed to withhold amounts due on loan obligations while it was treating the interest as a deductible expense.
- The Respondent submitted that under the acrrual basis of accounting, interest is taken into account as it accrues or becomes due and not when actual payment has been made.
- Therefore the Applicant ought to have paid WHT on the interest as soon as it accrued and not when actual payment was made through the conversion of the Applicant's debt into equity.
- That what amounts to payment can only be determined from the books of accounts.
- The Applicant expensed interest in its financial statements and annual tax returns as they accrued and thereby took benefit by the reduction of its taxable liability and were estopped from claiming that no payment had been made.

The Tax Appeals Tribunal's Ruling

- The Tribunal held that when interest accrues WHT becomes payable. However, the context of S. 47(2) requires that WHT on interest be withheld when it is paid.
- Having stated that WHT is due when interest is paid, the Tribunal had to answer the question as to when the Applicant paid interest in this matter.
- The Tribunal found that the Applicant's

financial statements showed that the Applicant had expensed interest as a deduction which implies that the taxes payable by the Applicant reduced in the said years.

- The Tribunal noted that when an Applicant expenses the said interest, it is only logical that it should withhold tax on the interest income.
- The Tribunal found that the attempt by the Applicant to declare the interest it expenses in its financial statements as a debt that was converted into equity was a tax avoidance scheme which the Commissioner re-characterized in her discretion for which she couldn't be faulted.
- The Tribunal concluded that the Respondent could not be faulted to rely on the financial statements to indicate the time when the interest was paid.
- The Application was dismissed with costs to the Respondent.

What Amounts to Interest Accrued or Paid to a Non-Resident Company?

Afgri Uganda Limited V Uganda Revenue Authority: TAT Application No.18 Of 2019

On the 27th day of May, 2020 the Tribunal delivered a ruling in respect of an application challenging a withholding tax assessment of UGX. 912,934,373.58 by the Respondent on the Applicant involving interpretation of what amounts to interest accrued or paid to a non-resident company.

Background

The Applicant is a company incorporated under the laws of Uganda; AfrgriAgri Services Mauritius is a major shareholder of the Applicant. The Applicant is involved in managing and financing other subsidiary companies which buy and sell agricultural stock. The funds for buying the agricultural stock are obtained by the Applicant who gets interest bearing loans from Afgri Mauritius. From 2014 to 2017, the holding company granted interest-bearing loans to the Applicant, which were disclosed by the Applicant in an associated Party Disclosure form to the Respondent. The Respondent issued a withholding tax assessment on the Applicant which was later revised to UGX. 912,934,373.58. The Applicant objected on the ground that the loans are exempt from withholding tax as the Applicant had not yet paid interest.

The dispute between the parties revolved around the imposition of withholding tax on interest paid on intergroup company loans by a non-resident parent company to a resident subsidiary company.

Applicant's Arguments

The Applicant submitted that:

- It was not liable to pay withholding tax as it was exempt and no interest was paid to the holding company for the period of 2014 to 2017.
- Under Section 47(2) of the Income Tax Act, withholding tax on deferred interest is only due when interest is paid and in this instance interest had not yet been paid.
- The determinant of whether withholding tax is due on interest is not whether interest expenses have been claimed as a deduction in the income tax returns but whether it has actually been paid as provided under **Section 47(2)** of the Income Tax Act.
- That it was not liable to pay withholding tax because it is exempt under **Section 83(5)** of the Income Tax Act which exempts withholding tax on interest paid on debentures issued outside Uganda.
- That the debentures used to finance the Applicant's business include many different people and are therefore widely issued.

Respondent's Arguments

The Respondent submitted as follows;

- The Respondent examined the transfer pricing records of the Applicant and Afgri Mauritius Investment Limited which established that the former had been paying interest to the latter. The Applicant did not declare any withholding tax on interest.
- The Applicant's tax returns and financial statements when examined revealed that interest had been expensed.
- The interest paid to Afgri Mauritius was sourced from Uganda in accordance with **Section 79** of the Income Tax Act and the interest income derived by the Applicant was chargeable under **Section 83** of the Income Tax Act.
- That the interest income obtained by Afgri Mauritius was liable to withholding tax at a rate of 10% in light of the Mauritius- Uganda treaty.
- The Applicant's loans were not widely issued as envisaged under the law and did not meet the public offer test as articulated in the Practice Note of 24th of July 2018.
- The payment included any amount payable and therefore the debt became due and payable once it featured in the books of account. Therefore interest paid and payable is one and the same thing. The Applicant's interest once charged, though not paid, remained a debt which was recognized in the Applicant's book of accounts.

The Tax Appeals Tribunal's Ruling

The Tribunal made the following observations and held that;

- The Income Tax Act imposes tax on activities of non-resident persons involving international payments as per Section 83(1) of the ITA which is to the effect a tax is imposed on every non-resident person

who derives any dividend, interest, royalty, natural resource payment, or management charge from sources in Uganda.

- According to Section 79(k) of the ITA, income is derived from sources in Uganda where the debt obligation giving rise to the interest is secured by immovable property located or movable property used in Uganda or where the tax payer is a resident person and finally where the borrowing relates to business carried on in Uganda.
- It was not in dispute that the Applicant is a resident person. The loans were to provide working capital for the Applicant which carried on business in Uganda. Therefore any interest payable or paid would be or is sourced from Uganda.
- The ITA considers a loan as a debenture and therefore the Tribunal considered the loans between the Applicant and Afgri Mauritius as debentures.
- The portion of Section 83(5) (b) that requires a debenture to be issued widely, meant that it has to be issued to different individuals that is the public as opposed to a loan that is between two parties and that is why it is concerned with debentures and not loans.
- The debenture between the Applicant and Afgri Mauritius could not be considered as one that was widely issued as it was between only two parties actually one debenture holder, Afgri Mauritius and therefore the loans between these parties failed to meet the conditions in Section 83(5)(b) of the ITA.
- The provisions of the Practice Note of 24th of July 2018 are not included in the ITA and therefore they do not bind tax payers as the Commissioner does not have powers to legislate.
- Where interest is not subject to withholding tax it is taken into account as it accrues, however withholding tax is payable on international payments when the interest is paid.
- Withholding tax is charged on interest when it is paid and not when it accrues and the specific provision in Section 47(2) overrides the general provision in Section 2 of the ITA.
- The financial statements that were signed by the directors reflected the true position of a company's financial affairs. The statements indicated that the Applicant was expensing interest as financial costs.
- Where a tax payer makes a representation which another party acts on, as in this case the revenue collecting body resulting in the Applicant paying less taxes, the taxpayer cannot turn around and deny the representations as the doctrine of estoppel would come into play.
- The Tribunal found that the Applicant was liable to pay withholding tax and dismissed the application with costs to the Respondent.

ATC (U) Ltd v URA TAT Application No. 17 of 2019

The Tax Appeals Tribunal delivered a ruling in the case of *ATC (U) Ltd v URA* in which it clarified the point at which withholding tax on deferred interest becomes due.

Background

The Applicant, ATC (U) Ltd entered into a shareholder loan agreement with its parent company, UTI incorporated in Netherlands. According to the agreement, unpaid interest on the loan would accrue on the outstanding principal and such accrued interest would be added to the principal loan and be paid to UTI at a future date together with the Principal.

ATC did not pay interest to UTI for about 54 months and the accrued interest was added to the principal loan. The URA issued an assessment for WHT on the accrued interest which was added to the principal loan for the period 2012-2017 to which the Applicant objected.

Applicant's Arguments

The Applicant argued that it never paid any interest to UTI. That under the Section 47(2) of the Income Tax Act, it was obligated to withhold tax at the time when the deferred interest is paid not when it accrued.

Respondent's Arguments

- The Respondent argued that: the Applicant had paid interest to UTI when the interest was added to the Principal.
- An audit revealed that UTI had acknowledged income from Uganda by including it in its audited statement and also paid tax on the income in the Netherlands.
- Withholding tax is due as soon as interest accrues or becomes payable to a non-resident company.

The Tax Appeals Tribunal's Ruling

The Tribunal had to determine at what point in time the obligation to pay withholding tax in respect of deferred interest arises; at the point of accrual or at the point of actual payment of the interest?

The Tribunal found that:

Where interest is subject to withholding tax, the obligation to pay the tax arises at the time when the interest is paid. The Tribunal thus held that for purposes of Section 47(2) withholding tax is due when interest is paid and not when it accrues.

Having held as such, the Tribunal found that:

- By converting the interest and adding it to the principal loan, the Applicant fully discharged its obligation to the lender as far as interest payments were concerned.
- In effect, the Applicant was paying the interest. The interest was paid at the end of each interest period when it was converted into the loan. That's why the parent company considered the conversion of interest into the loan as payment of income for which it paid tax on the income received.
- The Tribunal found that the Applicant was liable to pay the assessed withholding tax including the penalty. The Application was dismissed with costs to the Respondent.

Livingstone International University V Uganda Revenue Authority: Application No. 71 Of 2018

On the 13th of May, 2020 the Tribunal delivered a ruling in respect of an application challenging Pay As You Earn (PAYE) assessment on Expatriates.

Background

The Applicant is a non-profit University which has expatriates who provide services to it. A major portion of the costs of the Applicant are met by donations raised outside Uganda.

The expatriates are paid their emoluments outside Uganda.

The Respondent issued an assessment of UGX.666, 331, 727 being the principle tax and interest for the Applicant's failure to withhold PAYE from the purported income of the expatriates.

The dispute between the parties revolved around whether the expatriate staff were liable to pay PAYE and whether the Applicant was liable to withhold PAYE on the income received by the expatriates.

The Applicant's Arguments

The Applicant contended that:

- It used expatriate staffs who are volunteers at the Applicant. Donations were paid to the expatriates abroad for the services provided.
- The Applicant does not pay the volunteers and therefore it cannot withhold income on their payments.
- Their appointment letters confirmed that the expatriate workers do not receive monthly salaries, therefore despite the fact that the Applicant issued appointment letters there could not be an employment relationship.
- The donations that the expatriate staff received from churches did not amount to any form of remuneration within the meaning of Section 2(z) of the ITA as they did not arise form an employer. The expatriates also could not make a legal claim for any payment from the Applicant as unpaid remuneration or employment in-

come.

- The Respondent's private ruling was erroneous as the definition of an employee did not apply in its case.

The Respondent's Arguments

The Respondent submitted that:

- The Applicant requested for a private ruling regarding taxation of income earned by its expatriate staff whose payments are effected through their respective bank accounts in the United States of America.
- The Respondent issued a private ruling that the expatriate staff were employees within the meaning of the ITA.
- The expatriate staff of the Applicant held various positions at the University such as full-time lecturers, deputy Vice Chancellor, Professor and maintance Manager and all had appointment letters.
- The Respondent argued that it is evident that the expatriate staff were Employees of the Applicant, appointed to perform various roles subject to renewal basing on satisfactory performance and that it was not in contention that the expatriates derived or earned income arising out of the employment at Livingstone University.
- Any payment which accrued to them by virtue of holding office at the University is employment income except for those that are exempt.
- In respect of withholding tax, the Respondent submitted that according to Section 116(1) of the ITA every employer shall withhold tax from a payment of employment income, which the Applicant did not do hence failing its statutory obligations.

