THE REPUBLIC OF UGANDA

IN THE MATTER OF THE TAX APPEALS TRIBUNAL

APPLICATION NO TAT 1/2011

WARID TELECOM LIMITED ………………………………………… APPLICANT

VERSUS

UGANDA REVENUE AUTHORITY……………………………..… RESPONDENT

RULING

This ruling is in respect of an application challenging penalty interest arising from a Value Added Tax (VAT) Act assessment of Shs 1,086,513/= issued against the applicant.

The agreed facts of the case are briefly: The applicant is a limited liability company incorporated in Uganda which deals in the provision of telecommunications services. The applicant applied for and obtained an investment licence on 10th November 2006. It also obtained an investment trader status on 20th April 2007.

The applicant imported services from Ericsson AB (a company based in Sweden) while still an investment trader. VAT on the imported services amounted to shs 1,086,179,019/=. Payment for the services was made in three installments. The first installment was made while the applicant was still under investment trader status, in December, 2007. The applicant did not declare output VAT on the first installment. The other two installments were paid and VAT accounted for normally, after the applicant had ceased to be an investment trader in January 2008.

The applicant ceased being an investment trader in January 2008. In December 2008, the applicant imported other services worth shs 6,922,557,032/=. The required VAT was declared and claimed in January, 2009.

The respondent carried out a customs post clearance audit of the applicant for the period January 2007 to December 2009. The respondent raised an assessment of VAT, on the applicant, on 23rd September, 2010 in the sum of shs 11,021,513,660/= in respect of services imported during the period January 2007 to December 2009. On 28th September 2010, the applicant objected to the assessment. The respondent made an objection decision on 14th October 2010 after confirming that the imported services of shs. 5,922,557,032/=, in December 2008, were duly accounted for. The respondent revised the tax position demanding Ushs 3,454,915,018/= made a principal tax of shs 2,207,617,743/= and interest for late payment was Shs 1,247,297,275/= due for payment on 15th October, 2010.

On 18th October 2010, after the due date for payment, the applicant applied for a private ruling on the interpretation and application of Regulation 5(5) of the VAT Regulations, to an investment trader. On 15th November 2010, the respondent ruled that the applicant being a VAT registered person was required to account for VAT on imported services from Ericsson AB and that accounting for VAT does not translate into making a taxable supply by an investment trader.

On 6th December 2010, the applicant requested the respondent for a review of the private ruling and specifically for guidance on the application of paragraphs 3, 4 and 5 and 14 (3) of the VAT Regulations. The respondent provided the guidance on 10th December 2010 and re-affirmed the position earlier given. On 13th December 2010, the applicant filed amended returns for the months of December 2007 and November 2009.
On 28th December 2010 the respondent rejected the applicant's amended returns.

At the scheduling conference the parties agreed on two issues:

1. Whether the interest charged is properly imposed
2. Whether there are any remedies available

Both parties agreed to file written submissions.

The applicant contended that Section 4 of the VAT Act imposes VAT on imported services by any person. Further Regulation Reg. 13(3) provides that; "Tax accounted for on imported services may be claimed at a credit under the provisions of Section 28 of the Act, provided the recipient of the services prepares a self billed tax invoice to account for tax due on the supply; the claim for credit is subject to the conditions specified in section 28 of the Act." The applicant contended that it was required to claim input tax in its return provided it had prepared self-billed invoices. However it did not do so because it would forfeit its investment trader status.

The applicant used that procedure for the two installments that were paid after it had ceased being an investment trader. The applicant admits that this was not done for the first payment made when it was still an investment trader. In essence this is the crux of the matter. The applicant states that its reason for not accounting for the VAT at the time was that, doing so, meant forfeiture of its investment trader status.

