THE REPUBLIC OF UGANDA

IN THE TAX APPEALS TRIBUNAL AT KAMPALA

APPLICATION NO. 44 OF 2018

AFRICA BROADCASTING (U) LIMITED :::::::::::::::::::::::::::::::::::: APPLICANT

VERSUS

UGANDA REVENUE AUTHORITY :::::::::::::::::::::::::::::::::::: RESPONDENT

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

RULING

This is a ruling in respect of the respondent's revised Value Added Tax (VAT) assessment of Shs. 1,233,307,049 issued on the applicant arising from the tax treatment of media on imported disks.

The applicant provides broadcasting services under the business name of 'NTV' and airs programs for both local and foreign film producers. The applicant imported programs on hard drives or dvds. The applicant's agent sought clarification from the respondent on the tax status of the hard disks and a response was provided on the information provided. The applicant paid taxes on a self-assessment, but the respondent issued a revised assessment of Shs. 1,233,307,049.

The following issues were set down for determination.

1. Whether the items the applicant imports are goods or services?
2. Whether the applicant is liable to pay the tax assessed of Shs. 1,233,307,049?
3. What remedies are available?

The applicant was represented by Mr. Cephas Birungyi and Ms. Belinda Nakiganda while the respondent by Ms. Patricia Ndagire, Ms. Barbara Nahone and Ms. Tracey Basima

The dispute between the parties revolves around the tax treatment of media on imported hard drives. While the respondent contends that it is a provision of services the applicant contends it is a provision of goods.

The applicant called Mr. Daniel Nankunda, its engineer, who testified that broadcasting is getting content, editing and transmitting it to viewers. The applicant broadcasts local and foreign programs. The foreign programs come on a hard disk in a DV1 (Digital Video One) or MPEG1 (Motion Picture Expert Group One) format. The content is extracted and converted to MPEG2 and then installed into a digital server system. It is previewed, edited, and transmitted. Transmission is the process of sending signal from a system to different distributors. These distributors include DSTV, Signet, Azam, Zuku, GOTV and StarTimes. The applicant pays the distributors. The applicant benefits as its signal is distributed to many viewers. The applicant owns a Television station.

The applicant's second witness, Ms. Sarah Namawa, an accountant, testified that the dispute between the parties is about the tax treatment of imports of hard drives. The applicant contends that what it imported are goods and it paid the actual custom and domestic taxes. The applicant declared the hard drive but not the license agreements giving it the right to broadcast. The applicant declared the invoices of the hard drives.

The respondent's first witness, Mr. Solomon Musoke, a Supervisor in its Domestic Tax Department testified that it carried out a VAT compliance audit on the applicant. The contracts between the applicant and foreign suppliers were reviewed. They showed that the applicant obtained a right to air programs in Uganda. They were several modes of delivery such as hard disks. The applicant could also download content through the internet. The audit revealed that the applicant did not remit VAT on the purported imported services. The respondent issued an additional assessment against the applicant.

The respondent's second witness, Mr. Ephraim Mugenyi Mulindwa testified that the applicant broadcasts under the business name 'NTV'. It airs both local and foreign film programs. The respondent reviewed the applicant's VAT declarations and licence agreements which showed that the applicant was granted the right to air various programs by foreign licensors. The said programs were imported on hard drives. The 'Asycuda' data on imports showed that the applicant had made no declarations of the license agreements. The respondent deemed the import to be one of services which should be subject to VAT.

The applicant submitted that VAT is imposed by S. 4 of the VAT Act. S. 2(h) of the VAT Act defines 'goods' as "all kinds of moveable and immoveable property but does not include money". S. 2(t) defines 'service' as "anything that is not goods or money". The applicant argued that the programs imported fall within the meaning of property hence are goods under the Act. The word 'property' is not defined under the Act. However, **Black's Law Dictionary** 8th edition defines it as "the right to possess, use and enjoy a determinable thing, any external thing over which the rights of possession, use and enjoyment are exercised."

The applicant submitted that it declared the goods on importation and paid the required duty. It contended that according to Sections 5 and 17 of the VAT Act, the tax payable on import of goods is paid on the date the goods are brought into Uganda. S. 1(K) of the VAT Act defines an importer "in relation to an import of goods, includes the person who owns the goods, or any other person for the time being possessed of or a beneficiary interested in the goods." The applicant argued that its imported goods fell under HS. Code 8471.60.00 of the East African Community Customs External Tariff (EAC-ET) which covers input or output units, whether storage units in the same housing having data.