The Tax Appeals Tribunal's Ruling

The Tribunal found that:

- The ITA imposes taxes on every person including employees as per Section 19 and salary is one of the items considered to be employment income.
- The definition of employment under the ITA is wider than that of the employment act. In the ITA a director and person who receive fixed or ascertainable remuneration are considered an employee.
- For income to be termed as employment income, it has to originate from an employer to the employee, therefore as long as an income is paid from the employment the relationship between an employer and an employee may arise.
- In respect of whether the expatriates are volunteers, the Tribunal held that a volunteer is a person who provides his or her services gratuitously and freely. A person who receives a salary even when it is from a third party cannot be said to be a volunteer because the said person does not offer his services for free or gratuitously.
- The Tribunal found that the Applicant presented evidence that indicated that it made payments to the expatriates of UGX. 1,809,970,622 and sought for taxes to be waived in respect of the same.
- The Applicant had failed to explain the variances in the salaries declared in the audited books of account. The Tribunal therefore found, that if taxes were owed to the government, the Applicant ought to have withheld PAYE from the payments it made.
- The Tribunal noted that the Applicant did not discharge the burden of proof placed on it. Accordingly the Application was dismissed for lack of merit, with costs.

Tax Procedure

Time Limitation on an Action Based on Seiure of Imported Goods

Eddie Kazzi v Uganda Revenue Authority: TAT Application No. 03 of 2017

On 13th February, 2019, the Tax Appeals Tribunal delivered a ruling on a preliminary objection in respect of an application contesting the seizure of 450 bags of rice by the Respondent.

Background

On 22nd August, 2015, the Respondent's officers seized 300 bags of rice belonging to a one Haji Kabali on the ground that it was being smuggled. On payment of the relevant taxes, the rice was released and he sold some of it to the Applicant. On 16th September, 2015, the Respondent's officers seized 450 bags of rice packaged in 25kgs bags found in the Applicant's shop and a Seizure Notice was issued.

The Applicant claimed that he had bought the said rice from Haji Kabali and that it was Pakistani rice re-packaged in Thailand bags and that the taxes thereon had already been paid. However, the Respondent maintained that the 450 bags of Thailand rice were different from the 300 bags of Pakistani rice which had been impounded and released. On 6th October, 2015, the Applicant lodged a Notice of Claim but got no response from the Respondent. On 20th January, 2017, the Applicant filed this Application against continued seizure and detention of the Applicant's rice.

Preliminary Objection

The Respondent raised a preliminary objection that the Applicant had no cause of action and that the action was time barred.

Respondent's Arguments

The Respondent argued that:

- The Applicant did not lodge a Notice of Claim for the 450 bags of Pakistani rice seized. If the notice was lodged, it was on behalf of Haji Kabali who was not a party to the suit.
- The Applicant filed the application out of time and had no locus to appear before the Tribunal.
- The Application was filed thirteen months after the Applicant had lodged a Notice of Claim but did not apply for leave to file out of time.

Applicant's Arguments

- The Applicant responded by stating that:
- The Application was not based on the East African Common Customs Manage-

ment Act (EACCMA) but on the Tax Appeals Tribunal Act and therefore the issue of time limitation could not arise.

- The action fell under the Limitation Act and that since the Respondent failed to act on the Notice of Claim within two months as required, the Application was accordingly still within the 6 years' time limit provided for under the Limitation Act.

The Tax Appeals Tribunal's Ruling.

- The Tribunal explained the principles under S. 229 and 230 of the EACCMA which requires any person dissatisfied with the decision or omission of the Commissioner on matters relating to customs to lodge an application for review of the decision or omission within 30 days from the date of the decision or omission or apply to Court within 45 days after being served with a decision.
- The Tribunal noted that failure of the Commissioner to act within 2 months of receipt of Notice of the Claim amounted to an omission which required the Applicant to apply for review within 30 days of the omission. The 30 days begin to run from the day of the omission.
- The Tribunal held that since the Application was filed 13 months after the Commissioner's omission, it was time barred.
- The Tribunal noted that since the Applicant was contesting the Respondent's decision to seize its rice on ground of it being uncustomed, the applicable law for time limitation purposes was the EACCMA which deals with customs matters and not the Limitation Act which only deals with the tort of wrongful detention of a chattel. The Applicant therefore could only seek redress following the procedures set out in the EACCMA.
- The Tribunal also found that it was difficult to ascertain whether the rice was owned by the Applicant or Haji Kabali and that the repackaging of Pakistani rice as Thailand rice amounted to hoodwinking the public that the Applicant was selling rice of a better quality. On that ground, the Tribunal held that the Applicant and Haji Kabali came before it with unclean hands.
- The Application was accordingly dismissed with costs.**Payment of 30% upon applying for review of objection decisions.**

Constitutionality of Requirements to Pay 30% Before Hearing; Fundamental Right to a Fair Hearing

Fuelex (U) Limited v Uganda Revenue Authority Constitutional Petition No 3 of 2019

On the 24th July, 2020, the Constitutional Court of Uganda delivered a ruling in respect of the constitutionality of the mandatory payment of 30% of the tax assessed by an aggrieved tax payer.

Background

The Applicant lodged an objection with the Tax Appeals Tribunal against a levy by the Respondent of the sum of UGX. 160,525,530 as tax payable from its fuel business covering the period running from June 2005 to September 2006. The constitutionality of the mandatory payment of 30% of the tax in dispute became an issue before the Tribunal which formed an opinion that a substantial question of law as to the interpretation of the Constitution had arisen.

The question framed by was; *whether S. 15 of Tax Appeals Tribunal Act contravenes Articles 21 and 126(2)(a) of the Constitution in so far as it requires a tax payer who has lodged a notice of objection to an assessment to pending final resolution of the objection, pay 30% of the tax assessed or that part of the tax assessed not in dispute, whichever is greater.*

Applicant's Arguments

- The Applicant contended that the provision for the payment in the impugned section contravened the right to a fair hearing which is a component of the right to access to justice.
- The Applicant argued that there is no fair trial if a person is prevented from appearing before an adjudicating body in the first place.

Constitutional Court's Ruling

- The Constitutional Court found that the Act contravenes the following Articles of the Constitution which recognize and guarantee the non derogable right of equal access to justice as a fundamental right; Article 20(1) &(2) rights are inherent and not granted by the state, Article 26 on right to property, Article 28 on the right to a fair hearing, Article 44 right to a fair hearing is non-derogable, Article 50 on the enforcement of rights and freedoms by courts and Article 138 on access to justice of the Constitution.
- The Constitutional Court noted that the impugned provision of S. 15 of the TAT Act is a variant of infringement on the fundamental rights and freedoms enshrined in the Constitution because it had the grave effect of not merely restricting or fettering but altogether barring, or serving as an absolute impediment to access to courts of justice by an aggrieved person who desires to be accorded the protection of the law.
- The Constitutional Court found that the requirement of prior payment of 30% of the assessed tax levy to URA before a taxpayer can lodge an objection with the Tribunal is unjust, as it favors one of the disputants to the detriment of the other.
- This is exacerbated by the provision that the objector must make the impugned payment to the adversary in the dispute which clearly offends the rule of law of equal access to justice.
- The Court noted that the right to be heard includes a right to appeal. Under S. 15 a person who cannot raise the 30% of tax assessed is denied justice on account of inability to pay which may be equated to a boxing match at which one of the contestant's arms is tied behind his back.
- The Constitutional Court was aware of precedent by the Supreme Court in **Uganda projects Implementation and Management Centre v URA SCCA No. 02 of 2009** which held that the requirement for prior payment of 30% of VAT assessed to URA by an aggrieved party under S. 34C of VAT Act was constitutional and this extends to where a taxpayer conceded to liability to pay but contested only the quantum and also to a taxpayer who disputed his liability to pay.
- However, the Constitutional Court while recognizing the binding nature of this decision, found it to have been decided *per incuriam* to the extent that it applied in a matter in which the dispute is not about the amount of tax payable but rather whether the objector was liable to pay any taxes in Uganda.
- The Constitutional Court found that S. 15 of TAT Act is not unconstitutional in so far as it only applies to disputes over the tax amounts as assessed.
- The Constitutional Court found that the reference to an assessment in S.15 is in respect of a dispute as to an amount pay-

able by the tax payer as assessed by the tax authority where the tax authority is contending that it is due and payable on one hand and on the other the tax payer contending that a different and lower amount is payable or has been paid or is not due.

- The Constitutionality of S. 15 comes into question where its applicability is sought to extend to parties whose disputes are purely legal and or technical and where the issue for determination before the Tribunal does not relate only to the amount of tax payable.
- The Court thus held by a majority that S. 15 of TAT Act is inconsistent with Article 44 (c) of the Constitution in so far as it compels an objector to a tax assessment whose challenge is not with regard to the amount of tax payable, to pay to the tax authority 30% of the tax assessed, hence unconstitutional.

Payment of 30%; Seeking Leave of the Tax Appeals Tribunal to Raise Issues that were not raised in the objection decisions

Professor Emmanuel Mutebile& 8 Ors v Uganda Revenue Authority: TAT Misc. Application No. 32 of 2018

On 5th June 2019, the Tax Appeals Tribunal delivered a ruling concerning payment of 30%.

Background

On 14th April, 2016, Bank of Uganda wrote to the Commissioner General seeking a private ruling on the status of the Bank of Uganda Defined Benefits Scheme. On the 26th February, 2016, the Respondent delivered its private ruling stating that the scheme was taxable. The Respondent issued six administrative default assessments for the period 2010-2016 totaling to UGX. 106,162,667 which were objected to by the Applicant.

The Respondent issued an objection decision maintaining the assessment. It also issued additional assessments which increased the tax liability of the Applicant to UGX. 40,944,907,500 but this was not included in the objection decisions.

The Applicant applied for review of the objection decisions stating the amount in dispute to be UGX. 40,944,907,500.

The Respondent raised a preliminary objection that the Applicant had not paid the mandatory 30% of the UGX. 40,944,907,500.

Parties' Arguments

The Respondent submitted that:

- The Applicant was mandated to pay 30% of the tax assessed. The Respondent contended that the Applicant's application to the tribunal was for the assessments of UGX. 40,944,907,500 and not the earlier assessments of UGX.106,162,667.
- Since the Applicant had included UGX. 40,944,907,500 in the Application as the amount in dispute, it amounted to an admission and the Applicants were bound by their pleadings.
- The Applicants on the other hand did not dispute their obligations of paying 30% but contended that they had already paid UGX. 31,848,800 which is 30% of UGX. 106,162,667. The Applicants stated that the initial amount was increased to UGX. 40,944,907,500 which was not stated in the objection decisions.

The Tax Appeals Tribunal's Ruling

The Tribunal held that:

- A party should not raise an issue before the Tribunal which was not in the objection decision without leave of the Tribunal.
- The figures in the objection decisions totaled up to UGX. 106,162,667. Any ground relating to additional assessments cannot be raised without leave of the Tribunal.
- The Tribunal noted that the Applicant's application in putting the figure in dispute as UGX. 40,944,907,500 was illegal.
- The Tribunal thus found that indeed the Applicant had already paid 30% of the UGX.106,162,667 which was the correct figure of the dispute before it.
- The Respondent's preliminary objection was overruled.

Review of a Decision of the Commissioner General Rejecting the Payment of 30% of the Principle tax in Instalments

Century Bottling Company Limited V Uganda Revenue Authority: TAT Application No.33 Of 2020

On the 30th of June, 2020 the Tribunal delivered a ruling in respect of an application for review of a decision by the Commissioner General rejecting the payment of 30% of the principal tax in instalments and for a temporary injunction restraining the respondent from collecting the tax assessed pending the disposal of the main suit.