The applicant states that, if the applicant had duly declared the output tax during the respective months of December 2008 and November 2009, when it imported the services from Ericsson, it would have reversed the charge and thereby cancelled the output VAT on it, hence not tax would have been paid to the respondent by virtue of the reverse charge. In effect the principal tax would have been nil and not 2,707,617,743/= as indicated by the respondent. The applicant declared this output VAT in subsequent returns (i.e. August and September 2010) before the assessment by the respondent was finalized. The applicant contends that the issue of non-tax declaration does not arise as the tax due was duly accounted for by taxpayer el-beit in the wrong periods.

The applicant submits that a taxpayer is not required to claim input tax due to them during the same period that the input tax arises and this applies to importers of services who are required to reverse the charge. The applicant having imported services on those imports in December 2008 and November 2009 should have made a claim for their import tax on those imports in the same months. However not making the claim for input tax is not illegal and the claim can always be made in subsequent periods by the taxpayer.

The applicant sought a private ruling from the respondent on the application of Regulation 5(5) of the VAT regulations on its business activities. Regulation 5(5) reads: a person shall cease to be an investment trader immediately after making a taxable supply in the course of business". The respondent replied on the 15th November 2010 stating that Regulation 5(4) required that applicant as an investment trader to abide by all duties and obligations of a registered person including the keeping of proper books of accounts and the filing of regular returns. The respondent also stated that an omission to declare the VAT due was erroneous and an offence under the VAT Act.

The applicant further sought advice from the respondent on 6 December 2010 as regards the application of Regulations 6 (3), (4), (5) and 14(3) of the VAT Regulations. On the 10th December 2010 the respondent stated that the applicant was required to account for the VAT on imported services from Ericsson AB and reverse the charge through a self-billed invoice.

On receiving the guidance and pursuant to section 32(4) and (5) the applicant applied to amend its returns to include the amounts not declared in the first installment of December 2007. Section 32(4) and (5) of the VAT Act read

> *"(4) Where a person is not satisfied with a return lodged by the person under this Act, that person may apply to the Commissioner General to make any addition or alteration to the return.*
>
> *(5) An application under subsection (4) shall be in writing and specify in detail the grounds upon which it is made and shall be made within three years after the date on which the return was lodged by the person."*

The returns sought to be amended were those of December 2007 and November 2009. The reverse charge was to be applied. The amendments would result in no principal tax being due from the applicant in respect of services imported by the applicant.

The applicant contended that if the amendments were taken into consideration no principal tax would be due from it. The applicant wished to point out that it was within the three year limit provided under S. 32(3) for amendment of returns. Section 32(1)(b) and (4), in both sub-sections, does not close the door to the taxpayer to further correct a wrong time of three years has not expired.

The applicant also submitted that the provisions of the VAT Act do not state that if an error in a return is discovered by the Commissioner General then the taxpayer is barred from amending the returns. The applicant submitted the law is silent on whether a taxpayer can or cannot amend where the error in the returns is pointed out by the Commissioner General. In cases where the law is ambiguous, the interpretation should favor the taxpayer – See *Cape Brandy Syndicate V Inland Revenue Commissioners* (1921) 1 KB 64 which expounds on the principle that if the words are ambiguous and open to two interpretations, the benefit of interpretation is given to the subject.

A further defence by the applicant is that, in order to apply for interest on tax due there must be a principal tax outstanding. Indeed the section 65(3) relied on by the respondent reads:-

> *"A person who fails to pay tax imposed under this Act on or before the due date is liable for a penal tax on the unpaid tax at a rate specified in the Fifth Schedule for the tax which is outstanding."*

Since the reverse charge eliminates tax due on the imported service the tax due is "nil". Accordingly there cannot be a section 65 penalty. The final demand of shs 1,247,297,275/= by the respondent which is a section 65(3) penalty is therefore wrongly imposed.

Finally the applicant submitted that the respondent has not lost any tax because the reverse charge would have taken care of the principal tax. The taxpayer's amended returns only seek to aid the taxpayer take advantage of regulation 14 on reverse charge and self billed invoices. The applicant being an investment trader at the first importation was entitled to claim input tax deduction in respect of the services imported as provided by regulation 6(3). In the eyes of the applicant the respondent did not show justification for refusing the amended returns submitted by the applicant. The applicant makes reference to the amendments in the Finance Act 2011. It does not specify which amendments and in any case, it is not the law on which this ruling is based.