The applicant argued that the respondent's decision basing on the licence agreement to consider the right to broadcast as a service was not tenable. Under clause 12 of the licence agreement, the licensor sent developed physical copies of the program which are used by the applicant to provide a service. The transaction of importation of goods is different from that of broadcasting. It argued that one can import goods but not broadcast but is still liable to pay taxes. The applicant submitted that the imported hard disks have content which is made usable for broadcast. It contended that a hard disk containing recorded materials of television programs qualifies as an import of a good. The applicant also submitted that the Tribunal should take judicial notice of goods that have inbuilt programs such as phones, computers etc. The applicant contended that at no time are these in-built programs liable to VAT.

In reply, the respondent submitted that the applicant purchases rights/ licenses from foreign producers such as Telemundo International which give it the exclusive rights to broadcast foreign films in Uganda. The respondent contended that the grant of a right to broadcast foreign films in

Uganda constitutes a taxable supply of an imported service under the VAT Act and therefore the applicant is liable to pay VAT. The respondent contended that S. 4 (c) of the VAT Act provides for VAT on the supply of imported services, other than an exempt service. S. 5 provides that a person is liable to pay tax in case of a supply of imported services. Regulation 13(1) of the VAT Regulations stipulates a person who receives imported services other than an exempt service shall account for the tax due on the supply. The respondent contended that S. 1(t) of the VAT Act defines services as "anything that is not goods or money." The respondent argued that the grant of a right/licence to broadcast foreign films in Uganda is neither a good nor money but a service. The respondent cited **Black's Law Dictionary** 8th edition, p. 937 which defines a licence as permission revocable to commit some act that would otherwise be unlawful. The respondent contended that S. 11(1)(b) defined a supply of service to include the making available of any facility of advantage. The respondent argued that the licence was the availing of an advantage. The respondent also cited Clause 2 of the licence where Telemundo grants the licensee limited rights in the programs.

The respondent argued that the grant of the right to the applicant to use the copyright in foreign films is therefore a supply of services under S. 16(2)(e) of the VAT Act. The said Section provides that a transfer, assignment or grant of a right to use a copyright, patent, trademark, or similar right in Uganda is a supply of services. The respondent concluded that the grant of the right to use a copyright in films is a service under S. 16(2).

The respondent further contended that S. 1(j) of the VAT Act defines an 'import' to mean "to bring or to cause to be brought, into Uganda from a foreign country or place." The applicant purchases exclusive rights to broadcast films in Uganda from foreign film producers. Under the licence agreements there were different modes of delivery such as hard disks, dvds, satellite, inter alia. The applicant's preferred mode of delivery is hard disks. At customs import duty is paid on the hard disks and not on the licence agreements. The respondent cited **Mix Telematics East Africa Limited v Uganda Revenue Authority** TAT 4 of 2018 where the Tribunal stated that imported services are said to be supplied from abroad but delivered locally or remotely. The Tribunal further held that VAT on imported goods and services are paid by the recipient because the suppliers are abroad. The service which comprises of a right to broad cast films is received in Uganda from a foreign country.

The respondent cited S. 20A of the VAT Act that stipulates that an import of service is an exempt import if the service would be exempt had it been supplied in Uganda. The respondent argued that the Second Schedule Act does not list the grant of a right to use intellectual property as an exempt service. The respondent cited **Aviation Hangar Services Limited v Uganda Revenue Authority** TAT 21 of 2019 where the Tax Appeals Tribunal held that VAT is imposed by the VAT Act and for a consumption of a good or service to be exempt, zero rated or standard rated, the VAT Act has to provide for it. The respondent argued that the VAT Act does not exempt VAT on rights to broadcast films. The respondent also cited **Vodacom Business Nigeria Limited (Vodacom) v Federal Inland Revenue Service** (FIRS) CAL/556/2018 where the Court of Appeal upheld a decision that Nigerian recipients of imported services such as the supply of bandwidth capacities are required to pay VAT. The court stressed that the services were rendered in Nigeria through Vodacom's transponders in Nigeria though the suppliers were not physically present in Nigeria. The respondent further submitted that the mode of delivery does not change the character of what was imported. The hard disk is a mode of delivery. The contract and the substance of the matter show that the applicant procured rights to broadcast foreign programs which constitute an imported service.

