THE REPUBLIC OF UGANDA

THE TAX APPEALS TRIBUNAL AT KAMPALA

APPLICATION NO. 111 OF 2021

AFRICA BROADCASTING UGANDA LIMITED.....APPLICANT

VERSUS

UGANDA REVENUE AUTHORITY..... RESPONDENT

BEFORE: MS. PROCOVIA R. NAMBI, MS. CHRISTINE KATWE, MS. STELLA NYAPENDI.

RULING

This ruling is in respect to an application contesting several assessments issued by the Respondent against the Applicant for the period 2017 to 2019. Particularly, Value Added Tax and withholding tax assessments of Shs. 361,204,633 and Shs. 301,003,860 respectively on imported foreign programs on the ground that these programs are imported services; a Pay-As-You Earn assessment of Shs. 160,032,399 on the grounds that the Applicant's TV presenters are not consultants but rather employees; and finally, an income tax assessment of Shs. 168,780,000 resulting from disallowing a deduction of payments made to Phaz Motion Pictures which did not have a Tax Identification Number (TIN).

1. Background Facts

The Applicant is a company incorporated in Uganda which deals in the business of broadcasting under the business names NTV and Spark TV that airs both local and foreign content.

The Applicant executes contracts with different distributors, both local and foreign, for movies and series, which the Applicant broadcasts in Uganda. The programs are brought into Uganda on hard disks and the Applicant declares them as goods and pays import duty.

The Applicant also hires TV presenters who are required to report to the TV station in time for the programs they host. The Applicant treats the TV presenters as independent contractors.

The Applicant procured the services of an entity, Phaz Motion Pictures Limited to direct and produce an African version of a foreign TV show. The value of the contract was Shs. 562,600,000. As Phaz Motion Pictures Limited did not have a tax identification number (TIN) at the time of invoicing, it directed the Applicant to pay another entity, Diaspora Consultancy and Logistics Limited. The Respondent conducted a tax audit on the Applicant for the period 2017 to 2019 and raised several assessments for income tax and value added tax totaling Shs.1,826,837,971.

The Respondent contended that:

(i) The foreign programs are imported services which attract withholding tax and VAT on imported services. Therefore, the Applicant was liable to pay the said taxes.
(ii) The TV presenters are employees and not independent consultants. Therefore, the Applicant is liable to Pay As You Earn (PAYE).
(iii) The Applicant was not entitled to claim a deduction for income tax purposes for payment made in respect of services rendered by Phaz Motion Pictures Limited. This is because Phaz Motion Pictures did not have a TIN.

The Applicant objected and on 17 of November 2021, the Respondent issued an objection decision where it partially allowed the objections and issued revised assessments totaling Shs.1,773,192,304.

The Applicant then filed this application seeking review of the Respondent's decision.

During mediation, the Respondent further revised the tax assessments to Shs. 991,020,892, which was remitted to the Tribunal for determination. It includes:

i. VAT on foreign programs of Shs. 361,204,633,
ii. WHT on foreign programs of Shs. 301,003,860,
iii. PAYE on the Applicant's TV presenters of Shs. 160,032,399, and
iv. Shs. 168,780,000 paid to Phaz Motion Pictures which did not have a TIN.

2. Issues for determination

During the scheduling, the parties agreed on the following issues:

(i) Whether the Applicant is liable to pay VAT on foreign acquired programs?
(ii) Whether the Applicant is liable to pay WHT on foreign acquired programs?
(iii) Whether the Applicant is liable to pay PAYE?
(iv) Whether the Applicant is liable to pay Shs.168,780,000 in regard to Phaz Motion Pictures?
(v) What remedies are available to the parties?

3. Representation

The Applicant was represented by Ms. Belinda Nakiganda, Mr. Patrick Kabagambe, and Ms. Linda Mugisha while the Respondent was represented by Ms. Patricia Ndagire and Mr. Derrick Muhumuza.

The Applicant presented three witnesses namely, Mr. Johnson Omolo, the General Manager of the Applicant, Ms. Sarah Namawa the Applicant's Chief Accountant and Ms. Alice Nankya Luutu, the Applicant's Human Resource Lead.

