

EAST AFRICAN INVESTMENT LIMITED v UGANDA REVENUE AUTHORITY
APPLICATION No. 06 OF 2019.

TAX APPEALS TRIBUNAL

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

7th September 2020

Input tax credit- supplies made prior to VAT registration

The applicant is a limited company that deals in construction and was registered for VAT on 1st September 2013. Before September 2013 to August 2014 different persons purportedly provided goods and services to the applicant. The applicant claimed Shs. 485,444,050 as input tax for the goods and services provided. Some claims were rejected by the respondent on the ground that the applicant was not, yet VAT registered. Others were rejected on ground that the suppliers did not declare VAT.

RULING

This is a ruling in respect of the respondent's decision not to allow the applicant's Value Added Tax (VAT), input credit tax of Shs. 485,444,050 on the grounds that the services provided were not supplies of goods, some supplies were made prior to VAT registration and for others suppliers did not declare VAT.

The applicant is a limited company that deals in construction and was registered for VAT on 1st September 2013. Before September 2013 to August 2014 different persons purportedly provided goods and services to the applicant. The applicant claimed Shs. 485,444,050 as input tax for the goods and services provided. Some claims were rejected by the respondent on the ground that the applicant was not, yet VAT registered. Others were rejected on ground that the suppliers did not declare VAT.

The following issues were set down for determination.

1. Whether the respondent was justified in rejecting the applicant's claim for VAT input?
2. What remedies are available?

The applicant was represented by Mr. Cephas Birungyi, Ms. Belinda Nakiganda and Mr. Oscar Kamusiime while the respondent by Mr. Stuart Aheebwa and Ms. Patricia Ndagire.

The dispute between the parties revolves around the provision of services to the applicant before it was registered for VAT. The respondent also contends that the suppliers of the services did not declare VAT and there was a mixed supply of goods and services.

The applicant called Mr. Francis Ssemaato, its accountant, who testified that it deals in rental buildings. The applicant was registered for VAT on 1st September 2013. In August 2014 it applied for a VAT refund to the respondent of Shs.1, 215,782,399. An audit was conducted on the applicant to verify the authenticity of the claim and the respondent only allowed Shs.729, 296,530 and disallowed Shs. 485,444,050 on grounds that the supplies were made prior the VAT registration and the respective suppliers did not declare VAT in their returns.

The respondent's witness, Ms. Alice Komuhangi (RW1), an auditor, testified that the applicant filed for a VAT refund for the period September 2013 to August 2014. The respondent carried out an audit on the applicant which established that VAT of Shs. 479, 641,764 was incurred when the applicant was not registered for VAT. She further testified that the audit also established that VAT Shs. 5,802,286 was not due because suppliers had not declared it in their returns. Out of Shs. 1,215,782,399 the applicant applied for, the respondent allowed only Shs.729, 296,530 as input VAT and rejected a claim for VAT of Shs. 485,444,050.

The applicant submitted that the respondent was unjustified in rejecting its claim for VAT input credit. The applicant argued that it is entitled to input VAT credit since taxable

supplies were made and money was paid to suppliers. The applicant argued that S. 28(3)(a) of the VAT Act provides that a credit is allowed to a taxable person on becoming registered in respect of all taxable supplies of goods including capital assets made to the person prior to the person becoming registered if the supply or import is for use in business of the taxable person provided the goods are on hand at the date of registration and provided that the supply or import occurred not more than six months prior to the date of registration. The applicant cited **East African Property Holding v Uganda Revenue Authority** HCCS No. 247 of 2013 where court held that a credit is allowed to a taxable supply of a building through its construction even if it was prior to the taxpayer becoming eligible by registration if the credit was obtained for commercial purposes.

The applicant also submitted that it is entitled to input tax credit arising from construction of a workshop and an office block because it constituted a supply of goods within the meaning of S. 28(3) of the VAT Act. The applicant cited **Hackney Limited v Uganda Revenue Authority** HCCA No.27 of 2017 where the High Court held that the appellant supplied services to warehouses, and it was entitled to input VAT.

The applicant argued that it is the respondent's duty to ensure that suppliers remit the VAT they collect and not the taxpayer. The applicant argued that Sections 28 and 42 of the VAT Act allow credit on VAT made by a taxable person during a tax period and does not depend on it being declared by the supplier. The applicant cited **Target Well Uganda Limited v Uganda Revenue Authority** HCCS No.751 of 2015 which it argued was on all fours with the current case.