The respondent argued that the applicant's contention that the programs are incidental to the carrier medium is erroneous. It cited **Uganda Revenue Authority v Total Uganda** HCCA 11 of 2013 where the term "incidental" was defined to mean "happening in connection with something of greater importance." It argued that the programs and hard disk do not happen in connection with each other. The respondent argued that on other hand it is the programs which are more important than the discs. The value of the program "Rosa Diamante" in the shipping invoice is US$ 6,250 while the dvd is US$ 250. Hence the program cannot be said to be incidental to the hard discs.

The respondent also contended that the applicant did not make a full disclosure when requesting for classification of the items. It never declared that the hard discs contained TV programs. The respondent cannot therefore be estopped from asserting that the applicant imported a service which attracts VAT.

In rejoinder, the applicant contended that it is prudent for the Tribunal to understand the business of the applicant. It cited **Celtel Uganda Ltd V Uganda Revenue Authority** Civil Appeal No. 22

of 2006 quoting **Faagorge – Gelting Linien V A/S Finanzamt Flensburg** (1996) ALL ER 656 where the court held that in order to determine whether a transaction is a supply of goods or services regard must be had to all the circumstances in which the transaction took place in order to identify its characteristic features. The VAT Act does not define broadcasting. The applicant cited S. 2 and S. 38 of the Copyright and Neighboring Act, 2006 to define broadcast and argued that the applicant broadcasts within Uganda. It has its own signals and has its own transmission to its clients in Uganda.

The applicant contended that programs on the hard disks are goods. **Black's Law Dictionary** defines moveable property as property that can be moved or displaced. It defines intangible good as something that lacks physical form. The applicant cited **Mukwano Industries (U) Limited v Uganda Revenue Authority** HCCA 001 of 2008 where it was noted that intangible goods included software, patents, copyrights, among others. It also cited **TATA consultancy Services v State of Andhra Pradesh** Case 2582 of 1998 where it was held that a computer programme maybe copyrightable as intellectual property does not alter the fact that once in the form of a floppy disk or other medium, the programs is tangible, moveable and available in the market place, as goods of all kinds movable and immovable property but does not include money.

The applicant argued that the respondent has failed to prove that it did not supply goods. The applicant cited S. 10 of the VAT Act which states that a supply of goods is an arrangement where an owner parts with or will part with possession of a good including a lease or an agreement for sale and purchase. The agreement was for the purchase of goods and not for imported service. The applicant cited the **European VAT Directives article 24 on supply of services directive 200/112/EC** to argue that the directive includes television broadcasting services, floppy disks and similar tangible media video, cassettes, and DVD as not a supply of services. The applicant contended that the right to broadcast is not separate from the programs. The applicant argued that broadcasting services is provided in Uganda and is not an imported service.

The applicant argued that S. 14(1)(b) of the copyright Act provides that the owner of a copyright may as if it is usable moveable property licence another person to use the economic rights in a copyright. The licence is moveable property which is a good. The applicant cited **Stella Atal v Annabel Kiruta** HCCS 0967/2004 where it was held that a copyright is a natural right and creators

are therefore entitled to the same protection as anyone would be regarding tangible and real property.

The applicant contended that S. 16(2)(e) provides that a supply shall take place in Uganda if the recipient of the supply is not a taxable person and the supply is a transfer, assignment or grant of a right to use a copyright, patent, trademark or similar right. The applicant argued that the said Section is not applicable as it is a taxable person.

The applicant argued that **Mix Telematics East Africa Limited v Uganda Revenue Authority** (supra) deal with where services were supplied remotely. It did not deal with goods received at customs. If the applicant was getting the programs from foreign companies through their signal or satellite it would be an imported service.

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

The applicant is in the business of broadcasting local and foreign programs. The applicant imports hard disks which has programs (content or software) which it declares at custom as goods. The respondent conducted an audit on the applicant's tax affairs for the period 2013 to 2017. The audit revealed that the applicant had licence agreements with foreign film producers which granted the former rights to broadcast the programs by hard disks, online, satellite inter alia. However, the applicant's preferred mode of delivery was hard disks. The licence agreements were not declared by the applicant on the import of hard disks. The respondent issued an additional assessment which was later revised to Shs. 1,233,307,049. While the applicant considered the imports as one of goods the respondent considered them imported services. It contended that the applicant did not pay VAT for the imported services.