Mr. Johnson Omoro testified that the Applicant has two categories of TV presenters, those who are employees and those who are independent contractors. Referring the Tribunal to Exhibit A30 which is a sample contract with one such independent contractor, he testified that independent contractors do not serve any probationary period and are not entitled to monthly salary, annual leave, sick leave maternity/paternity leave, severance pay, medical insurance, NSSF contributions and there is no retirement age for them.

Unlike the Applicant's employees who have fixed working hours, the independent contractors are only required to report to the TV station in time for the programs they host. The independent contractors are not allowed to act for or on behalf of the Applicant and are even liable to indemnify the Applicant against any claims that arise of any breach or nonperformance of the contract. The Applicant withholds 6% on payments made to the independent TV presenters which is remitted to the Respondent on a monthly basis as shown in Exhibit A30, the independent contractors are mandated to file and pay their own taxes. These TV presenters also take full responsibility for all their utterances on air during

their respective shows. Ms. Alice Nankya Luutu testified that she oversaw the welfare of only two TV presenters who are employees of the Applicant. She further stated that the other TV presenters are independent contractors recruited by the Applicant to offer services intended to boost the success of the TV programs that they host. They are not employees of the Applicant's and are not entitled to any employment benefits.

Ms. Sarah Namawa in her witness statement stated that the Applicant during its business executes contracts with different program distributors local or outside Uganda for foreign movies and series, which it then broadcasts in Uganda. She stated that the purpose of the agreement is grant the Applicant the right to use the copyrights as required by law to enable the Applicant to broadcast the programs in Uganda. That the programs are sent by the foreign suppliers on hard disks and the Applicant declares the hard disks and programs as imported goods and pays customs taxes. Indeed, by letter dated 21 November 2017, the Respondent clarified to the Applicant the correct HS Code for the hard disks with media content.

Regarding Phaz Motion Pictures, Ms. Namawa referred the Tribunal to Exhibit A35 and stated that the Applicant contracted Phaz Motion Pictures Limited to direct and produce an African version of the foreign TV show. Phaz Motion Pictures limited issued the Applicant with invoices with instructions to pay the money to the bank account of Nile Diaspora International Film Festival, which was vested under Diaspora Consultancy and Logistics Limited. She testified that while the Respondent disallowed the Applicant's expenses on the basis that the Applicant paid Phaz Motion Pictures Limited which did not have a TIN, the Applicant did not pay Phaz Motion Pictures. Instead, the Applicant paid the invoiced sum to Diaspora Consultancy and Logistics that was a registered taxpayer.

The Respondent presented one witness who reiterated the Respondent's reasons for the assessments.

4. The Submissions of the Applicant

Whether the Applicant is liable to pay VAT on foreign programs?

The Applicant asserted that it provides both local and foreign content to its subscribers in Uganda for entertainment, health, or educational purposes. For the foreign content, the

Applicant contracts with international suppliers of movies and series for the rights to use their copyrights and broadcast them in Uganda. The programs and films are sent on hard disks by the foreign suppliers and declared as goods upon importation.

The Applicant noted that the Respondent argues that these programs are classified as a service, and therefore the Applicant should account for VAT on imported services. In contrast, the Applicant argues that the programs are considered goods subject to customs duty upon importation and should not incur VAT on imported services.

The Applicant cited Section 4 of the VAT Act which provides that:

"A tax to be known as value added tax, it shall be charged in accordance with this Act on

c) Every taxable supply in Uganda made by a taxable person;
c) Every import of goods other than an exempt import;
c) The supply of imported services other than an exempt service by any person.

The Applicant contended that this provision is not applicable in this case since the Licensors are non-Ugandan and the supply is not in Uganda. The Applicant states that it imported programs, and the import duty was paid. The Applicant argued that no service was imported but rather, there was the importation of goods.

The Applicant cited Section 5 of the VAT Act which provides that the importer is liable to pay the tax. The Applicant argued that they imported the goods and does not dispute the liability to pay VAT on imported goods. Foreign programs were goods that were imported and cleared at customs. Section 10 of the VAT Act provides:

"A good is any 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 Applicant contended that in the instant case the programs qualify to be goods.