In reply, the respondent argued that it was justified in rejecting the applicant's claim for VAT input of Shs. 485,444,050 on the ground that construction work and consultancy services are not goods within the meaning of S. 28 of the VAT Act. The respondent contended that the heading of the invoices and the description of the supplies shows that the suppliers were providing services and not goods to the applicant. The respondent cited S. 10(1) of the VAT Act which provides, a supply of goods means any

arrangement under which the owner of the goods parts or will part with possession of the goods, including an agreement of sale and purchase. The respondent argued that the applicant never received any goods and the contractors never parted with any to constitute a supply of goods within the meaning of S. 28(3)(a) of the VAT Act. The respondent argued that construction is a service and not a good as alleged by the applicant and therefore S. 28(3) of the VAT does not apply to the applicant. The respondent cited **Hackney Limited v Uganda Revenue Authority** HCCA No.27 of 2017; where the court held that based on all invoices, apart from one, the supply of construction work/labour was a supply of services. The respondent also cited S. 11 of the VAT Act which provides that except as otherwise provided under this Act, a supply of services means any supply which is not a supply of goods or money, including - (a) the performance of services for another person; (b) the making available of any facility or advantage; or (c) the toleration of any situation or the refraining from the doing of any activity. The respondent argued that goods are defined in S.1 of the Act to include all kinds of movable and immovable property but not money

The respondent also argued that some invoices were issued between March and August 2013 prior to registration for VAT of the applicant. The respondent contended that the construction and delivery of the houses ought to have been done within six months prior to VAT registration.

The respondent further argued that some of the applicant's suppliers did not declare input tax on the supplies made to the applicant. The respondent cited **Red Concepts Ltd v Uganda Revenue Authority** TAT Application 36 of 2018 and contended that the invoices presented by the applicant were full of contradictions, false and misleading. The respondent invited the tribunal considering the falsehoods in the invoices to dismiss the applicant's claim.

In rejoinder, the applicant argued that S. 28(3) of the VAT Act does not envisage that construction and delivery should be commenced and completed in six months prior to

the date of registration but rather limits the claim to taxable supplies of goods including capital assets made to a taxable person six months prior to the date of registration.

The applicant cited **Enviroserv (U) Ltd v Uganda Revenue Authority** TAT 24 of 2017 which relied on **Target Well Uganda Limited v Uganda Revenue Authority (supra)** to hold that it is not a duty of the taxpayer to follow up the suppliers to declare input VAT. The applicant submitted that it availed the respondent invoices, receipts and bank statements in a letter dated 18th August 2014 and AW1 testified that invoices were paid.

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

The applicant, a company engaged in construction, was registered for VAT on 1st September 2013. The applicant requested for input tax of Shs. 1,215,782,397 for the months of September 2013 and August 2014. The respondent allowed Shs. 725,787,561 as input tax. A refund of Shs. 485,444,050 as input tax was rejected by the respondent on grounds that the applicant was not VAT registered at the time of the provision of some of the goods and services and that other suppliers did not declare the said VAT in their returns. The respondent also contended that the supplies claimed for input VAT were not goods but services.

To address the issue whether the applicant is entitled to input tax we must determine when the entitlement to a VAT credit input arises. A taxpayer is entitled to VAT input after being issued with a certificate of registration. S. 28(3) of the VAT Act reads:

“A credit is allowed to a taxable person on becoming registered for input tax paid or payable in respect of –

- (a) all taxable supplies of goods, including capital assets, made to the person prior to the person becoming registered; or
- (b) all imports of goods, including capital assets, made by the person prior to becoming registered,

Where the supply or import was for use in the business of the taxable person, provided the goods are on hand at the date of registration and provided that the supply or import occurred not more than six months prior to the date of registration.”

A taxable person is defined under S. 6 of the VAT Act to mean a person registered under S. 7 and is a taxable person from the time registration takes effect. The Certificate of VAT registration, exhibit A3 shows that the applicant’s effective date of VAT registration is 1st September 2013. Therefore, the applicant was a taxable person effective from that date.

However, there is a difference between when a person is a taxable person, and when a person is entitled to input tax. S. 28(3) of the VAT Act shows that a taxable person is entitled to input tax in two situations. The first one is: a person is entitled to all taxable supplies of goods made prior to a person becoming registered. The second situation deals with imports of goods made by a person prior to becoming registered. However, in both situations, the supply or import should be for the use in the business of the taxable person, the goods should be hand at the date of registration and the supply or import of goods occurred not more than six months prior to the date of registration. Therefore, the applicant should be entitled to input tax for all taxable supplies of goods but not services made 6 months prior to becoming registered.