S.4 of the VAT Act provides that VAT shall be charged on a) every taxable supply made by a taxable person; b) every import of goods other than an exempt import; and c) the supply of any imported services other than an exempt services by any person. S. 18 defines a taxable supply to mean a supply of goods or services, other than an exempt supply, made by a taxable person for consideration as part of his or her business activities. S. 5 provides for three categories of persons

liable for VAT a) in the case of a taxable supply, VAT is to be paid by the taxable person making the supply; b) in the case of an import of goods, VAT is to be paid by the importer; c) in the case of a supply of imported services, other than an exempt service VAT is to be paid by the person receiving the supply. Therefore, if the applicant imported goods and or services it was required to pay VAT. The applicant contends that the dvds were goods and it paid VAT. The respondent contends that the applicant imported services and is still liable to pay additional VAT of Shs. 1,233,307,049.

Did the applicant import goods or services or was there a mixed supply? S. 2(h) of the VAT Act defines goods as "all kinds of moveable and immoveable property but does not include money. It is not in dispute that the applicant imported dvds that are deemed moveable and tangible goods. **Black's Law Dictionary** 10th Edition p. 1683 defines tangible as "having or possessing physical forms." In **TATA Consultancy Services v State of Andra Pradesh** (supra) the court stated "That a computer programme may be copyrightable as intellectual property does not alter the fact that once in the form of a floppy disc or other medium the programme is tangible, moveable and available in the marketplace." However, the said dvds contained programs or software that could be converted into films. The word "intangible" is defined by **Black's Law Dictionary** (supra) at p. 929 as "something that lacks a physical form; an abstraction, such as responsibility; esp., an asset that is not corporeal, such as intellectual property." The applicant imported dvds that had content or software. A software program may consist of various commands which enable the computer to perform a designated task. The copyright in that program may remain with the originator of the program. But the moment copies are made and marketed, it becomes goods. Even intellectual property, once it is put on to a media, whether it be in the form of books or canvas (in case of painting) or computer discs or cassettes and marketed would become goods. We see no difference between a sale of a software program on a CD/floppy disc from a sale of music on a cassette/CD or a sale of a film on a video cassette/CD. In all such cases, the intellectual property has been incorporated on a media for purposes of transfer. The software and the media cannot be split up. What the buyer purchases and pays for is not the disc or the CD. As in the case of paintings or books or music or films the buyer is purchasing the intellectual property and not the media i.e. the paper or cassette or disc or CD. A transaction/sale of computer software is clearly a sale of goods. However in the matter before the Tribunal the applicant did not sell software to consumers. It harnessed the software progammes of the dvds for broadcasting purposes hence this dispute.

The applicant contended it purchased a copyright from the licensors or the owners of foreign films. The applicant cited S. 2 of the Copyright Act which reads that: "the owner of a copyright may, as if it were movable property – license another person to use the economic rights in a copyright. We already stated that under the licence agreements the applicant was required to pay a licence fee. **Black's Law Dictionary** 10th Edition p. 1059 defines a licence as "a permission usually revocable, to commit some act that would otherwise be unlawful." It is without doubt that the owners of the foreign films gave permission to air their films, without which would have been an infringement of their copyrights.

However, giving permission to use a copyright is not the same as purchasing the copyright. In the licence agreement the property in the licence remained with the licensor. **Black's Law Dictionary** (supra) p. 1410 defines property as "Collectively, the rights in a valued resource such as land, chattel, or an intangible. It is common to describe property as a 'bundle of rights." These rights include the right to possess and the right to use, the right to exclude the right to transfer. In **TATA Consultancy Services v State of Andra Pradesh** (supra) the court said:

> "When one buys a video cassette recording, a book, sheet music or a musical recording, one acquires a limited right to use and enjoy the material's content. One does not acquire; however, all that the owner has to sell. These additional incidents of ownership include the right to produce and sell more copies, the right to change the underlying work, the right to license its use to other and the right to transfer the copyright itself. It is these incidents of the intellectual, intangible competent software property Wallingford has impermissibly assessed as tangible property by linking these incorporeal incidents with the tangible medium in which the software is stored and transmitted."