This application was brought under Rule 30 of the Tax Appeals Tribunal (Procedure) Rules 2012.

Background

A tax audit carried out on Century Bottling Company Limited (CBC), the Applicant by the Respondent in 2019, disclosed an assessed tax liability of UGX. 58, 141,883,182 comprising of Local Excise Duty, Value Added Tax and Corporate Income Tax.

The Applicant's Claim:

The Applicant's contentions were that:

- Section 15 of the Tax Appeals Tribunal Act requires a tax payer who has lodged an objection to pay 30% of the tax assessed or part of the tax not in dispute whichever is higher, pending final resolution of the objection.
- In seeking to comply with this provision the Applicant wrote to the Respondent requesting to pay 30% of the tax assessed in instalments.
- The Respondent rejected this request and instead sent a final demand letter.
- The Applicant objected to this assessment on 16th January 2020 and the objection was disallowed on 12th April 2020.

Applicant's Submissions

- In respect of the request to pay 30% of the principal tax in instalments the Applicant submitted that:
- It did not have the means to pay 30% of the principal tax in a lump sum.
- In accordance with Section 1(1) of the Tax Appeals Tribunal Act, the Tribunal has the powers to review any taxation decision by the Respondent, including a decision, rejecting a proposal to pay the 30% of the principal tax in instalments.
- Concerning the application for a temporary injunction, the Applicant argued that it had a good case with a high likelihood of success and that it would suffer irreparable damage if the injunction was not granted.

The Respondents Arguments

- The Respondent raised a preliminary objection on a point of law to the effect that the Tribunal does not have the jurisdiction to grant the Applicant an order permitting it to pay 30% of the principal tax in instalments. The Respondent contended that this lies with the Commissioner General and cited **Section 28(1) of the Tax Procedure Code Act**.
- The Respondent also submitted that the Commissioner General's decision rejecting the applicant's request did not amount to a tax decision and therefore the tribunal had no jurisdiction to hear the matter.
- Regarding the application for a grant of a temporary injunction the Respondent submitted that the Applicant having failed to pay 30% of the principal tax, had no locus to appear before the Tribunal, on any business let alone file an application for an injunction seeking to restrain lawful collection of tax.
- The Respondent submitted that the Applicant had not met the grounds of grant of a temporary injunction and that the application was premature.

The Tax Appeals Tribunal's Ruling

The Tribunal observed and held that:

- The gist of the preliminary objection is that the tribunal has no jurisdiction to determine an application to review a decision made by a Commissioner General rejecting a request to pay 30% of the tax assessed in instalments.
- A tax decision means either a tax assessment or a decision on any matter left to the discretion, judgement, opinion, approval, satisfaction or determination of the Commissioner, other than a decision made in relation to a tax assessment.
- Applying the literal rule of statutory interpretation to **Section** 1(k) and S.1 of the TAT Tribunal Act and the Tax Procedures Code Act respectively, the Tribunal noted that it is apparent that the decision by the Commissioner General, rejecting a request by a tax payer, to pay 30% of the tax assessed in instalments is a decision and therefore found that the Tribunal has the jurisdiction to review the Commissioner General's decision.
- As to whether the discretion was exercised judiciously, the Tribunal held that the decision of the Commissioner General rejecting the application to pay 30% of the tax assessed in instalments, was so outrageous in its defiance of logic, no sensible person who had applied his mind to the question to be decided could have arrived at it especially in light of the economic impact of Covid-19 on the economy and the Commissioner had allowed payments in instalments before, in less strenuous situations.
- In respect of the application for a temporary injunction, it was held that an objection decision is defined under Section 1(1) (g) means a taxation decision made in respect of a tax objection.
- The term objection as used in **Section 15** of the Tax Appeals Tribunal Act was not used in the technical sense but rather to mean objections against the Respondent's tax decisions, but in its ordinary sense to mean the action of challenging or disagreeing with something.
- The Respondent's argument, based on Section 24 of the Tax Procedure Code Act, is incorrect, for the reason that there was no justification for the Respondent, to look to the Tax Procedures Code Act for assistance, as no ambiguity, had been found, in the use of the said terms in the Tax Appeals Tribunal Act.
- The phrase "final resolution of the objection" refers to the proceedings before the Tribunal filed by an applicant in response to a taxation decision and not to the objection rendered by the Respondent in answer to an objection.
- Consequently, the Tribunal ordered that the Applicant be allowed to pay 30% of the tax assessed in four equal monthly instalments and the temporary injunction was granted as well.

Extension of time Within Which to File an Application for Review of URA's Objection Decision

Ecobank Uganda Limited V Uganda Revenue Authority: Miscellaneous Application No. 1 Of 2019

On the 16th of March, 2020 the Tribunal delivered a ruling in respect of an application to extend time within which to file an application to review the Respondent's objection decision.The Applicant brought this application under Section16 of the Tax Appeals Tribunal Act, Rules 10, 11, 30 and 31 of the Tax Appeals Tribunal Rules for leave to file an application challenging the taxation decision of the Commissioner General out of time.

Background

In October 2017, the Applicant was served an agency notice instructing it to collect and remit monies from the bank account of Isolux to the Respondent. On 31st October, 2017 the Applicant objected to the Respondent's agency notice and stated that the monies held on the said account were held by it in its own right as a guarantor of a bank guarantee issued in favour of Uganda Electricity Transmission Company Limited on behalf ofIsolux.

On 16th January, 2018, the Respondent wrote to the Applicant's counsel refusing to withdraw the agency notice. The Applicant was also involved in Civil Suit 468 of 2017 where Johnstone Group Limited had filed a suit against Isolux and obtained judgment. Johntstone Group Limited then attempted to attach monies on the said account.

On 27th November, the court ordered that the garnishee order attaching monies on the account be lifted. Johnstone Group appealed against the said order to the High Court which was dismissed on the 12th December 2018. The Applicant had applied that the Respondent be added as a party to the garnishee application.

That application was dismissed on 27th November 2018 with the court noting that applications to objection decisions of the Respondent can only be brought by way of review of a decision of the Tax Appeals Tribunal. Secondly a third party cannot be joined in an appeal against a garnishee decision.

The Applicant having reached a dead end in the high court opted to file an application on the 16th of January, 2019 before the Tax Appeals Tribunal seeking to extend time within which it could file the application.

At the trial the Respondent raised a preliminary objection that the application had been filed outside the prescribed period of six months within which it ought to have been filed.

The Applicant's Arguments

The Applicant submitted that:

- The Respondent's submission was premised on a misinterpretation of the law in particular **Section 16 (7)** of the Tax Appeal Tribunal Act.
- That **Section 16(7)** of the Act should be read together with Section 16(1) (c) of the TAT Act.
- A careful reading of taxation decision in **Section 1(k)** of the Act shows that it is different from an objection decision in **Section 1(g)** of the Act.
- The reference to six months in **Section 16(7)** of the Act cannot be applied to the filing for an extension of time.
- Therefore the lack of a provision to cater for extension of time for application under objection decision is cured by **Rule 11** of the Tax Appeals Tribunal Procedure Rules which generally provides for extension of time.
- In the alternative, but without prejudice, the Applicant contended that as long as it had filed an application in High Court it would not file a similar matter in the Tax Appeals Tribunal as this would create the risk of obtaining two conflicting decisions.(**See Section 6 of the Civil Procedure Act**)
- The High Court ruled that when the Registrar failed to join the Respondent as a party to the suit, it could not be done at the appeal stage. The court held that the matter ought to have been filed before the Tax Appeals Tribunal.
- Until the ruling of the court on 27th November, 2018, time could not be reckoned to have started to run. To the Applicant, it would be an injustice for the Tribunal not to reopen the matter for its review.

The Applicant prayed for the tribunal to dispense justice with undue regard to technicalities as provided for in **Article 126(2) of the Constitution**.

The Respondent's Arguments

The Respondent contended that:

- The Tribunal was a court of first instance and that the Respondent delivered and served its taxation decision on the 16th of July 2018, the Applicant was aware of the decision but decided to go to the High Court.
- According to **Uganda Communications Commission V URA** the Tribunal held that having further meetings and correspondences between the taxing authority and a tax payer should not prevent the latter from filling an application before in time.
- Since the Applicant had the option of filling a matter in the Tribunal, he opted to do so in the High Court and this was dilatory conduct on its part.
- Under **Section 16(7) of the TAT** Act, an application for review of a taxation decision shall be made within six months after the date of the taxation decision and that the six months started to run on 29th January 2018.

The Tax Appeals Tribunal's Ruling

- **Section 16(1) (c)** of the TAT Appeals Tribunal Act provides that an application to a tribunal for review of taxation decision shall be made within 30 days.
- **Section 16(2)** of the TAT Appeals Tribunal Act states that the tribunal may upon application in writing extend the time for making an application to the Tribunal, however an application for review of a taxation decision shall be made within six months after the date of the taxation decision.
- Furthermore, **Rule 11(1) of the Tax Appeals Tribunal Procedure Rules, 2012** provides that the tribunal may in its discretion and upon the application of the applicant, extend the time for making an application for review where it is not filed within 45 days from the date of service of the taxation decision.
- **Rule 11(6)** provides that the Tribunal may extend time if satisfied that the tax payer was unable to file the application

because of illness, absence from Uganda or any other reasonable cause.

- From the reading of the Act and relevant cases, an objection decision is a taxation decision though a taxation decision may not be an objection decision. The decision made by the Respondent to the Applicant dated 16th January, 2018 was a taxation decision and it was not an objection decision
- Therefore the Applicant was applying for a review of taxation and not an objection decision.
- Under Section (1)(c) the Applicant was required to file an application for review of the taxation decision within 30 days, which it did not, the Applicant proceeded to make an application for extension of time.
- The Applicant ought to have filed the application for extension of time within six months from 16th January, 2018 which is 16th July, 2018 yet they filed on 16th January 2019. The Tribunal found that the application was time barred.
- The Tribunal held that it does not have any discretion to exercise when an application for extension of time is time barred. An attempt to challenge a tax decision in a wrong court cannot be considered as an excuse in an application to extend time as ignorance of the law is no excuse.
- Finally, the Tribunal held that taxes due to government take precedence over other claims in insolvency.

Prompt Supply 2011 Limited v Uganda Revenue Authority: TAT Misc. Application No. 91 of 2019

On 18th May, 2020, the Tax Appeals Tribunal delivered a ruling in respect of an application to extend time within which to file an application for review of the Respondent's objection decision.

Background

Sometime in 2018, the Respondent carried out an audit on the Applicant and disallowed the Applicant's VAT input claim and subsequently made several assessments against the Applicant. In October, 2018 the Applicant made an objection against the assessment.

The Applicant contended that the Respondent never replied to the objection, but the Respondent contended that it made objection decisions on 27th and 28th September, 2018 and on 2nd October.

In September, 2019 the Applicant filed an application seeking leave for an extension of time within which to file an application for review of the objection decision. The Respondent opposed the application on the ground that it was time barred.

The issue for determination was whether the Tribunal could extend the time within which the Applicant could file an application for review of the objection decision.

Applicant's Arguments

- The reason for the delay was that it had objected to the assessment issued by the Respondent and received no reply from The Respondent.
- The Applicant's Tax Identification Number (TIN) was deactivated for 5 months.
- The Applicant further contended that all disputes should be investigated and decided on merit. The Applicant argued that it was entitled to a VAT refund and had filed its application without unreasonable delay and was entitled to an extension of time.
- The Tribunal had the power to enlarge the time within which it could file its application for review.