The Applicant cited the case of ***Bharat Sachar Nigam Ltd & Another v Union of India & Others Civil Suit 183 of 2003,*** where it was held:

"To constitute a transaction for the transferor the right to use the goods, the transaction must have the following attributes;

a. *There must be goods available for delivery.*

b. *There must be a consensus ad idem as to the identity of the goods.*

c. *The transferee should have the legal right to use goods".*

The Applicant argued that the programs come in raw form; they are formatted, edited, and undergo processes so that they are viewable and segmented before they are aired in public which meant that the Applicant broadcasts within Uganda.

The Applicant submitted that its position that the programs are goods is further supported by the Copyright Law as the nature of the transaction in dispute is in the ambit of intellectual property, specifically copyright. The right, which is regarding the programs, amounts to a right to use a copyright (intangible/ movable property), which is a good per the VAT Act.

The Applicant cited Section 14 of the Copyrights and Neighboring Act which provides:

"The owner of a copyright may as if it were movable property-

c) *License another person to use the economic rights in a copyright;*

c) *Transfer to another person or bequeath the economic right in copyright in whole or in parts;"*

The Applicant relied on Section 38 of the Copyrights and Neighboring Act (Copyright Act) which provides: *"The author, performer, successor in title or agent shall, in a broadcasting contract, transfer to a company involved in radio or television broadcasting or the supplier of audiovisual communication services or other form of broadcast, the right to broadcast his or her literary dramatic, dramatic-musical or musical work against payment of remuneration".*

The Applicant argued that the programs are goods because they fall within the definition of property, and property is the essence of the definition of goods.

Whether the Applicant is liable to pay WHT on foreign programs?

The Applicant contended that it imports programs on hard drives, declaring them at customs. Since the Applicant is exempt from withholding tax, no withholding tax was

assessed or charged to the Applicant, as indicated by the customs valuation documents on record for the relevant period.

The Applicant relied on Section 136 (3) of the Income Tax Act which provides:

"Every person who imports goods in Uganda is liable to pay withholding tax at a rate of 6%. However, Section 136 (5) (b) provides that *Section 136 (3) doesn't apply if a supplier or importer, who is exempt from the tax; or who the Commissioner General is satisfied has regularly complied with the obligations imposed on the supplier or importer under this Act".*

The Applicant submitted that for the period 2017-2019, they were on the Respondent's exemption list, and they were not changed WHT at import as per Section 136 (5) (b) of the Income Tax Act.

Whether the Applicant is liable to pay PAYE?

The Applicant stated that it engages independent presenters to host certain shows. The Respondent categorized these presenters as employees, claiming that the Applicant exerts control over them. However, the independent presenters are not employees, and the Applicant deducts 6% tax from their payments, which is submitted to the Respondent.

The Applicant cited Section 2 of the Employment Act which defines an employee as *"any person who has entered a contract of service or an apprenticeship contract..."*

The Applicant further defined a Contract of Service under Section 2 of the Employment Act to mean; *"any contract whether oral or in writing, whether express or implied, where a person agrees in exchange for remuneration, to work for an employer and includes a contract of apprenticeship."*

The Applicant submitted that a person can be an independent contractor through a contract for services. The Applicant relied on the case of ***Meera Investments Ltd v Andrea T/A Wipfler Designer and Co Ltd, Civil Suit No. 0028 of 2004***, which referred to ***Black's Law Dictionary, 9th Edition*** to define an independent contractor as "*one who is entrusted to undertake a specific project but who is left free to do the assigned work, and to choose the method for accomplishing."*

The Applicant further relied on the case of ***Infectious Diseases Institute v Uganda Revenue Authority Application No.15 of 2019*** where the Tribunal quoted the case of ***Naraich Property Limited v The Commissioner of Pay-roll Tax Privy Council Appeal No. 38 of 1982*** where the Privy Council noted that:

"Where there is a written contract between the parties whose relationship is in issue, the court is confined, in determining the nature of that relationship, to a consideration of the terms, express or implied, of that contract in light of the circumstances surrounding the making of it..."

The Applicant argued that the terms of the contracts in question are consistent and expressly state that the contract is a contract for services. The terms such as consideration where the presenters are paid per episode aired and the liability to be incurred by the presenters, among others, are all consistent with a contract for services and should be treated as such.