From the licence agreements it is apparent that what the licensor gave the licensee a bundle of rights which did not amount to a transfer of property. Firstly, the licensor gave the licensee permission to use the contents of its copyright but did not give it the copyright. The licensee at the expiry of the contract no longer had any right to exhibit in the media the programs. The property in the physical dvds and the software/contents at all times remained with the licensee. We already stated the copyright are moveable goods, but the licensor did not sell a copyright because it retained the property of the subject matter. In the agreement the licensor gave the licensee a right to exhibit the contents in media. This is different from the copyright. It is a right to use. The right

to exhibit involves broadcasting to customers. Is this right to exhibit in the media a good or a service?

S. 1(t) of the VAT Act defines services to mean anything that is not a good or money. The definition of service in the VAT Act is a bit too simplistic. It is the work of a lazy draftsman. **Blackman's Dictionary** (supra) p.1578 defines service inter alia as: "the performance of some useful act or series of act for the benefit of another, usu. for a fee (goods and services). In this sense service denotes an intangible commodity in the form of human effort, such as labor, skill or advice." In **Metropolitan Life Limited v Commissioner for the South African Revenue Service:** A 232/2007 the court defined service as follows:

> "services' mean anything done or to be done, including the granting, assignment, cession or surrender of any right or the making available of any facility or advantage, but excluding a supply of goods, money or any stamp, form or card contemplated in paragraph (c) of the definition of good"

The problem that arises is that both goods and services include intangible items. Intellectual property such as copyrights and patents are intangible goods which revolve around rights. A service also involves the grant inter alia of a right or the making of a facility or advantage available. At times, the line between a supply of an intangible good and that of a supply of a service is so thin that one may not distinguish what is being supplied. In our case there were film contents or program on the dvds which are intangible. Were there a supply goods or services? At this stage we cannot tell.

In **Celtel Uganda Ltd v Uganda Revenue Authority** Civil Appeal No. 22 of 2006 the court quoted **Faagorge – Gelting Linien v A/S Finanzamt Flensburg** (1996) ALL ER 656 where court held that in order to determine whether a transaction is a supply of goods or services regard must be had to all the circumstances in which the transaction took place in order to identify its characteristic features. Therefore, before the Tribunal can determine whether the applicant imported goods or services regard must be made to the circumstances of the case.

The starting point to determine what the applicant was allowed to broadcast would be the licence agreements the applicant entered with foreign producers. The parties filed sample agreements. The first agreement between the applicant and Tokyo Broadcasting System showed that the applicant

was sold film programs of "Ninja Warrior", and "Unbeatable Banzuke". The applicant as a licensee was required to pay licence fee and deduct withholding tax. The licensor was to supply a copy of each episode as a digital file. The episodes were furnished in an "On Air" version. Under the standard terns of the agreement, the licensor remained the owner of the property. The licensor granted the licensee a limited licence to exhibit the property during the term in the television media by the facilities of the licensee's station, as part of the licensee's series, in the licensee's territories and in the licensed language. Upon expiration of the agreement, the licensee no longer has any right of exhibition of the property and the licensor was free to exploit in any media or to license the property to any third party. The licensor was to indemnify the licensee for any breach of any warranty and representation. The second agreement was between ETV (Proprietary) Limited and the applicant. However, the first pages of the agreement are missing in the exhibit. Under the agreement the licensor was to deliver the channel signal in digital form, SDI standard etc. Under clause 9.1 of the agreement, the programs, the channel, logos, inter alia remained the property of the licensor.

The applicant as its name suggests is a broadcasting company. It is not the physical dvds that were the subject of the licence but their contents which were for broadcasting purposes. The contents of the dvds was converted into usable format. A perusal of the agreement gave the licensee a right to exhibit the media subject of the agreement until its expiration. Clause 2 of the agreement granted the licensee exclusive right to air out films in English language. This right was not a copyright one nor a sale of intellectual property. In **TATA Consultancy Services v State of Andra Pradesh** (supra) it was noted that when one buys a copy of the copyrighted novel in a bookstore or recording of a copyrighted song in a record store, one only acquires ownership of that particular copy of the novel or song but not the intellectual property in the novel or song. The licensor still held the copyrights to the media as the owner of the property. Therefore, what was sold to the applicant apart from the ownership of the physical dvds were rights other than intellectual property. As already stated, one of the rights mentioned in the agreement was the right to exhibit the media. The term exhibition according to the License Agreement means:

> "…..to broadcast, distribution, transmission, display or performance of audio-visual programming via any means format or media or media in any language , on free or pay or another basis for rental or ownership and any and all other methods of transmission or reception ….."