The respondent contended that S. 4(c) of the VAT Act provides for the imposition of Value Added Tax. Under S. 18(8) of the VAT Act a supply by a foreign person for consideration as part of the person's business activities is treated as a taxable supply. The applicant made supplies in January 2008 in accordance with Regulations 5(4) and 13(2) of the VAT Regulations and should have declared output tax on imported services in the month of receipt of the services through filing of regular returns.

Section 34(1)(c) of the VAT Act provides that the tax payable under the Act is due and payable on the date the taxable transaction occurs as is determined under the Act. As such the respondent correctly assessed the tax payable by the applicant from the date the imported services were received.

Regulation 13 of the VAT Regulations makes provisions for accounting and calculation of VAT tax when there is a supply of services form a foreign supplier. The respondent contends that the applicant made taxable supplies in December 2007 and November 2009 of 1.086,179,091 and 1,121,438,652/ respectively. VAT was due and payable by 15.1.2008 and 15.12.2009 but tax was never paid within the stipulated time.

The taxpayer then amended the returns of December 2007 and November 2009 on the 13th December 2010 which action was ruled by the respondent as unnecessary. The rationale behind the decision was that the Commissioner General's action under S. 32 (1)(b) of the VAT Act ruled the corrective action sought by the taxpayer under S. 32 (4) of the VAT Act.

S.65(3) of the VAT Act provides that a person who fails to pay tax imposed under the Act on or before the due date is liable to pay a penal tax on the unpaid tax. Therefore the interest of 1,247,297,275 was correctly charged. The respondent cited the case of *Kasampa Kalifani V URA* HCCS 579 of 2007 where the court stated that if a person failed to pay tax imposed under the Statute on or before the due date, he was liable to pay a penal tax at the rate specified in the law.

In reply to the respondent's submissions the applicant challenges the respondent's citing of Kasampa Kalifani V URA HCCS No. 579 of 2007 and Uganda Projects Implementation and Management Centre v Uganda Revenue Authority, Constitutional Petition No. 18 of 2007. The applicant argues that these cases are irrelevant because there is not principal tax due by reason of the reverse charge. The service delivery by Government was therefore not affected by the non-declaration by the applicant since declaration would in effect, have resulted in zero tax payable. There is no absurdity in the law.

According to the applicant absurdity would arise if the taxpayer was made to pay interest where the principal tax is zero. The respondent should not be allowed to collect tax where none is due.

The applicant asserts that VAT returns are self-assessment returns. The VAT Act allows the taxpayer to amend the return, to correct any errors, any time and severally where necessary, within three years from the date of filing [section 32(4)]. The assessment issued by the Commissioner General under section 32(4) does not prevent the taxpayer from taking advantage of the right provided under section 32(4).

Having read the submissions of both parties this is the ruling of the Tribunal

The Tribunal notes that the applicant was an investment Trader. Regulation 5 (5) of the VAT regulations is to the effect that; "A person shall cease to be an investment trader immediately after making a taxable supply in the course of business." The Income Tax Act defines a taxable supply as 'a supply of goods or services, other than an exempt supply, made by a taxable person for consideration as part of his business activities". In order not to lose it status did not declare output tax on its first installment. It is a question of one having his cake and eating it. As a result of the said omission the applicant was required to pay a heavier tax burden.

The respondent proceeded under S. 65(3) of the VAT Act which provides that a person who fails to pay tax imposed under this Act on or before the due date is liable to pay a penal tax on the unpaid tax as a rate specified in the Fifth Schedule specified in the for the tax which is outstanding. The respondent imposed a tax liability which was eventually reduced to Ushs 3,454,915,018/= made of a principal tax of shs 2,207,617,743/= and interest for late payment was Shs 1,247,297,275/=.