The Applicant submitted that the contracts are specific, they don't create agent-principal or employee-employer relationships, clearly stating their obligations, payment per show aired, and termination by either party with or without cause.

The Applicant submitted that the independent presenters do not qualify as employees under the Income Tax Act and thus cannot be treated as employees because they don't have a position in the Company nor are they directors and are not entitled to remuneration.

Whether the Applicant is liable to pay Shs. 168,780,000 in regard to Phaz Motions Pictures?

The Applicant stated that it had a contract with Phaz Motions. However, Phaz Motions requested that the Applicant pays the contract sum to Nile's Diaspora International Film Festival, which was managed by Diaspora Consultancy Logistics, and the Applicant remitted the money as instructed by Phaz Motions. The Respondent disallowed its expenses on the basis that Phaz Motions did not possess a Tax Identification Number. The Applicant argued that it did not pay Phaz Motions but instead Diaspora Consultancy Logistics, which has a Tax Identification Number.

The Applicant contended that any issues should be directed at Phaz Motions rather than itself, as the Applicant properly accounted for the expense, withheld the required tax, and remitted it to the Respondent in compliance with the law.

5. The submissions of the Respondent

Whether the Applicant is liable to pay VAT on foreign programs?

In reply, the Respondent cited Section 4 (c), Section 5 (1) (c) of the VAT Act and Regulation 13 (1) of the VAT Regulations and argued that imported services are taxable supplies and VAT is paid by the person receiving the supply, who in this case is the Applicant, and is liable to pay VAT on the supply of the grant of rights to broadcast, which constitutes a service.

The Respondent cited the case of ***Victoria Motors Limited v Uganda Revenue Authority TAT No.2 of 2017*** where it was stated that the liability to pay VAT is created by Section 4 of the VAT Act which provides that VAT shall be charged on every taxable supply by a taxable person.

The Respondent cited Section 1 of the VAT Act which is instructive and provides a wide definition of a service as "*anything that is not goods or money*". The Respondent contended that the grant of a right/license to broadcast foreign films in Uganda is neither a good nor money but a service.

The Respondent further cited Section 11 (b) of the VAT Act which provides;

"Except as otherwise provided under this Act, a supply of services means a supply which is not a supply of goods or money including,

b) The making available of any facility or advantage "

The Respondent argued that without the license to broadcast the foreign films, the Applicant would not be in position to legally broadcast the licensed films, and they would similarly not be able to import the programs on the hard discs.

The Respondent submitted that the license agreements constitute the making available of an advantage, by granting the Applicant an exclusive right to broadcast the foreign programs purchased under the license agreements which constitutes a service.

The Respondent argues that the grant of the right to the Applicant to use the copyright in the foreign films is therefore a supply of a service as per Section 16 (2) (e) of the VAT Act which provides:

"a supply of services shall take place in Uganda if the recipient of the supply is not a taxable person-

e) The supply is a transfer, assignment, or grant of a right to use a copyright in Uganda."

The Respondent cited ***Golden Leaves Hotels and Resorts Limited*** and ***Apollo Hotel Corporation v Uganda Revenue Authority Civil Appeal 64 of 2008,*** which referred to the case of ***Mix Telematics East Africa Limited v Uganda Revenue Authority TAT Application No.4 of 2018,*** wherein the term 'Imported services' was defined to mean, services supplied from abroad where they are manufactured but delivered locally or remotely. His Lordship still concurred with the Tribunal that VAT on such services and goods is paid by the recipient because the suppliers are abroad.

The Respondent also relied on ***Aviation Hanger Services Ltd v Uganda Revenue Authority TAT No21 of 2019*** where the Tribunal held:

"VAT is imposed by the VAT Act and for a consumption of a good or service to be exempt or zero rated or standard rated, the VAT Act has to provide for it".

The Respondent submitted that the supply which comprised of license/ grant of a right to use the copyright in the foreign programs by broadcasting is an imported service and the Applicant is accordingly liable to pay VAT in accordance with VAT Act.

Whether the Applicant is liable to pay WHT on foreign acquired programs?

The Respondent relied on Section 82 (1) of the Income Tax Act which provides:

"Subject to this Act, a tax is imposed on every non-resident person who derives any dividend, interest, royalty, rent natural resource payment, agency fee in case of Islamic business or management charge from sources in Uganda."