The right to exhibit the media requires broadcasting. The word "broadcast" is defined by **Advanced Learner's Dictionary** 6th edition p 138 as "to send out programmes on television or radio". Transmission is the process of sending signal from a system to different distributor and eventually to the consumer. Broadcasting programs to consumers is a supply of a service. What the consumers received was not a good but a service that is entertainment. The story may have been different if the applicant had sold dvds and or the contents/ software to its customers. Therefore, the right to exhibit in the media under the licence agreement was a right to provide services. While a copyright is an intangible good the right to exhibit media was one in relation to a supply of services. Such a supply is a supply of a service. . In **Infotech Software Dealers Association vs. Union of India W.P.Nos.3811 & 18886 of 2009**, the Madras High Court, among other issues, had to consider the following two questions. Firstly, whether a supply of software is a supply of a good and secondly, if so, whether in all cases, transactions relating to the supply of software amounted to a supply of a good or in some cases; a supply of software could be considered to be a supply of a service. The court agreed with the decision of the Supreme Court of India in **Tata Consultancy Services v. State of Andhra Pradesh, (2005) 1 SCC 308,** that the sale of a software was a sale of a good and then proceeded as follows

> "on a careful reading of the above, we are of the considered view that when a transaction takes place between the members of ISODA with its customers**,** it is not the sale of the software as such, but only the contents of the data stored in the software, which would amount to only service.".

In the instant case, it is clear from the licensing agreement, that the rights granted to the applicant were limited to broadcasting the said programmes for a limited period of time. The contract between the applicant and the producer did not constitute a complete transfer of ownership of the goods, as copyright in the films remained the property of the producer. In effect, what was supplied by the producer to the applicant was a supply of a service and not a supply of goods.

The respondent contended that the applicant imported services. Regulation 13 of the VAT Regulations provides that a person who receives imported services other than an exempt service shall account for the tax due on the supply. The VAT Act S. 1(j) states that "import means to bring, or cause to be brought, into Uganda from a foreign country or place." One has to ask himself whether the dvds were a cause to bring into Uganda a supply of goods or services. **Mix Telematics East Africa Limited v Uganda Revenue Authority** TAT 4 of 2018 where the Tribunal stated

that imported services are said to be supplied from abroad but delivered locally or remotely. In **Metropolitan Life Limited V Commissioner for the South African Revenue Service (**supra) the court held that;

> "imported services' means a supply of services that is made by a supplier who is resident or carries on business outside the Republic to a recipient who is a resident of the Republic to the extent that such services are utilized or consumed in the Republic otherwise than for the purpose of making taxable supplies".

There are three requirements for a service to fall within the ambit of 'imported services' in the VAT Act, namely: The services must be rendered by a supplier who is outside Uganda; the recipient of the services must be in Uganda; the services must be utilized or consumed in Uganda and are taxable.

Having looked at what it takes to import goods and services, the Tribunal must resolve whether there was an import of goods or services. The Tribunal already stated that regard must be made to all the circumstances in which the transaction took place to identify its characteristic features. S. 2 of the VAT Act states that to import means to bring or cause to bring into Uganda a supply of goods or services. There were three conditions stated. The Tribunal notes that the suppliers of the foreign films were outside Uganda. The applicant provided broadcasting services of the said foreign films to consumers who were in Uganda. The consumption of the services which was entertainment was done in Uganda. The dvds and its contents were mere vessels in which the supply of entertainment services was made possible. Under S. 1(j) of the VAT Act the dvds were a cause in which the services were imported.