Respondent's Arguments

The Respondent contended that:

- There had been inordinate delay in filing the application and that there was no sufficient cause for extension of time. The Respondent prayed that the application is dismissed.

Tribunal's Ruling

The Tribunal ruled as follows:

- It reiterated the principle that timelines set by statutes are matters of substantive law and not mere technicalities and must be strictly complied with. The Tribunal noted that this is intended to urge taxpayers to pay taxes in time to enable the government deliver timely services.
- That therefore when a taxpayer fails to lodge its application in time, it becomes an issue of substantive law and is not considered as a mere technicality.
- The Tribunal noted that an application for review shall be made within 30 days of the taxpayer being notified of the taxation decision, and the Tribunal may upon application in writing, extend the time for making an application for review of taxation decision. Further, an Application for review shall be made within six months of the taxation decision.
- Under the Tax Appeals Tribunal (Procedure) Rules, a Tribunal may in its discretion and upon the application of the Applicant extend the time for making an application for review where it is not filed within 45 days from the date of service of the taxation decision, where the taxpayer was unable to do so due to illness absence from Uganda or any reasonable cause.
- In order to qualify for an extension of time, there is need for the Applicant to show that it has reasonable cause as to why the application was not filed in time.
- Where a taxpayer has not been served with an objection decision, it may elect to treat the Commissioner as having made a decision to allow the objection under S. 24(7) of the Tax Procedure Code Act. If there is no objection, then there is no decision for the Tribunal to listen to and on that ground alone the instant application was misconceived.
- Objection decisions are served on the taxpayer that is registered and not its consultants. The Applicant's application was supported by an affidavit sworn by its tax consultant who did not disclose the information that the Applicant was not served with an objection decision. Since there was no affidavit in rejoinder, the Respondent's averments in the affidavit in reply that the Applicant was served were deemed unchallenged.
- If the Applicant was going to challenge the objection decision, it would mean that it received it.
- Time has to run from when the objection decision was served.
- The Applicant should have filed its application for extension of time by the end of 2018 but instead filed it over nine months from the day of service of the objection decision.
- Deactivation of the Applicant's TIN was not a good reason for a delay in filing an application on time. The Tribunal noted that not having a TIN does not stop a taxpayer from filing an application. It should have been a good reason for filing the application urgently.
- All applications for extension of time must be filed within six months of the taxation decision. After six months, the Tribunal does not have powers to grant an extension. The powers of the Tribunal are created by statute and for it to entertain an application after six months would be acting ultra vires.

The Application was dismissed with costs

Suing a Wrong Party and Time Limitation

Jutrade General Agencies Limited v Uganda Revenue Authority & Equity bank: TAT Application No. 65 of 2019

On 21st May, 2020 the Tax Appeals Tribunal delivered a ruling in respect of an application in which the Respondents had objected to the application on grounds that it was time barred and that the 2nd Respondent was a wrong party to the Application.

Background

URA issued the Applicant with various tax assessments for payment of VAT for the period from 2011 to 2012. On 24th July 2012, the Applicant objected to each of the assessments which were disallowed by various objection decisions with the latest being in July 2013. The Applicant did not pay the VAT on the said assessments which attracted interest. The 1st Respondent then issued an agency notice on the Applicant's bank, the 2nd Respondent. The Applicant filed the application for review of the objection decision on 5th July 2019. The first and second Respondents raised preliminary objections to the Application.

1st Respondent's Objection and Arguments

The 1st Respondent objected to the Application and prayed that it be dismissed because it was time barred. The Respondent submitted that:

- The objection decisions were issued in 2012 to 2013 and the Applicant ought to have filed the Application within 30 days of the receipt of the notice of the objection decision as provided under the then S. 33C of the VAT Act which was later incorporated into S. 25(1) of the Tax Procedure Code Act.
- Even if the Applicant was not served with the objection decision, the taxpayer did not write a notice to the Commissioner General electing to treat the non service as an allowance of the objection.
- The Applicant filed the application after it was served with an agency notice.
- The Applicant did not seek extension of time.

2nd Respondent's Objection and Arguments

The 2nd Respondent submitted that:

- It was wrongly sued. It denied any liability as it was a mere agent of the 1st Respondent, a fact that was not disputed.
- An agent cannot be sued where the Principal is known and disclosed, and further that the application did not disclose a cause of action against it and the prayers were unenforceable against it.
- The Tribunal did not have jurisdiction to hear and determine the Applicant's complaint of irregular transactions on its bank accounts as it is a civil matter. The Tribunal only has power to review taxation decisions.

Applicant's Response

The Applicant submitted that:

- It was not served with the objection decisions until May 2019 when objection decisions were availed, served and communicated. The Applicant contended that it had not elected to treat that the objections as having been allowed.
- The 2nd Respondent as a financial institution can be sued.
- The 2nd Respondent did not serve, avail or communicate the agency notices to it, failed to act with due care and skill in executing the duty delegated to it by the 1st Respondent and did not follow the instructions of the principal.

The Tax Appeals Tribunal's Ruling

- The Tribunal noted that an objection decision is deemed not to have been made until it has been served. In the absence of service, the taxpayer cannot be deemed to have received it.
- It further noted that if one files an application before the Tribunal, the starting point would be that he received an objection decision. It becomes difficult to challenge an objection decision one has not received.
- The Tribunal believed the Applicant's argument that it was served with the objection decision in May 2019 and hadn't elected to treat the objections as having been allowed.
- It reiterated the rule that an application for review must be filed within 30 days of notice of the objection decision. As such, the Applicant should have filed the application by 30th of June 2019. The application filed on 5th July 2019 was time barred and the Applicant ought to have applied for extension of time.
- The Tax Procedure Code Act makes the bank an agent of the taxpayer. That where a principal is known and has been disclosed, an aggrieved party cannot sue an agent.
- Thus the Tribunal opined that the Applicant could not sue its own agent, the 2nd Respondent though it was carrying out instructions of the 1stRespondent to pay the taxes due.
- The Tribunal upheld the preliminary objections raised by the Respondents and dismissed the Application with costs.

Jurisdiction of Court of Appeal in Tax Matters

Housing Finance bank Ltd v Uganda Revenue Authority Court of Appeal Civil Appeal No. 22 of 2012

On 9th March, 2020, the Court of Appeal delivered a ruling concerning the jurisdiction of the Court of Appeal, in its appellate jurisdiction, from a tax decision of the High Court in

Background

On 15th of March, 2005, URA issued a VAT assessment of UGX.5, 491,436,703 as VAT on the sale of houses under 3 projects and interest earned by the Appellant. The Appellant objected to the assessment and the Respondent reduced the sum to UGX. 2,427,486,928. The Appellant appealed to the Tax Appeals Tribunal on the ground that it was not a VAT registered company and had not collected any VAT from the credit purchases under the 3 projects. It contended that there was misdirection on the classification of the services it rendered which were financial services and therefore exempt supplies for purposes of VAT. The Respondent maintained that the Appellant's services under the 3 projects did not fall within the classification of financial services under the VAT Act. The Respondent contended that the commission the Appellant earned through the 3 agency contracts amounted to a commission paid for debt collection services which is liable to VAT.

The Tax Appeals Tribunal held that the services rendered by the Appellant amounted to financial services which were exempt under the VAT Act and ordered the Respondent to refund the 30% of the disputed tax.

The Respondent appealed to the High Court against the above decision. The High Court found that services rendered for one of the projects amounted to financial services and qualified for exemption. The Court found that the services rendered under two of the projects did not amount to financial services and were therefore not exempt.

The Appellant appealed to the Court of Appeal.

Issues before the Court of Appeal

Before determining the Appeal on its merits, the Court of Appeal decided to first address the question of the appellate jurisdiction of the Court of Appeal to hear and determine appeals from decisions of the High Court having heard and determined an appeal from a decision of the Tax Appeals Tribunal.

Court of Appeal Ruling

The Court of Appeal held as follows:

It reiterated the law that an appeal is a creature of statute.

- The statutory provisions which confer a right of appeal by a taxpayer from any objection decision or taxation decision of the Commissioner General can be found in the VAT Act and TAT Act.
- Application for review of an objection decision is an appeal to the Tribunal. The use of the word review does not take away the substance of the application which is an appeal;
- There is no right of appeal provided for under the law from decisions of the High Court to the Court of Appeal;
- The provisions of the Civil Procedure Act which deal with appeals are procedural sections and do not confer any right of appeal from decisions of the High Court to the Court of Appeal with regard to decisions made under the Value Added Tax Act;
- That the Application for review of the objection should be considered as an appeal from the decision of the Commissioner General. It follows that appeal from the decision of the Tax Appeals Tribunal to the High Court is to be considered as a second appeal as envisaged by S. 72 of the Civil Procedure Act;
- That an appeal from the decision of the High Court under the VAT Act, which matter emanated from an objection decision made by the Commissioner General and which was appealed to the Tax Appeals Tribunal would be a 3rd appeal to the Court of Appeal which requires a Certificate that the appeal concerns a matter of law of great or general public importance;
- That even if it can be argued that an appeal is lodged under the provisions of the Civil Procedure Act, such an appeal had to be on the Certificate of the High Court that it concerns a matter of law of great or general public importance or with leave of the High Court or the Court of Appeal following an application for leave;
- That the Appellant did not seek leave of the High Court or Court of Appeal before lodging this appeal.
- The Court thus concluded that a Court of Appeal has no jurisdiction to hear an appeal from the decision of the High Court determining an appeal from the decision of the Tax Appeals Tribunal. The Appeal was struck out with costs.

NOTE; The above decisions on the jurisdiction of the Court of Appeal in tax matters have been rendered moot with the passing of the Tax Appeals Tribunal (Amendment) Act 2021 which amended Section 27 by introducing Section 27A and 27 B that allows an appeal from High Court to the Court of Appeal on questions of law only and to the Supreme Court with leave and a certificate that the matter raises questions of law of great public importance.

Addition of a Ground or Issue for Determination by the Tax Appeals Tribunal

Airtel Uganda Limited V Uganda Revenue Authority: Application No. 10 Of 2019

On the 20th of May, 2020 the Tribunal delivered a ruling in respect of an application to add an additional ground for determination.

Background

The Applicant is a company that deals in telecommunications services. The Applicant acquired Warid telecom and as a result there were pending transactions of Warid Telecom carried forward to the Applicant that had tax implications including withholding tax, PAYE, excise duty and VAT.

In 2018, the Respondent carried out an audit on the Applicant for the period July 2007 to June 2014 where it disallowed its input tax credit. The Applicant appealed to the Tribunal.

At the scheduling of the matter, the Applicant applied to add an additional ground or issue for determination. The ground the Applicant sought to add was on time limits. The Applicant contended that the assessments issued by the Respondent were time barred.

The Applicant's Arguments

The Applicant submitted as follows:

- Section 23(2)(b)of the Tax Procedure Code Act provides that an additional assessment should be made within three years from the date of the additional assessment or in any other case within three years after the date the taxpayer has furnished a self-assessment.
- The period in issue was July 2007 to June 2014. However the assessment was issued outside the prescribed time in 2018. The Applicant contended that an assessment made out of time is illegal and it is proper that such an issue should be put to trial.
- The Applicant stated that though Section 23(2)(a) of the Tax Appeals Tribunal Act gives the Commissioner wide discretion in issuing an additional assessment, the law also clearly stipulates the circumstances under which that discretion should be exercised. The discretion is not unqualified and the Respondent did not point out which new information it relied on to issue an additional assessment.
- The Applicant noted that Section 16(4) of the TAT Act provides that an Applicant is limited to the grounds in an objection decision unless the Tribunal orders otherwise. Therefore, the Tribunal has the

discretion to allow additional grounds to those in the objections.