The Respondent also cited Section 78 (j) (i) (A) of the Income Tax Act Cap 338 which defines income derived from sources in Uganda, among others to mean;

"*a royalty arising from the use of, or right to use, in Uganda*

(A) Any patent, design, trademark, copyright or any model, pattern, plan, formula or process or any property or right of a similar nature".

Relying on Section 78 (j) and (i) which provides that payments for a royalty arising from the use of, or right to use, in Uganda any copyright of a similar nature, to a non-resident forms part of incomes sourced in Uganda where it has been paid by a resident person , the Respondent argued that it is not in contention that the Applicant is a resident person as per Section 10 (a) of the Income Tax Act and the Applicant made a payment to a non-resident person for consideration for broadcasting the rights.

The Respondent submitted that since the license fees are paid by the Applicant to the foreign film/program producers, the failure to withhold creates a withholding liability on the withholding agent to pay to the Commissioner, the amount that was not withheld.

Whether the Applicant is liable to pay PAYE of Shs. 160,032,399?

The Respondent cited Section 2 of the Income Tax Act which defines an employee as:

"An individual engaged in employment" and defines employment as:

i. *The position of an individual in the employment of another person*
ii. *A directorship of a company*
iii. *A position entitling the holder to a fixed or ascertainable remuneration or the holding or acting in any public office*

The Respondent submitted that the key qualification in this case is an individual who is in "position entitling the holder to a fixed or ascertainable remuneration" concluding that the independent presenters are employees. The Respondent submitted that the Applicant, as per the Contracts signed, exhibits full control of the Applicant over the alleged independent presenters.

The Respondent argued that since the Applicant alleged that the independent contractors cannot delegate their work and similarly work continuously through the calendar year, this is evidence that the alleged independent presenters are employees of the Applicant and thus paid salary on which PAYE should be remitted to the Respondent.

Whether the Applicant is liable to pay Shs.168,780,000 in regard to Phaz Motion Pictures?

The Respondent quoted Section 22 (3) (1) of the Income Tax Act which states:

"No deduction is allowed for any expenditure above five million shillings in one transaction on goods and services from a supplier who does not have a taxpayer identification number."

The Respondent submitted that the Applicant's contract was with Phaz Motion and not Diaspora Consultancy and Logistics Limited. The Respondent submitted that the Applicant could not claim the expenses to their supplier Phaz Motion considering that they did not have a tax identification number.

6. The Applicants Submissions in Rejoinder

In rejoinder, the Applicant reiterated its earlier submissions. It affirmed that it imported goods (Foreign programs) and not services. It duly declared the imported goods at customs.

The Applicant cited the case of ***Africa Broadcasting (U) Ltd v Uganda Revenue Authority Civil Appeal No.044 of 2018*** where the judge held that *"the DVDs in the present case were similarly tangible, movable goods. Though the right to exhibit films (intangible property) was associated with DVDs, the DVDs themselves remained goods."* The Applicant contended that this is likened to programs that are put on to the hard drives, they are a commodity traded and thus a good and licenses are incidental to the program.

The Applicant submitted that without the programs, there would not be a license. Therefore, the principal good is the program, and the license is incidental to the program (good). The program is the one that brings in the money.

Regarding withholding tax, the Applicant submitted that it duly withheld taxes on foreign payments for the foreign programs and remitted that same to the Respondent. The Applicant submitted that, at importation, whilst VAT was paid, no withholding tax was paid because the Applicant got a withholding exemption from the Respondent. The Applicant submitted that the issue be remitted back to the Respondent for reconsideration. The Applicant prayed that the Tribunal considers the withholding tax exemption list showing that the Applicant was exempt during the that period.

Regarding PAYE, the Applicant submitted that the Presenters do not receive an ascertainable fixed income, they are paid per episode aired. This cannot be said to be ascertainable as the number of episodes cannot be determined at the signing of the contract. If they do not work, or if there is no episode, they are not paid.

The Applicant submitted that the level of control exercised by the Applicant is limited to what is necessary for compliance with the contract and cannot impute an employment relationship. The independent contractors are not an integral part of the Applicant's work, and the assessment should be vacated.