When one imports goods or services into Uganda the consumption of the said imports requires a supply of the same in Uganda. S. 16(2)(e) of the VAT Act provides that a supply of service shall take place in Uganda where the supply is a transfer, assignment, or grant of a right to use a copyright, patent, trademark or similar right in Uganda. The Tribunal already noted that the applicant was granted a right by foreign producers to use their copyrights in their films. S. 16(2) provides the recipient of the supply should not be a taxable person. This section is equivocal because VAT is actually paid by the recipient of the supply, who are taxable. If it is read as it is, it would mean there would be no supplies in Uganda. Where there is an absurdity in the meanings of words in a statute courts can give them a purposive interpretation. To give effect to the term,

'non-taxable person' it refers to one who is not collecting VAT in the VAT chain. It is not concerned with an intermediary but the final consumer. The recipients of the supply of a right to use a copyright in this case were the viewers of the programs broadcasted. The Section is interested with the consumers as recipients and not the broadcasters. The VAT Act considers the use of a copyright as a supply of services and not goods. We do not think that the intention of the legislature was that while the use of local copyrights is considered a supply of a service, the use of foreign copyrights would be one of goods. A tax should be uniform in application.

An import of services which is provided to consumers involves a supply of services. S. 12(2) of the VAT Act provides that a supply of goods incidental to the supply of services is part of the supply of services. (3) A supply of services incidental to the import of goods is part of the import of goods. In **Uganda Revenue Authority v Total Uganda Limited** Civil Appeal *No 11 OF 2012* Justice Madrama observed that

> "Where a transaction comprises a bundle of features and acts, regard must be made to all the circumstances in which the transaction in question takes place in order to determine, firstly, if they were two or more distinct supplies or one supply and, secondly whether in the latter case, the single supply is to be regarded as a supply of services.…"

In **Card Protection Plan Ltd v Commissioners Customs and Excise [**2001] UKHL 4 Lord Slynn of Hadley held that:

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

The tribunal notes that the principal business operations of the applicant are to broadcast films and films cannot be aired without a hard drive or other modes of broadcasting. The rights are reserve of the licensor. The programs were imported by the applicant to enable it to broadcast foreign films.

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." In **Uganda Revenue Authority v. Total Uganda Limited** HCCA No. 11 of 2012 the Court defined it as follows:

> "- incidental means "happening in connection with something greater in importance. Where a transaction comprises a bundle of all circumstances in which the transaction in question takes place in order to determine firstly; if they were two or more distinct supplies or one supply and secondly whether in the latter case the single supply is to be regarded as a supply of services ...."

In **Commissioner Customs and Excise v. Madgett and Baldwin** *[1998] STC 1189 25* where it was stated:- "A service must be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself but a means of better enjoying the service supplied." The respondent noted that value of the program "Rosa Diamante" in the shipping invoice is US$ 6,250 while the dvd is US$ 250. The supply of dvds was subordinate to the supply of the right to use it for broadcasting services.

The transaction in this case was therefore a mixed supply. The supply of the service as indicated above was the supply of the right to broadcast certain films. These films were incorporated onto the hard disk for the purpose of making them available to the applicant. The real purpose of the hard disks therefore was to facilitate the transmission of the films to the applicant. This is apparent from the terms of the agreement between the applicant and the producer under which the applicant was given various options through which to access the films. The applicant could have chosen any of the options available for accessing the films. The supply of the good in this case was the supply of the hard disk. The supply of the hard disk was incidental to the principal supply of the right to broadcast the films which was a supply of a service. The transaction in question would therefore undergo a single VAT treatment namely as a supply of an imported service, the supply of the good being merely incidental to the supply of the service.

The value of a blank dvd is not the same as one that has content on it. In **TATA Consultancy Services v State of Andra Pradesh** (supra) it was noted that the value of an encyclopedia or a

dictionary or magazine is not the value of the paper. The value of the paper is in fact negligible as compared to the value or price of an encyclopedia. The court noted that:

> "Similar would be the position in the case of a programme of any kind loaded on a disc or a floppy. For example in the case of music the value of a popular music cassette is several times more than the value of a blank cassette. However, if a pre-recorded music cassette or a popular film or a music score is imported into India duty will necessarily have to be charged on the value of the final product."

Therefore, if the Tribunal was wrong to hold that there was an imported service, the applicant is still liable to pay taxes on the final value of the dvds taking into the consideration the contents thereon. They were not blank dvds. The dvds were enhanced by the foreign film contents input.

Taking the above into consideration, this application is dismissed with costs.

ides guidance on scope, the determination of the accounting model, specific characteristics of concessions that are common (take-or-pay arrangements, capacity availability, etc.) and much more.

Dated at Kampala this 21 day of September 2020.

DR. ASA MUGENYI	**MR. GEORGE MUGERWA**	**MR. SIRAJI ALI**
CHAIRMAN	**MEMBER**	**MEMBER**