The Respondent's Arguments

The Respondent submitted that:

- This was not a proper case for a grant of leave to add an additional ground as **Section 16(4)** of the TAT Act requires that matters before the Tribunal be confined to the grounds raised in the objection notice.
- Though the Tribunal has the discretion to allow an additional ground, it should not prejudice the Respondent or lead to miscarriage of justice and in any case the new ground would not serve any purpose and would result in protracted litigation.

The Tax Appeals Tribunal's Ruling

The Tribunal ruled as follows:

- In order for the Tribunal to grant an application to include a new ground for determination, it must exercise its discretion judiciously in order to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but not to assist a person who has deliberately sought (whether) by evasion, or otherwise to obstruct or delay the cause of justice hence applying the rules of natural justice.
- In this case the Applicant was audited in 2018 for the period of July 2007 to June 2014 and it is not difficult to discern that the time period of three years had expired.
- **Section 32(2)(a)** of the TAT Act, which provides that an additional assessment may be issued at any time, if fraud or any gross or wilful neglect has been committed or if any new information has been discovered, provides an exception to the time limits.
- Issues of time limits go to the merit of the case and are points of substantive law and not mere technicalities and must be strictly complied with.
- They can be raised at any time during the trial. However the Respondent should be given ample time to contradict them or raise grounds objecting to them and that is why the Tribunal insists they be raised at the beginning of the trial, however, raising them during or at the end of the trial does not mean that the Tribunal will not entertain them.
- The Tribunal found that the Applicant raising and including the ground of time limits as an issue provided ample time for the Respondent to contradict or set up a defence. It did not prejudice the Respondent. In fact it helped the Respondent, as there are may be delays in hearing the matter but listening to the said ground at the earliest opportunity avoided a multiplicity of suits and unnecessary appeals. The application was allowed with costs.

Value Added Tax

Classification of Educational Materials and Legal Effect of A Practice Notice

Picfare Industries Limited v Uganda Revenue Authority: TAT Application No. 35 of 2017

Introduction

On the 1st of March, 2019, the Tax Appeals Tribunal issued a ruling in Application No. 35 of 2017 in which it addressed the issue of whether A4 hard cover books qualify as educational materials for tax purposes.

Background

The ruling was in respect of an application by the Applicant to set aside a VAT assessment arising from a classification of hardcover books as educational materials for tax purposes. The Applicant who is a producer and supplier of stationery for school use in Uganda, produced A4 hardcover books from 2014-2017. The Applicant's books are categorized into gold, bronze and silver. In 2016 the Applicant applied for a tax refund on the supply of A4 bronze and silver hardcover books on grounds that they were zero rated. URA rejected the application and issued a VAT assessment amounting to UGX. 1,742,217,003. The Assessment was maintained upon objection by the Applicant, hence the Application to TAT to set aside the assessment.

Applicant's Arguments

The Applicant argued that:

- Under S. 24(4) of the VAT Act, the supply of educational materials is zero rated.
- It did not pay the VAT on bronze and silver books because they were produced for educational purposes but paid VAT for the gold books, which were not customized for educational purposes.
- The Practice Notice issued by the Respondent on 24th April, 2018 excluding counter books, note books and ruled papers as educational materials was issued in bad faith and with no retrospective effect.

Respondent's Arguments

The Respondent contended that:

- Under the definition of educational materials, for a material to be educational, it must be exclusively for use in public libraries and educational establishments.
- The books produced by the Applicant were not marked or labeled to guarantee that the books were utilized only for educational purposes.
- The books were re-classified for failure to meet the test of exclusivity.

The Tax Appeals Tribunal's Ruling

- The Tribunal ruled in favor of the Applicant and set aside the assessment. It held that:
- The Respondent's contention that the books should only be used for educational purposes is unsustainable in law. This was because the law uses the phrase "suitable for use."
- When a person uses a book customized for education, for another purpose, then it has been inappropriately used.
- The Applicant's books were suitable for educational purposes and thus qualified as educational materials for tax purposes.
- The question the Respondent should have asked is *'are the books suitable for use only in educational establishments?'* and not *'are the books used only in educational establishments?'*
- The application of the Practice Notice (which excluded counter books as educational materials) was rejected on the basis that it is not law and further that Practice Notices do not bind tax payers and do not create law. They are the Commissioner's interpretation of the law and only bind the Commissioner.

Taxable Supplies for VAT Purposes

Victoria Motors Limited Vs Uganda Revenue Authority: TAT No 2 of 2017

Background

Victoria Motors Limited (Applicant) is engaged in the business of distributing Mitsubishi motor vehicles in Uganda and neighboring countries. The Applicant is an agent for Sable Cross Trading Company Limited ("Sable Cross"), which exports the vehicles.

The dispute between the Applicant and Uganda Revenue Authority, (URA), arose when the URA imposed VAT on the Appli-

cant's dealership management services.

Applicant's Arguments

The Applicant submitted that:

- It submits bids to government bodies and private companies for vehicle purchase. If the Applicant wins and does not have the requisite finance, arrangements are made for Sable Cross to purchase and export the vehicles to the Applicant's bonded house where sales are executed. Sable Cross retains the risk and remains the owner of the vehicles until the cars are sold.
- It acts for Sable Cross, a non- resident company, in its dealings with third parties and the money paid to it is remitted to Sable Cross.
- It provides bonded warehouses, distribution services and looks for customers for Sable Cross, mainly government organizations and in addition, provides pre-delivery and after sale services. The Applicant also assists customers in clearing tax payments due.
- However, it does not receive a commission from Sable Cross, but a residual value for the sold vehicles, arising out of fluctuation on exchange rates. Customers pay in Uganda Shillings which the Applicant converts into Dollars and remits to Sable Cross.
- It relied on a private ruling in which the Respondent stated that it was liable to income tax not VAT, on the mark up earned on sale of vehicles. The private letter ruling had never been revoked by the Respondent and therefore was binding on them.
- Applicant also argued that the Tribunal had previously held that since bonds are custom gazetted areas where transfer of ownership is made therein, the sales are not deemed to have been made in Uganda and hence no VAT is due. Relying on Section 17 of the VAT Act, the Applicant argued that the goods are not brought into Uganda.
- The Applicant submitted that the vehicles are only imported into Uganda after paying off customs duty and transfer of ownership, and all these transactions occur in the bond and therefore, the residual income earned should not be subjected to VAT.
- Without prejudice, the Applicant argued that the residual income is incidental to the import of vehicles.

Respondent's Arguments

The Respondent submitted that:

- The Applicant is in the business of distributing motor vehicles. That the Applicant provides other services to Sable Cross, which attracts 18% VAT that the Applicant is liable to pay.
- The Applicant is not an agent of Sable Cross as it had not adduced any evidence to prove that allegation. Further, that the Applicant's witness had admitted that the Applicant has no specific relationship with Sable Cross.

The Tax Appeals Tribunal's Ruling

- The Tribunal focused on whether the services provided to the importer and the customers are taxable supplies. The tribunal found that:
- In accordance with Section 2 of the VAT Act, the Applicant provides services to the importer and customers. Activities that take place from the port to the bond before taxes are paid such as; storage, insurance, transport from the ship offloading, after sales services, security, packing add value to the goods and are therefore taxable supplies.
- The residual value the Applicant received was a fee and/or charge.
- It is not what a charge is called but that fact that the applicant received consideration for the services it rendered.
- There was no connection between the retail services and the importation of goods.
- The differences in the exchange rates were as a result of the retail services provided.

- Regarding the private letter ruling, the Tribunal ruled that this was a mere letter and not a private ruling. It only summarized the position of a private ruling which was issued to another party and therefore could not apply to the Applicant. The Application was dismissed with costs to the Respondent.

VAT on Exported Services.

Aviation Hanger Services Ltd V Uganda Revenue Authority: Application No. 21 Of 2019

On the 30th of March, 2020, the Tribunal delivered a ruling in respect of an application challenging a Value Added Tax assessment of UGX. 384,025, 308 arising after the Respondent disallowed the Applicant's VAT refund claim of UGX.122,671,55.

Background

The Applicant carries on the business of providing maintenance services to foreign operated aircrafts. The Applicant' services aircrafts that do not operate on any routine route in Uganda. The aircrafts only fly to Uganda for purposes of being serviced. The Applicant applied for a VAT refund of UGX. 122, 671,551 which the Respondent rejected and issued an additional VAT assessment of UGX 384, 025, 308 on grounds that the services of the Applicant were standard rated.

The dispute of the parties revolved around the VAT treatment of aircraft services in Uganda.

The Applicant's Arguments

The Applicant submitted that:

- It is a 100% owned subsidiary of Intra-Ocean Aviation Finance Corporation (IOAFC), a Mauritian registered company that provides aircraft leases to various NGOs which require IOAFC services in various countries in Africa.
- The Applicant provided aircraft maintenance to only IOAFC operated aircrafts 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 as none of them operate a route in Uganda.
- The Applicant considered its services as an export to IOAFC as the use and con-

sumption of its services is done in other countries within the meaning of the VAT Act and therefore qualifies as zero rated.

- The Applicant contended that the Respondent's assessment of UGX. 384,025,308 based on an allegation that the Applicant's services are performed in Uganda was erroneous.

The Respondent's Arguments

In response, the Respondent argued that:

- The Applicant was misclassifying its services as zero rated exports yet they should be standard rated.
- The Applicant was charging a fee for the services offered under the agreement between IOAFC and itself. The Applicant was invoicing IOAFC and filing the services in its e-tax return as zero rated sales.
- The Applicant's explanation that the services are used and consumed outside Uganda was not convincing as the services that the Applicant provided were completed in Uganda, at the Applicant's premises.

The Tax Appeals Tribunal's Ruling

The Tribunal Ruled as follows:

- The Tribunal noted that while VAT may be considered a tax on final consumption of goods or services, it is a tax on transactions and is charged on any transactions that add value to goods and or services.
- Tax is charged on the value added by a taxable person at each stage in the course of production and distribution. This value can be anything from providing transport to advertising. 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 when there is no consumption, or the consumption is outside the jurisdiction of the taxing authority.
- Secondly, for consumption of a good or service to be exempt, zero rated or standard rated, the VAT Act has to provide for it. VAT is charged on every taxable supply by a taxable person and the Applicant is VAT registered and it is not in dispute that it is a taxable person.
- Section 18 of the VAT Act defines taxable supplies as goods or services other than exempt supplies, made in Uganda for consideration as part of his or her business activities.
- Therefore provision of maintenance service by the applicant to aircrafts of IOAFC locally for a fee would qualify to be a taxable supply under **Section 18** of the Act.
- 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.
- In such cases where both these conditions are met, a supply of service will be taxable in Uganda even though it is for use or consumption outside Uganda.
- In respect of whether the services are an export and therefore zero rated, the Tribunal held that the VAT Act provides that VAT is due where there is a supply of goods and services whereas Regulation 12 of the VAT Regulations provide that where services are used and or consumed outside Uganda the rate of VAT is zero.
- There is a disharmony between the Regulations and the VAT Act. The VAT Act is concerned with the supply of goods and services and looks at the transactional nature of them.
- While the Regulations are concerned with the use and consumption of goods outside Uganda, they do not indicate the parameters on how use and consumption can be determined.
- The Regulations are out of chord and 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 a service should be done wholly outside Uganda in order to qualify as an export. If there is a local component on the use or consumption of the services, it shall be deemed to be a supply of services in Uganda.
- In the instant case, IOAFC, the recipient

of the supply, is not a taxable person by virtue of Section 6 of the VAT Act. The services were physically performed in Uganda by the Applicant, who was in Uganda at the time of the supply.