Regarding Phaz Motion Pictures, the Applicant submitted that the Respondent should not fault the Applicant as they duly accounted for the expense and withheld on it and remitted to the Respondent. The Applicant submitted that they qualify a deduction under Section 22 of the Income Tax Act. The Applicant prayed the application is allowed with costs.

7. Determination by the Tribunal

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

This dispute revolves around three points of contention – the first is whether foreign programs purchased by the Applicant are goods or services for VAT and withholding tax purposes. The second contention is whether individuals hired as TV presenters by the Applicant are employees or independent contractors. The last point is whether the Applicant was entitled to claim a deduction for income tax purposes for expenses incurred in respect of services provided by a supplier who did not have a TIN.

Issue 1: Whether the Applicant is liable to pay VAT on foreign acquired programs?

The resolution of this issue depends on whether the programs are considered imported goods or imported services. The Respondent claims that the programs are a service, requiring the Applicant to account for VAT on imported services. In contrast, the Applicant argues that the programs are classified as goods, since they are delivered on hard disks, which would incur customs duty upon importation.

Under Section 10 of the VAT Act, a supply of goods is defined to mean:

"Any arrangement under which the owner of the goods parts or will part with possession of the goods..."

Section 11 defines a supply of services to mean:

" a *supply which is not a supply of goods or money".*

The VAT Act in Section 1 defines goods to *include all kinds of movable and immovable property, but does not include money* and defines services as *anything that is not goods or money.*

The Applicant argued that the programs are goods because "they fall within the definition of property, and property is the essence of the definition of goods". The Applicant quoted Section 14 of the Copyrights and Neighboring Act which is to the effect that copyright may be owned as if it were immovable property.

Section 14 of the Copyrights and Neighboring Act which provides:

"The owner of a copyright may as if it were movable property-

b. *License another person to use the economic rights in a copyright;*
c. *Transfer to another person or bequeath the economic right in copyright in whole or in parts;"*

Furthermore, Section 38 of the Copyrights and Neighboring Act (Copyright Act) provides:

"*The author, performer, successor in title or agent shall, in a broadcasting contract, transfer to a company involved in radio or television broadcasting or the supplier of audiovisual communication services or other form of broadcast, the right to broadcast his or her literary dramatic, dramatic-musical or musical work against payment of remuneration."*

The Applicant relied on the above sections concluding that the nature of the transaction entailed a transfer of immovable property as per Section 14 of the Copyrights and Neighboring Act (Copyright Act). That it was within the ambit of intellectual property in specific "copyright".

However, according to our analysis we find that the right to use a copyright is distinguishable from the ownership of the copyright itself. The right to use is not a good but a service. When a producer creates a program and transfers both ownership and copyright of the entire program to another party, this constitutes a supply of goods.

In cases where a producer creates a program and grants limited rights, such as broadcasting rights for a specific period, to a broadcaster while retaining other rights, the transaction is merely a license to broadcast the programs. not considered a supply of goods for VAT purposes because they only have a right to broadcast.

Where the contract grants rights only (for example, transmission rights for a fixed period, exploitation of broadcasting rights and renegotiation of rights at a future date), this will infer the supply of a service rather than a good. This transaction is classified as a supply of services.

We reviewed the Applicant's agreements with its international suppliers and noted that the Applicant is granted limited rights to air the programs within a set period and within a specific geographical territory. For example, with the drama "Taste of Love" the Applicant was granted a license / exclusive rights to broadcast the drama in Uganda only, for only 3 TV runs and for a period of only 24 months from 16 December 2015 to 16 December 2017, with the materials delivered on hard drive by express courier to the Applicant.

The above shows that:

(i) The contracts are for a limited license to broadcast programs in Uganda;
(ii) The hard drives are merely a medium via which the programs are delivered to the Applicant; and
(iii) There was no transfer of ownership of the program in absolute terms from the supplier to the Applicant.

Therefore, the substance of the transaction is that certain rights to the content are granted to the Applicant and access to the content is via the hard drives.