The respondent contended that it was justified in rejecting the applicant’s claim for VAT input of Shs. 485,444,050 on ground that construction work and consultancy services are not goods within the meaning of S. 28 of the VAT Act. S. 1(h) of the VAT Act defines goods to include all kinds of movable and immovable property, thermal and electric energy, heating, gas, refrigeration, air conditioning and water but does not include money. S. 1(t) defines services as anything other than goods or money. In order to understand whether the supply the applicant was making was one of goods or services one has to look at the contract between it and Concrete Construction (U) Ltd. It was a contract to construct a workshop, office park and office block. Clause 1(i) of the contract provided that the contractor was to complete work shown in the contract drawings and described in the contract bill. Clause 6 provided that all materials, goods and

workmanship was to be procured in the kinds and standards described in the contract bills. Clause 6(2) provided that the contractor upon request of the architect shall furnish vouchers to prove that the materials and goods shall comply with clause 6(1). Therefore the perusal of the contract between the applicant and Concrete Construction Limited shows that it was a supply of both goods and services.

S. 12 of the VAT Act provides that a supply of services incidental to the supply of goods is part of the supply of goods. In **Hackney Limited v Uganda Revenue Authority** Civil Appeal 27 of 2017 the court noted that **Black's Law Dictionary** 7th Edition p. 765 defines "incidental" to mean subordinate to something of greater importance, having a minor role. The court applying the above definition stated that "it's clear that the supply of services (construction work/labour) would not be necessary if there was no supply of goods (the building materials) in order to come up with the 9 warehouses." The Court concluded that "it shows that the supply of construction of work/labour was incidental to the supply of the building materials which include soils and this in my opinion is what makes the whole supply a supply of goods". Therefore, while the provision of legal services in the incorporation of a construction company may not be incidental to the supply of a building the provision of services by carpenters, masons, engineers, architects may be incidental. The applicant obtained suppliers who provided services to enable it to construct a workshop, office park and office block which can be considered as being incidental to and are therefore supplies of goods. The tribunal will award the applicant input VAT credit it incurred in respect of the invoices that provided a mixed supply of goods and services which was used in the construction only.

In **East African Property Holding (U) limited v Uganda Revenue Authority** Civil Suit 247 of 2013 it was held that the plaintiff was entitled to seek credit for the activity it carried out prior to registration where credit was claimable. Therefore, the respondent ought to have perused the invoices for input tax before the VAT Registration and allowed those in respect of supplies of goods and services incidental to the supply of goods.

The respondent also contended that the suppliers did not declare the VAT the applicant paid. The amounts claimed by the applicant were not reflected in the returns of the suppliers. The applicant contended that it was not its responsibility to ensure that its suppliers properly account for their VAT returns. In **Target Well Control Uganda Limited V Commissioner General, Uganda Revenue Authority** HCCS 751 of 2015 His Lordship David Wangutusi said;

“One of the arguments of the Defendant was that the Plaintiff should have exercised due diligence to find out whether Neptune was VAT registered and also followed up to ascertain whether she had remitted to the Defendant the tax that was collected.

With due respect I do not agree with that argument for the simple reason that it does not make sense to require a taxable person to follow up a payment and find out whether the agent has remitted the tax so collected from him or her.

This would be asking the Plaintiff to do a very difficult task because first of all he has no access to the agent’s returns and books of accounts. Secondly, it is the Defendant who has access to the books of businessmen in the country. They are the ones who find out returns that are recklessly made or made intentionally to deceive...

The tax laws make it clear that collection of tax is the sole responsibility of the Defendant. Where a taxable person claimed for VAT, it was the Defendant’s duty to take on the party that received the money from the person. It as I said before could never be the duty of the payer to ensure that the money was remitted. Even where the Plaintiff did not do due diligence, the Defendant was obliged to demand it from Neptune and the latter was obliged to hand over the tax to Uganda Revenue Authority.”

In **Enviroserv (U) Ltd v Uganda Revenues Authority TAT No. 24 of 2017,**

“The tribunal observed that the applicant presented evidence of invoices that were issued and VAT was paid to the suppliers for the respondent to pay input VAT. It is not a duty of the taxpayer to follow up with the suppliers to declare input. Taking all the above decision into mind, the entire applicant is required is to present the invoices and payments. There is no evidence from the respondent disputing the presence of the suppliers”.

Therefore, the respondent ought to have considered the input tax claimed by the applicant which were not declared by the suppliers. The argument by the respondent that the suppliers had not declared the same in their returns in order to refund the applicant is not tenable. The applicant has no duty to make a follow-up on the suppliers.