- The facts place the said services within the ambit of **Section 16(2) (a) of the VAT Act.** 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.
- Therefore, the provision of maintenance services by the Applicant was not a zero rated supply. The services were standard rated and therefore attracted VAT.

Whether Services Provided by Employees Abroad to a Branch in Uganda are Imported Services and Therefore Attract VAT

Cowi A/S V Uganda Revenue Authority: Tat Application No. 4 of 2019

On 22nd May, 2019 the Tribunal delivered a ruling in respect of an application challenging a VAT assessment of UGX. 371,409,113 for work provided to the Applicant by its head office in Denmark.

Background

The Applicant is a company registered and has its headquarters in Denmark and carries

on business in Uganda through a branch. The head office is not a separate legal entity from the branch. The Applicant provides engineering and consultancy services.

The branch withholds 6% as taxes and the Applicant pays taxes according to a Double Taxation Agreement between Uganda and Denmark. In 2018, the Respondent carried out an audit on the Applicant in which it alleged that the branch did not charge VAT for imported services. The Respondent issued a VAT assessment of UGX. 371,409,113.

The dispute in this matter revolved around whether VAT should be paid for services performed abroad but costs are remitted to the branch in Uganda.

The Applicant's Arguments

The Applicant contended that:

- It was not liable to pay VAT on the man hours and the income monies allocated to the branch as the said man hours are not imported services because they were provided by the Applicants own employees.
- A supply of a service made by an employee to an employer by reason of employment is not a supply by the employee.
- The VAT Act does not create a distinction between head office and it does not define a branch as one of the "persons" envisioned as tax payers.

In alternative, the services provided by the Applicant's employees cannot be deemed an import within the meaning of Section 1 of the VAT Act because the work was done in Denmark and never imported into Uganda as the administrative and support services were performed and utilized in Denmark.

The Respondent's Arguments

The Respondent submitted that:

- The Applicant was liable to pay VAT on imported services.
- The Applicant's branch in Uganda received services from its head office in Denmark.
- Regulation 13(3) of the VAT Regulations provides that if part of a business is carried on outside Uganda by an overseas person, the overseas person is not a taxable person, the internal provision of services is treated as a supply of services made outside Uganda by the overseas person to a taxable person for a reduced consideration.
- The Applicant carries on business both in and outside Uganda, the provision of services by the head office in Denmark is, for the purposes of VAT, treated as if it were carried on by a person separate from the branch and that there is no conflict between the VAT Act and Regulation but they rather they complement each other.

The Tax Appeals Tribunal's Ruling

The Tribunal ruled that:

- If one were to use the *ejusdem generis* rule on statutory interpretation, one would not fail to notice that the person or specific listed in Section 1 of the VAT Act are a legal person.
- The VAT Act is concerned with taxable person and this refers to a person that is registered under Section 7 of the VAT Act as a taxable person.
- In this case, the party in Denmark and the one in Kampala are one and the same legal person.
- For an import to take place there is need to be at least two different legal persons involved in the activity. One cannot be said to be importing to itself. As soon as the services are performed by employees of the head office of the Applicant in Denmark, it cannot be deemed to be an import because it is one and the same person in two countries.
- Regulation 13 of the VAT Regulations does not apply to situations where a company is being provided services by its employees. The said regulation only applies where a company is being provided services by a parent company or subsidiary companies which are not taxable person in Uganda; that is they are not VAT registered. The subsidiary and or parent

company may be considered as an overseas person.

Whether Fronting and Facultative Fees are VAT Exempt

Britam Insurance Company Uganda Limited V Uganda Revenue Authority: TAT Application No. 69 Of 2018

On the 26th of March 2020, the Tribunal delivered a ruling in respect of an application challenging VAT assessments on fronting and facultative fees received from other insurance companies

Background

The Applicant is regulated by Insurance Regulatory Authority of Uganda to provide insurance services. The Applicant receives fronting and facultative fees from other insurance companies for reinsurance services.

The Respondent issued assessments of UGX. 250,023,977 being VAT for which UGX. 206, 727,735 was fronting fees and UGX. 43,301,242 was facultative fees which the Applicant objected to.

The Applicant brought this application challenging the Respondent's decision not to treat fronting and facultative fees as VAT exempt.

The Applicant's Arguments

The Applicant contended that:

- The fees and commission earned on fronting and facultative reinsurance are VAT exempt under the VAT Act. It cited Section 19(1) of the VAT Act and the Second Schedule to the Act paragraph 1(d)(iv) and 2(f). Under the second schedule the supply of the reinsurance service is an exempt supply.
- A facultative reinsurance transaction involves a ceding insurer remitting a portion of insurance fee received from an insured to the reinsurer.
- Re-insurance service is not defined in the VAT Act. The Applicant argued that the services provided for reinsurance companies are incidental or ancillary to reinsurance services and therefore should be exempt from VAT.
- The Applicant argued that the services provided by the Applicant are incidental or ancillary to reinsurance services and that the commission collected by the Applicant wholly depends on the provision of reinsurance services and cannot be treated as a separate supply.

The Respondent's Arguments

The Respondent submitted that:

- In a Contract of supply of reinsurance services, there must be; transfer of risk to a reinsurer from an insurer, the reinsurer must accept all or part of the risk in exchange for a premium and the reinsurer compensates the insurance company.
- The fronting and facultative commission constitute a commission for sourcing the business which falls under the ambit of general insurance and not reinsurance and that they take the character of principal supply of insurance.

The Tax Appeals Tribunal's Ruling

The Tribunal observed and held that:

- The essential features of a 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.
- It noted that it takes two companies to be involved in reinsurance business, the insurance company and the reinsurance company. An insurance company has to cede a portion or all the risk for reinsurance to take place.
- Therefore, the Applicant is engaged in the general insurance business. It arranges for the insurance of a portion or all the risks it undertakes with various reinsurance companies and in return for the above service it is paid a certain fee or a commission.
- Fronting and facultative commissions emanate from transactions in which a primary insurer acts as the insurer by issuing a policy, and then passes the risk to a reinsurer.
- Reinsurances services cannot exist without fronting and facilitate arrangements. They are incidental to reinsurance services which are VAT exempt.
- The services performed by the Applicant can be termed as secondary services which are used by the primary service provider.
- The secondary service (insurance service) ultimately gets consumed / merged with the primary service (reinsurance). Meaning that for these purposes, both primary and secondary service providers keep records deemed fit to be able to identify the secondary service providers.
- The consumer or insurer may never meet the reinsurer. The services of reinsurance intermediary are to spread the risk of high exposure.
- Therefore found that the fronting fees and facultative commission earned in respect of reinsurance services is VAT exempt.
- The application was allowed.

Application of Standard Alternative Method; Apportionment of Expenses not Attributable Solely to Taxable or Exempt Supplies

MTN Uganda Ltd v Uganda Revenue Authority: TAT Application No. 15 of 2018

The Tax Appeals Tribunal issued a ruling in respect of a dispute on the proper application of the Standard Alternative Method under the VAT Act and the VAT assessment issued on the Applicant.

Background

The Applicant is a mobile telecommunication company that has provided mobile and fixed line telecommunication services since 1998. In April 2009, the Applicant introduced mobile money services which are financial services. Since March 2011, the Applicant has been using the Standard Method under the VAT Act. The Applicant reviewed its application of the Standard Method and decided to use the Standard Alternative Method (SAM) under S. 28(10) of the VAT Act because the use of the Standard Method (SM) was a disadvantage to it.

On 3rd November, 2015, the Applicant applied to the Commissioner General to use SAM instead of SM. On 14th March, 2016, the Commissioner General allowed the Applicant to use the Standard Alternative Method. On 8th June, 2016, the Applicant requested the Respondent to allow it to apply the Standard Alternative Method retrospectively from 1st January 2014.

On the 4th July, 2016 the Respondent wrote to the Applicant requesting it to provide details of input tax showing the categories of directly attributable input tax to exempt and taxable supplies for the requested period for the purpose of evaluating the Applicant's application. This information was provided by the Applicant in its letters dated 11th July 2016 and 27th October 2016.

On 5th April, 2017 the Respondent wrote advising the Applicant to apportion all network related costs and company overheads between mobile money and telecom services using the ratios in S. 28(10) of the VAT Act. The Respondent deferred its approval of the retrospective application of SAM pending the Applicant's compliance with its letter.

On 19th April 2017, the Applicant informed the Respondent that the proposal to apportion was unacceptable as it eliminated the advantage the former sought to gain. On 24th November, 2017, the Respondent issued an assessment of UGX. 20,053,441,670 (Uganda Shillings Twenty Billion Fifty Three Million Four Hundred Forty One Six Hundred Seventy Only) against the Applicant including principal tax and interest. On 3rd January, 2018 the Applicant objected to the said assessment and on 29th March, 2018 the Respondent issued an objection decision disallowing the objection.

The Dispute

The dispute between the parties revolved around the use of the Standard Alternative Method, the apportionment of costs between exempt and standard supplies, and the apportionment of costs between mobile money and telecom services using the ratio of taxable sales to total sales.

Applicant's Arguments

The Applicant's arguments were that:

- Applying the Standard Method as a provider of both mobile money and telecom services was disadvantageous to it as it obtained lesser credit.
- If a person has a disadvantage, it is entitled to use the Standard Alternative Method.
- Under the VAT Regulations, input tax should be attributed separately between the exempt, taxable and other supplies it made.
- Until the Standard Alternative Method is revoked it is still binding on the Respondent.
- The Regulations mandate the Applicant to apply and the Commissioner to give written approval.
- The assessment for the principal tax should be set aside because it was for the period of January 2014 to April 2017 while the Applicant only began applying SAM on 15th November 2015.
- The Applicant objected to the interest on the ground that during the period 2014 to 2015 it was using the Standard Method therefore there was no basis for charging tax and interest on the Applicant.
- For the period of November 2015 to April 2017, the Applicant was using SAM which had been approved by the Respondent therefore the Applicant should not be charged interest for using a method approved by the Respondent. The Applicant prayed for the assessment to be vacated.
- The Applicant further contended that telecom services are distinct from mobile money services and should be treated separately.

Respondent's Arguments

The Respondent admitted that it's not in dispute that the Applicant was granted permission by the Commissioner General to use SAM but the permission was granted subject to the Applicant complying with the requirements under the VAT Regulations.

- That the dispute between the parties lay in the Applicant's refusal to apportion the costs attributable to exempt and taxable supplies.
- The Respondent contended that its proposal advising the Applicant to apportion all network related costs and company overheads using the ratio of taxable sales to total sales was not an imposition of a new method of apportionment but merely guidance to the Applicant on the proper application of the SAM.
- Further, the evidence adduced by the Respondent proved that the mobile money network relied heavily on the telecom infrastructure giving rise to shared costs which ought to have been properly apportioned by the Applicant. The Respondent advised the Applicant to apportion all network related and telecom services using the ratio of taxable sales to total sales in accordance with S. 28(10) of VAT Act and to amend the tax returns accordingly.
- The Respondent submitted that the figures relied on to arrive at the assessment were derived from the Applicant's own VAT returns and the Applicant can't deny the assessment based on its own returns and the law.
- The Respondent contended that the Applicant was liable to pay a penal tax on the unpaid tax.