The Applicant's assertion that it imports hard drives with content and licenses as secondary would mean that the primary focus of the transactions with international suppliers is on the physical medium (the hard drives), which is incorrect. Clearly, the main emphasis is on the rights to broadcast the content included on the hard drive, with the medium being secondary. Therefore, the licenses cannot be said to be incidental to the import of hard drives as envisaged by Section 12 of the VAT Act.

We also note that in ***Africa Broadcasting (U) Limited v Uganda Revenue Authority (TAT Application No. 44 of 2018***, this Tribunal extensively dealt with a similar dispute between the same parties. The Tribunal held:

"... 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 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".

The Tribunal further noted that:

"...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 facts in the present case are like the above case where this Tribunal found the Applicant liable to pay VAT. We find no reason to depart from this Tribunal's earlier decision. The Applicant is liable to pay VAT on the imported services, with the taxable value being the license fees payable to the international suppliers as opposed to the value of the hard drives.

Issue 2: Whether the Applicant is liable to pay WHT on foreign acquired programs?

Section 84 of the Income Tax Act provides:

"(1) Subject to this Act, a tax is imposed on every non-resident person deriving income under a Ugandan Source services contract.

(2) The Tax payable by a non-resident person under this section is calculated by applying the rate prescribed in Part V of Schedule 4 to this Act to the gross amount of any payment to a non-resident under a Ugandan source services contract".

Section 84 (4) defines a "Ugandan Source services contract" as:

"a contract, other than an employment contract, under which-

(a) The principal purpose of the contract is the performance of services which gives rise to the income sourced in Uganda; and

(b) Any goods supplied are only incidental to that purpose".

Section 78 defines the income derived from sources in Uganda. Relevant to this case, income is sourced in Uganda to the extent to which it is:

"...a royalty (i) paid by a resident person, other than as an expenditure of a business carried on by the person outside Uganda through a permanent establishment."

Section 2 of the Act defines a royalty, of relevance to this case, *to mean:*

"...the use of or right to use -

(B) any video or audit material, whether stored on film, tape, disc or other medium for use in connection with television or radio broadcasting"

Section 137 of the Income Tax Act provides:

"(1) Any person making payment of the kind referred to in section 82,84 or 85 shall withhold from the payment the tax levied under the relevant section".

We find that the license fees paid by the Applicant to the international suppliers of programs are royalties within the meaning of Section 2 of the Income Tax Act and thereby constituted income sourced in Uganda as provided for by section 78 of the Income Tax Act. The Applicant was therefore, under obligation to withhold taxes therefrom and remit the same to the Respondent.

In ***Esri Eastern Africa LTD v URA App NO. 41 of 2023,*** the Tribunal ruled: *"Having found that the non-resident is liable to withholding tax on income earned from the provision of software to customers in Uganda, it was incumbent on the Applicant to withhold the said tax and remit the same to the Respondent. This is as per the provisions of Section 137 of the ITA which requires any person making payment of the kind referred to in section 82,84 or 85 to withhold from the payment the tax levied under the relevant section."* The Tribunal further stated that *"where the taxpayer does not withhold the tax, they are personally liable to pay it to the Respondent. However, it is upon them to claim the tax paid from the non-resident person who should have paid it in the first place"*

In the circumstances, we find the Applicant liable to pay withholding tax from the payments that were made to its international suppliers of programs.

Issue 3. Whether the Applicant is liable to pay PAYE?

Section 2 of the Income Tax Act defines an employee as *"someone engaged in employment"*. Section 2 (z) of the Income Tax Act defines employment as:

"(i) the position of an individual in the employment of another person. (ii) directorship of a company. (iii) a position entitling the holder to a fixed or ascertainable remuneration; or (iv) the holding or acting in any public office;"

The question for determination is whether the presenters were in the employment of the Applicant or independent contractors. See *International Food Policy Research Institute v Uganda Revenue Authority TAT No.59 0f 2023.* We rely on the case of ***Infectious Diseases Institute versus Uganda Revenue Authority, Civil Appeal No. 006 of 2022,***

where Hon. Justice Ocaya Thomas O.R opined extensively on the circumstances under which one will identify an independent contractor from an employee. He stated:

"The contractors are not beneficiaries of the benefits conferred on staff and are practically "left to their own devices" ... It appears to me that the only "control" that the Appellant exercises, from the materials on the record of appeal, is contractual; that is, ensuring that the consultants deliver what has been contractually agreed to be delivered rather than overarching control in the employment sense. It therefore is clear to me that the Appellant does not exercise control over the consultants".