The application before Tribunal raises a number of procedural issues. It is a question of whether the cart comes before or after the horse. Under S. 18 of the Tax Appeals Tribunal Act states that the in a proceeding before a tribunal for a review of a taxation decision, that applicant has the burden of proving that

> "(a) where the taxation decision is an objection decision in relation to an assessment, the assessment is excessive; or
>
> (b) in any other case, the taxation decision should not have been made or should have been made differently"

The question is whether the applicant has discharged the said burden.

First and foremost the Tribunal wishes to note that the applicant made an objection to the respondent on the 28th September 2010 challenging an assessment of Shs. 11.021,513,660. The respondent gave an objection decision on 14th October 2010 the tax was revised to Shs. 3,454,915/= comprised of the principal tax Shs. 3,454,915,018 and interest of late payment of Shs. 1,247,297,295/=. The applicant did not object to the second assessment in the objection decision. The applicant filed this matter on the 11th January 2011 which maybe outside the prescribed time in which he ought to have filed an application to the Tribunal. Once an illegality comes to the attention of the Tribunal it will not ignore it.

Once an objection decision is not challenged within the prescribed time it crystallizes. Instead the applicant applied for a private ruling. So it is not clear whether the applicant is challenging the private ruling or the objection decision.

Furthermore in the objection decision of 14th October 2010 the respondent revised the tax position to Shs. 3,454,915/= comprising of principal tax of Shs. 2,207,617,743/= and interest of Shs. 1,247,297,275/=. The interest or penalty arose from the principal tax. The issues raised and the submissions of the applicant show that it is challenging the interest and not the principal tax. The applicant ought to have first challenged the principal tax in order to challenge the interest.

Counsel for the applicant told the Tribunal that the principle tax ought to have been nil in its submission. As a counsel he should know better. A counsel can not testify in his submission. The applicant ought to have adduced evidence to that effect. The audited reports and returns ought to have been tendered in court by competent witnesses who ought to have clarified on the matter to the Tribunal. From reading the submission the Tribunal cannot hold that the principal is nil when in the agreed facts it was stated to be Shs. 2,207,617,743/=.

The applicant referred to amended assessments in its submission. However if one had the time to peruse the list of documents agreed during the scheduling the amended assessment were not listed. So one wonders how they were smuggled into evidence. The said evidence was from the bar and not from the court. S. 32(4) and (5) of the VAT Act provides that

> "(4) Where a person is not satisfied with a return lodged by that person under this Act, that person may apply to the Commissioner General to make any addition or alteration to the return.
>
> "(5) An application under subsection (4) shall be in writing and specify in details the grounds upon which it is made and shall be made within three years after the date on which the return was lodged by the person."

In order for a party to make an addition or an alteration to a return, there has first all to be a return. Secondly they has to be an application within three years after the date on which the return was lodged by the person. In the agreed facts the applicant states that it did not declare output tax because it feared to lose its investment trader status. Therefore the applicant could not have made an alteration to a return that was not in existence. Secondly the Section requires the applicant to apply to the Commissioner General. It is not clear whether the applicant made an amended assessment without first applying to the

Commissioner General. Did the applicant apply to the Commissioner General? When was the application made? Did the Commissioner General accept the application? In the event the Commissioner General rejected the application was the applicant aggrieved? Is this application about the refusal of the Commissioner General to allow the amended assessment, or about the private ruling or the objection decision? These are questions the Tribunal cannot answer because there is no evidence to that effect. There are so many facts and issues of law so muddled up that the Tribunal does not see the direction this application is taking.

The Tribunal therefore hold that the applicant has not discharged the burden to prove to its satisfaction that the interest of shs. 1,247,297,275/= was proper. This application is dismissed with costs.

Dated at Kampala this ………………….. day of ………………..2011.

Asa Mugenyi	George Mugerwa	Pius Bahemuka
Chairman	**Member**	**Member.**