The Tax Appeals Tribunal's Ruling

- The Tribunal ruled that it was not the intention of the legislature that once a proposal has been made by the taxpayer, it is mandatory for the Commissioner General to accept it. The word "may" requires the Commissioner General to exercise

his or her discretion. The Commissioner General has the option to accept or refuse a proposal.

- The Tribunal noted that a Commissioner may allow the tax payer to use the SAM but not accept the proposal. Where a Commissioner has refused to accept a proposal, a taxpayer has two options; to go back and adjust the proposal till it is acceptable or to challenge the refusal in Court of the Tribunal.
- The Taxpayer has to show that the Commissioner failed to exercise his or he discretion or if so, it was done illegally, irrationally or with procedural impropriety.
- The Tribunal further noted that SAM has two limbs; the first limb is for the taxpayer to directly attribute input tax separately to the exempt and taxable supplies in so far as this is possible. The taxpayer may then claim credit for all the input tax related to taxable supplies and for none of the input tax related to exempt supplies.
- The second limb requires the taxpayer to apportion the balance of input tax which cannot be attributed to taxable or exempt supplies.
- The Tribunal acknowledged that telecom services are taxable while mobile money services are exempt. The Tribunal found that the services of mobile money were dependent on those of telecom services which meant that some of the expenses cannot be attributed wholly to taxable supplies. The shared costs between the Applicant's telecommunications services and the mobile money services should have been apportioned in accordance with paragraph 3 of Regulation 14 as they cannot be attributable to either taxable or exempt supplies.
- The Tribunal went on to list down some of the expenses which could not be attributed to taxable or exempt supplies and held that the said expenses can however still be attributed to taxable supplies where it is clearly evident that they were incurred in respect of only telecom services. The Tribunal noted that the shared expenses had to be calculated as input tax in accordance with the formula specified in S.1 (f) of the Fourth Schedule.
- The Tribunal held that the Respondent was justified to ask the Applicant to attribute and apportion all network related costs and company overheads between mobile money and telecom services using the ratios in S.28 (10) of the VAT Act. The Respondent acted within the law.
- The Tribunal further held that the Applicant was entitled to a VAT refund using SAM. However the Tribunal found that the Respondent acted irrationally when handling the Applicant's proposal for SAM by omitting to compute the input tax credit claimable by the Applicant using SAM. The Applicant was free to challenge such decision.
- The Tribunal found that the gist of the case was as to the proper application of SAM and not whether the assessment was correct. No evidence was adduced challenging the principal tax and the interest. The Tribunal thus held that the Applicant failed to prove that the assessment issued by the Respondent was incorrect.
- The Tribunal ordered that the matter in respect of proper application of SAM be remitted back to the Respondent for reconsideration, that the Applicant should apportion its input tax according to those that are taxable, exempt and those that are not attributable to either and that the Respondent computes the input VAT refund if any payable to the Applicant using the proposal adjusted by the Applicant in accordance with S. 28(10) of the VAT Act. The Tribunal upheld the assessment which had not been challenged by the Applicant and ordered each party to bear its costs.

Classification of Veterinary Products as Medicaments or Food Supplements; Burden and Standard of Proof; Effect of Practice Notes

Noorbrook Uganda Ltd v Uganda Revenue Authority: TAT Application No 18 of 2018

On 15th May, 2020 the Tax Appeals Tribunal issued a ruling in respect of treatment of purported medicaments and food supplements by the Applicant under the East African Community Customs Management Act (EACCMA).

Background

The Applicant imported veterinary products namely; Alamycin Egg Formula, Alamycin Chock Formula, Colvasone, Multivitamin Injection, Muliject IMM and Calciject which it classified as medicaments. The Respondent conducted an audit on the Aplicant and re-classified the disputed items supplements and assessed customs duty, VAT and WHT on them to which the Applicant objected.

Applicant's Arguments

The Applicant contended that:

- The said products are drugs 'medicaments' and not supplements which are zero rated under the VAT Act.
- The Applicant submitted that even if the Act does not define drugs, the said products are classified as medicaments in Tanzania and Kenya.
- The Applicant submitted that it had sought clarification from the Respondent on how to classify its imports and the Respondent issued a private ruling the Applicant to classify the items under HS Code 3004.50 which classified the Products as attracting 0% import. This created a legitimate expectation to the Applicant that the items attracted 0% import duty.

Respondent's Arguments

- The Respondent argued that the National Drug Authority did not carry out tests on all the products in contention to classify them as drugs.
- The Respondent contended that even if a product is presented by the manufacturer as a medicament it can still be classified as a food supplement.
- The Responded further contended that the Applicant should not rely on classifications by Tanzania and Kenya to bind Uganda. The fact that a product is classified as a foodstuff in another member state cannot prevent its being classified as a medicinal product in another when it displays the characteristics of such a product.

- The Respondent argued that the doctrine of legitimate expectation does not apply to Uganda as it was developed abroad in 1969 after Uganda had obtained independence. The Respondent further submitted that it did not make any representations to the Applicant.
- The Respondent contended that WHT should be paid because the Applicant's products are not classified as medicaments.

The Tax Appeals Tribunal's Ruling

- The Tribunal first clarified what qualifies a product as a medicament; it noted that it must be a product that has therapeutic and prophylactic properties. A medicament is a product which does not only cure but also prevents diseases.
- The Tribunal found that the Respondent had issued Practice Notes in 2007 which recognized drugs for veterinary purposes as products covered under the VAT Act.
- The Tribunal thus held that the Respondent was bound by the Practice Notes. The Tribunal further noted that the fact that a product has vitamins should not be the test as to whether it is a drug or food supplement.
- This is because vitamins have medicinal value especially in the prevention of diseases. A product with vitamins should be examined to see if it has medicinal effect, if it has therapeutic or prophylactic uses.
- Where a product has nutritional elements, this does not disqualify it from being a medicine or drug.
- The burden is on the Applicant to prove that the products it imported are drugs or medicines and the standard of proof is on balance of probabilities.
- That The Tribunal noted that where an Applicant states its case, the burden shifts to the Respondent to controvert it.
- After considering the elements of the impugned products, the Tribunal found that the evidence of the Applicant was consistent in respect of four of the six products, that is; colvasone, multiject IMM, Calciject 4Cm and Multivitamins which were declared as medicaments. The Respondent failed to prove that the four products do not have therapeutic and prophylactic uses. The Tribunal found that there were inconsistencies in respect of Alamycin egg and Chick formulas.
- The Tribunal thus set aside the assessments with respect to the four products and ordered that the Applicant pays the taxes assessed on the two products not proven as medicaments.

Denial of Input Tax Credit

Red Concepts Limited V Uganda Revenue Authority: Application No. 36 of 2018

On the 25th of March, 2020, the Tribunal delivered a ruling in respect of an application challenging a decision of the Respondent rejecting the Applicant's input credit of UGX. 112,276,213 and the issuance of an additional assessment of UGX. 138,012,418.

Background

The Applicant deals in furnace oil. It purchased furnace oil from Boona Electrical and General Distributors in respect of which it paid input VAT of UGX. 112,276,213 for the period of January to May 2017.

The Applicant made an application for input tax credit for the said purchases. The Respondent rejected the application for input tax credit on the grounds that the company that purportedly made the supplies was a fraudulent one and issued additional administrative assessments.

The Applicant's Arguments

The Applicant submitted that:

- Under Section 28 of the VAT Act it was entitled to the input tax credit of UGX. 112,267,213 because it is a taxable person.
- A summary of transactions relating to its dealings with Boona showed the invoice numbers, dates, the amounts due exclusive of VAT, the VAT amount, the name of the client to whom the oil was delivered, the Applicant's invoice number and all relevant information to indicate their business relationship.
- Sufficient proof had been adduced to show that the Applicant carried on the business of supplying furnace oil, and therefore Boona made a taxable supply of furnace oil to the Applicant and charged VAT.
- The Applicant contended that it paid for the furnace oil and was issued with tax invoices and receipts, the Applicant supplied the furnace oil and charged output tax, Boona filed returns reflecting the purchases.
- The reasons given by the Respondent for rejecting its input credit tax claim were not tenable and that it was not the Applicant's duty to ensure that the tax was remitted by Boona to the Respondent.
- It further submitted that the investigations made by the Respondent in trying to locate Boona were shoddy and haphazard.
- The Respondent ought to accept its claim for input tax credit because the Respondent did not challenge the output tax it filed in its returns.
- It had proved that Boona was a duly registered VAT agent of the Respondent who had charged VAT for the transactions in question and had filed returns.
- The reasons given by the Respondent were contradictory and unreliable.
- Itwas not liable to pay any tax on the additional assessment and prayed that the said assessment be set aside.

The Respondent's Arguments

In response, the Respondent submitted that:

- The Applicant was not entitled to the input tax credit because the transactions between the Applicant and Boona were fictitious and the documentation presented by the Applicant in support of the said transactions was full of contradictions and ambiguities.
- The fourteen transactions between the Applicant and Boona showed that there was inconsistency in the quality of the furnace oil purchased from Boona and the quality delivered to the Applicant's clients.
- In respect of some of the transactions, there was always excess furnace oil because the Applicant purchased more but delivered less to the Applicant's customers, and in other transactions the Applicant purchased less furnace oil from Boona but delivered more to the applicant's its clients.

- The documents presented by the Applicant were insufficient to prove that the transactions were completed and yet the Applicant used the tax invoices allegedly issued by Boona to claim VAT returns.
- The Respondent noted that some computations were wrong and that there was no contract between the Applicant and Boona Electrical and General Distributors as required under **Section 10(5) of the Contract Act.**
- **Section 23(2) of the Tax Procedure Code Act** provides that an additional administrative assessment may be made at any time, if fraud or any gross or willful neglect has been committed by or on behalf of a tax payer or new information has been discovered in relation to the tax payer for a tax period and in this case an investigation was carried out which revealed that Boona was non-existent.