Having discussed whether the applicant is entitled to input tax, the Tribunal will peruse the invoices tendered in as exhibits. It will consider the date of VAT registration of 1st September 2013. The table below show that what the applicant was supplied and therefore what input tax it was entitled to:

TABLE A.

Item No.	Invoice No.	Exhibit No.	Date	Supplier	Description of goods/services	VAT paid for goods	VAT paid for services
1	892	A2(i)	2.3.13	Concrete Construction Ltd.	Construction work	54,730,292	
2.	894	A2(ii)	9.4.13	Concrete Construction Ltd.	Construction work	77,406,422	
3.	895	A2(iii)	9.4.13	Concrete Construction Ltd.	Construction work	7,160,096	
4.	896	A2(iv)	18.4.13	Concrete Construction Ltd.	Construction work	40,573,879	
5.	898	A2(v)	17.3.13	Concrete Construction Ltd.	Construction work	118,927,588	
6.	900	A2(vi)	12.3.13	Concrete Construction Ltd.	Construction work	19,977,011	
7.	901	A2(vi)	31.7.13	Concrete Construction Ltd.	Construction work	70,173,475	
8.	12367		6.8.13	A & S Electronic Ltd.	Security systems	1,330,560	
9.	902	A2(vii)	21.8.13	Concrete Construction Ltd.	Construction work	88,994,100	
10.	3000440	A10	5.3.13	Equatorial Secretaries and Registrars	Secretarial services		
11	1000806	A11	21.6.13	PKF Uganda	Professional fees		
12.	2000955	A12	23.5.13	PKF Taxation Services Ltd.	Professional fees		
13.	2001017	A13	20.6.13	PKF Taxation Services Ltd.	Professional fees		
14	200110	A14	6.8.13	PKF Taxation Services Ltd	Professional fees		
15.	3042	A15	11.10.13	S.M. Cathan	Valuation fees		1,260,000
16.	5956	A16	17.10.13	Standard Signs Uganda Ltd.	Door labelling		89,460
17.	5999	A17	29.10.13	Standard Signs Uganda Ltd.	Door labelling		6,864
18.	KMT/025	A18(i)	9.9.13	KMT Advocates	Legal fees		54,000
19.	KMT/030	A18(ii)	16.10.13	KMT Advocates	Legal fees		90,000
20.	12151	A19	31.10.14	A & S Electronics Ltd.	Electric fence		
21.	2013/18	A20	10.3.14	Peatfield And Bodgener	Architectural work		890,635
22.	213233	A21	2.4.14	Bin It Services Ltd.	Garbage collection		5,186
23.	KMT/019	A22	2.5.14	KMT Advocates	Legal fees		

24.	KMT/020	A22	23.5.20	KMT Advocates	Legal fees		
25.	2014417	A23	24.6.20	Infinity Computers and Communications Co. Ltd.	Internet		56,441
26.	215146	A24	1.5.14	Bin It Services Ltd.	Garbage collection		5,186
27.	217049	A24	1.6.14	Bin It Services Ltd.	Garbage collection		5,186
28.	219093	A24	1.7.14	Bin It Services Ltd	Garbage collection		5,186
29.	219093		31.5.14	Knight Frank Uganda Ltd.	Letting fees		86,584
30.	KMT/051		29.7.14	KMT Advocates	Legal fees		
31.	KMT/052		29.7.14	KMT Advocates	Legal fees		
32.	KMT/054		8.8.14	KMT Advocates	Legal fees		
	TOTAL					479,273,423	2,554,728

The applicant would be entitled to VAT input for the supplies of all goods 6 months prior to the date of registration which is 1st March 2013. The effective date of registration of the applicant was 1st September 2013 meaning the invoices for supplies of good from March 2013 can be allowed. The amount of VAT input for good supplied is Shs. 479,273,423. The applicant is entitled to VAT input for the supplies of services after registration. Item 10 to 14 were for services before VAT registration and are excluded. For items 20, 23, 30, 31 and 32 no VAT invoices were adduced in evidence. The VAT input for the services excluding the aforesaid would be Shs. 2,554,728. In total the applicant would be entitled to VAT input of Shs. 481,828,151. The applicant had applied for interest from 25.4.2014. It does not indicate why interest should run from that date.

In conclusion, the Tribunal orders that:

1. The applicant is entitled to input VAT of Shs. 481,828,151.
2. The applicant is awarded statutory interest from the date of this ruling till payment in full.
3. The applicant is awarded costs of this application.

Dated at Kampala this 7th day of September 2020

DR. ASA MUGENYI
CHAIRMAN

MR. GEORGE MUGERWA
MEMBER

MR. SIRAJI ALI
MEMBER