The Tax Appeals Tribunal's Ruling

The Tribunal Ruled that:

- The duty of the Tribunal is not to determine whether the transactions between the Applicant and Boona actually took place but whether the Respondent was justified to deny the Applicant's claim for VAT.
- It is the duty of the Respondent to track the person making the taxable supply.
- The standard of proof in all civil cases is on the balance of probabilities and the burden of proof is on the Applicant to prove that these transactions are not fictitious. It then however shifts and rests after evidence is given on the party against whom judgment would be given if no further evidence is adduced.
- The evidence presented by the Applicant contained all the required information except that the Applicant did not show the place of business of the taxable person.
- The Tribunal agreed with the position in **Target Well Uganda Limited V Uganda Revenue Authority HCCS. NO. 751 OF 2015** in which the court held that it is not the duty of the taxpayer to ensure that the money paid by it as input tax is remitted to the taxpayer.
- It is the duty of the Respondent to track the person making the taxable supply.
- In this case the Respondent was unable to trace the place of business of Boona during its investigations and the Applicant did not adduce evidence to indicate that at one time Boona had premises on the said location. None of the directors or employees of Boona were called to testify on the transactions. The Applicant was silent on place of business of Boona.
- The said evidence raises a shadow of doubt in the mind of the Tribunal. The Tribunal was unable to tell whether Boona is a fictional company or if it had a physical existence and if so, whether the above transactions ever made.
- The Tribunal noted that this was because there was no evidence to show that Boona actually existed. In the absence of such evidence one cannot rule out fraud or fictitious transactions or invoice trading.
- Invoice trading involves companies being set up to enable one claim VAT input by issuing fictitious invoices. Where a statute requires one to give information or other particulars, the said information should be accurate to enable public authorities act on it. If the information is false or misleading, the Tribunal cannot turn a blind eye to it as this would be tantamount to condoning an illegality and perpetrating fraud.
- In most jurisdictions if not all, it is a criminal offence to give false informational to public officers. This may include issuing false documents.
- The Tribunal found that while the onus may be on the Respondent to ensure that VAT paid by taxpayers is remitted, taxpayers should facilitate that by giving correct information to it.
- **Section 18 of Tax Appeals Tribunal Act** places the burden on the taxpayer to prove that an assessment was wrong or the tax authority should have decided the matter differently.
- The Tribunal had already noted that the

standard of proof in civil matters is on a balance of probabilities. Where there is doubt on the application of a law, the tax-payer takes benefit of doubt because the Respondent is in a position to influence changes in the law.

- A balance of probabilities means that the Applicant has to prove its case over a 50% chance that it is true and if it is just 50%, the Applicant would not have discharged its burden.
- However where there is doubt on facts before the Tribunal, the Respondent takes the benefit of doubt because the burden of proof is placed on the Applicant.
- The Tribunal therefore held that in this case, there was still doubt as to the existence of Boona. The said doubt has not been cleared to the satisfaction of the Tribunal.
- Having looked at all the documents adduced by the Applicant, the Tribunal was not satisfied that the Applicant had proved on a balance of probability that their transactions with Boona were not fictitious.
- In respect of the additional statement, **Section 23(2) of the Tax Appeals Tribunal Act** provides that an additional administrative assessment may be made at any time, if fraud or any gross or willful neglect has been committed by or on behalf of a tax payer or new information has been discovered in relation to the tax payer for a tax period.
- Furthermore **Section 28 of the Tax Appeals Tribunal Act** places the burden on the Applicant to prove that the assessment was excessive or should not have been made. The Tribunal noted that the Applicant had not adduced any evidence challenging the additional assessment.

The Tribunal dismissed the application with costs to the Respondent and the Respondent's decisions to disallow the input tax credit claim and to issue additional VAT assessments worth UGX. 138.012,418 were upheld.

Claiming Input Credit; Fictitious Suppliers; Burden and Standard of Proof; missing Information on Tax Invoice.

Leds Uganda Limited v URA: TAT Application No. 3 of 2018.

On 14th May 2020, the Tax Appeals Tribunal delivered a ruling in respect of an application disallowing the Applicant's claim of input tax and issuance of VAT assessment by the Respondent.

Background

The Applicant is a company involved in the provision of transport services and claimed input tax credit for purchases for the period of April 2012 to July 2014. The Respondent rejected the claim and instead issued a VAT assessment. The Applicant had allegedly entered into a sub contract with two other companies to provide transport services for delivery of cement to Tororo Cement. The Applicant did not own trucks, and therefore it hired them from Dong Ming International Ltd and Honghai General Suppliers Ltd which had tax identification numbers. The Applicant sought to claim credit for VAT input for the services rendered by these two companies, which claim was rejected by the Respondent on the allegation that he Applicant was a fictitious trader involved in VAT fraud.

Applicant's Arguments

The Applicant submitted that:

- It adduced evidence to show that it sourced and received the services of Dong Ming Ltd and Honghai General Supplies Ltd and that the trucks used in transportation were in Uganda during the period in issue.
- That the fact that foreign trucks were used to deliver materials does not make the transactions invalid.
- The two companies were taxable persons as the Respondent registered them for VAT and could not thus be treated as missing trader.
- That the Respondent should be estopped from denying the existence of the two companies when it placed them on its web portal.
- The incompleteness of details in the invoice and use of foreign registered trucks does not vitiate the transactions.

Respondent's Arguments

The Respondent contended that the Applicant was running a VAT fraud scheme by using fictitious invoices from the two companies when in fact there were no actual supplies from them.

There was no subcontract and that the two companies were non-existent.

The invoices issued had missing particulars and investigations revealed that the transactions never took place.

The Tax Appeals Tribunal's Ruling

- The Tribunal found that the two companies that supplied trucks were non-existent in law as they were not duly incorporated and had presented certificates of incorporation belonging to other companies.
- It was noted that the Applicant could not have legally contracted with non-existent companies and any dealings between the Applicant and those companies were illegal.
- The Tax Identification Numbers were issued on the basis of forged certificates of incorporation, and that the transactions were deceitful as the said companies had no physical location nor known directors.
- The Tribunal further found that the vehicles were foreign and not licensed to be on the road or carry goods in Uganda and some of the vehicles did not belong to the said companies.
- The standard of proof in tax matters like civil matters is on a balance of probabilities. It is not proof beyond reasonable doubt nor is the tribunal required to find out the absolute truth.
- The Tribunal noted that it could not turn a blind eye to at the missing and false information in the as this would be tantamount to condoning an illegality and perpetrating fraud.
- The Tribunal found that the Applicant did not adduce any evidence that the VAT assessment was excessive. On a balance of probability, the Tribunal was not convinced that the supply of transport services being the subject of the claim took place or were genuine.
- The Application was dismissed with costs and the Applicant ordered to pay the assessed VAT.

Excise Duty;

Imposition of Excise Duty on Airtime:

MTN Uganda Ltd v Uganda Revenue Authority: TAT Application No. 8 of 2019

On 28th May, 2020, the Tax Appeals Tribunal delivered a ruling in which it clarified the point at which excise duty is charged on the provision of airtime.

Background

In 2009 the Applicant introduced a product known as mobile money which also sold airtime. The Applicant sells airtime at what the parties called a "discount" to dealers known as point of sale (sale price). The dealers then sell airtime to customers at a market rate which includes his or her commission (retail price), and the customers use airtime for making calls, data or SMS or text messages (point of usage).

The Respondent is authorized to collect excise duty from the Applicant, as such, the Respondent issued an assessment of UGX.24, 273,771,472 to the Applicant based on the point of usage which the latter objected to and insisted that the former uses a point of sale. In a consent judgment arising out of HCCS No. 938 of 2016 involving the same parties, it was agreed that the amount of excise duty on airtime be referred to the Tribunal for determination as to whether it is calculated at point of sale or point of usage.

Applicant's Arguments

The Applicant argued that:

- The amount the dealer pays for the airtime is what the law requires the Respondent to use to account for excise duty.
- The Applicant sells the airtime at a discount and therefore the discount or reduced consideration is the taxable value for both excise duty and VAT.
- The point at which the dealer purchases the airtime is the point of sale and this is the point the Tribunal should find as when excise duty should be paid.

Respondent's Arguments

The Respondent argued that:

- The law requires excise duty to be charged on the usage of time but not on point of sale.
- The the taxable value is the price paid or payable by the consumer of the airtime.

The Tax Appeals Tribunal's Ruling

- The Tribunal first clarified that a commission and a discount are not one and the same thing. When a commission is paid

to an agent, the value of the service is not reduced. The commission is factored in the price of the item or service.

- The Tribunal defined excise duty as a tax imposed on specified imported or locally manufactured goods and services.
- The Tribunal held that the imposition of excise duty on airtime is concerned with the usage of airtime.
- The Tribunal found that the consideration for taxable value is the total consideration paid and does not include reduced consideration as the Applicant had submitted.
- The Tribunal further found that the taxable value is the price paid by the customer excluding taxes but does not exclude commissions paid to agents. The tax treatment of public pay phones, landlines and cellular phones is the same.
- The Tribunal held that while excise duty is charged according to usage and not sale value, it should be collected when services are sold.
- The Tribunal concluded that the Act intended that excise duty should be paid according to what the parties know as usage of the services and not point of sale. The Application was dismissed with costs to the Respondent and the assessment upheld.

Tax Credit;

Use of Tax Credit to Offset Tax Liability; Applying for Tax Refund Before Offsetting

Red Chili Hideaway Limited v Uganda Revenue Authority: TAT Application No. 38 of 2018

On 25th May, 2020, the Tax Appeals Tribunal delivered a ruling in which it clarified the position of the law in respect to the taxpayer's use of tax credits to offset any outstanding tax liabilities and the duty of the Commissioner in that respect.

Background

The Applicant is a duly registered tax payer engaged in hotel business. It had withholding tax credit and provisional tax payment for the period 2012 to 2013 and other years. The Applicant filed income tax returns for the period 1st January to 31St December 2016, after which the Respondent audited the Applicant for the said period and issued a tax assessment and a penalty for nonpayment. The Applicant objected to the tax and the penalty contending that the Respondent could recover the taxes by offsetting from its withholding tax credit and provisional tax payment. The Respondent used the tax credit and provisional tax payments for the period 2015 to 2016 to reduce the Applicant's tax liability. The Respondent then requested the Applicant to apply for a refund of the credit for the period 2012 to 2013 so as to offset any further tax liability of 2016. The Applicant objected on the ground that it does not need to do so as it was not mandatory to do so.

Applicant's Arguments

- The Applicant argued that it is not stated anywhere in the law that a taxpayer has to apply for a refund before utilizing its tax credit. The intention of the law was never to give the Commissioner discretion to allow or to refuse a taxpayer to utilize its credit. The Applicant argued that it had not refused to pay tax since it had tax credits and could not be charged with penal interest.

Respondent's Arguments

- The Respondent contended that the Applicant ought to have filed its income tax return and attached withholding tax credit certificates showing the amount of withholding tax incurred by it during the year of income.
- The Respondent further contended that the Applicant was liable to pay penal interest since it failed to pay tax when assessments were issued to it.
- The Respondent argued that where a taxpayer has paid tax in excess of the tax liability, it is required to apply to the Commissioner for a refund.
- The Respondent further argued that the Applicant was out of time within which to apply for a refund.

The Tax Appeals Tribunal's Ruling

- The Tribunal held that the Applicant was entitled to use its withholding tax and provisional tax credit to offset its tax liability without first applying for tax refund.
- In reaching the above holding, the Tribunal reasoned that the Income Tax Act requires the Commissioner to make a refund if there is an overpayment after he or she has applied the excess in reduction of any tax due from the tax payer.
- Therefore the Commissioner cannot refund monies if there are other taxes due from the taxpayer. The Commissioner ought to have applied the excess tax of the Applicant to reduce the tax due from the taxpayer and if there is any balance, the Commissioner had to apply it to pay other taxes not in dispute or make provisional tax payments for the year of income in which a refund is made.
- The Tribunal noted that when the Commissioner is applying the excess amount withheld to paying taxes, he is not refunding.
- The Commissioner does not need a taxpayer to ask for a refund before it can offset any tax liabilities arising.
- The Tribunal found that the Respondent ought to have applied any excess payments, withholding and provisional tax to reduce the tax liabilities of the Applicant. Therefore no penalty would arise if the Respondent had applied the excess payments to meet the tax liabilities in time.
- One cannot impose a penalty on a debtor when the former has an option of offsetting the debt using other monies belonging to the debtor within its possession.
- The application was allowed with costs to the Applicant.

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