He further stated:

"The rest of the relationship between the Appellant and its consultants is not consistent with employment. There isn't a "certainty" to payment since the consultant must either deliver or work to be paid, unlike say an employee who may earn money while sick or on leave. There is no entitlement to leave, bereavement pay or sick day...."

We find that, the independent presenters do not fall within the definition of employees. The presenters are only paid when they work unlike employees who are paid on days when they are sick /have not worked.

Independent contractors do not serve any probationary period and are not entitled to monthly salary, annual leave, sick leave maternity/paternity leave, severance pay, medical insurance, NSSF contributions and there is no retirement age for them. Unlike the Applicant's employees who have fixed working hours, the independent contractors are only required to come to the TV station in time for the programs they host. The independent contractors are not allowed to act for or on behalf of the Applicant and are even liable to indemnify the Applicant against any claims that arise of any breach or nonperformance of the contracts.

The Applicant therefore, succeeds on this issue and is not liable to pay the PAYE assessed. The Applicant was right to withhold tax at a rate of 6% from the payments made to the TV presenters.

Issue 4: Whether the Applicant is liable to pay Shs.168,780,000 is respect to Phaz Motion Pictures?

The Applicant submitted that the Respondent should not fault the Applicant as they duly accounted for the expense, withheld and remitted the same to the Respondent. The Applicant submitted that they qualify for a deduction under Section 22 of the Income Tax Act (ITA). The Respondent submitted that it was justified in disallowing the expenses from a supplier, Phaz Motion pictures Ltd, as the supplier did not have a TIN.

Section 22 (3)(l) of the Income Tax Act which provides:

"Except as otherwise provided in this Act, no deduction is allowed for-

(l) any expenditure above five million shillings in one transaction on goods and services from a supplier who does not have a taxpayer identification number".

In the present case, there was a contract between the Applicant and Phaz Motion Pictures for services. Phaz Motion Pictures provided services to the Applicant for consideration of Shs. 562,600,000. Upon invoicing, Phaz Motion Pictures instructed the Applicant to pay to Diaspora Consultancy Limited. Whilst Phaz Motion Pictures does not have a TIN, Diaspora Consultancy Limited has one.

We agree with the Respondent that the Applicant was not entitled to a deduction for the expense incurred in respect of services procured from Phaz Motion Pictures. The law is unequivocal that a deduction is not allowed for any expenditure above five million shillings in one transaction for goods or services procured from a supplier who does not have a TIN.

The nomination of Diaspora Consultancy Limited was an attempt to circumvent the above requirement. This was not done in good faith. The Tribunal will not close its eyes to such maneuvers and allow to be blinded by the form of transaction, when the substance of it points to something else. In this particular case, the substance of the transaction is that there was provision of services by Phaz Motion Pictures in consideration for amounts exceeding five million shillings.

Further, there was no transaction between the Applicant and Diaspora Consultancy Limited to warrant the payment received by it. Diaspora Consultancy did not provide any services to the Applicant. Phaz Motion Pictures' instruction on the invoices to pay

Diaspora Consultancy does not change the fact that Phaz Motion Pictures is the supplier who provided the services. It follows therefore that if Phaz Motion Pictures did not have a Tax Identification Number as required by Law, then the expense was not deductible for income tax purposes.

It should also be emphasized that the objective of Section 22 (3) (I) of the Income Tax Act is to widen the tax base by bringing into the tax net, persons who are earning taxable income and are not registered for tax purposes. It is the duty of any taxpayer to carry out the necessary due diligence of its suppliers to ensure that they are tax compliant. This is particularly important where the contract sums involved are significant. The tax law has set a threshold of five million shillings and therefore, any amount above this should be considered significant. The Applicant who is a large corporate, ought to have known better.

Therefore, we find that the Respondent was correct to disallow the deduction of the expense and consequently the resultant tax liability is due and payable.

We reiterate our findings as follows -

(i) The Applicant is liable to pay the assessed Value Added Tax of Shs. 361,204,633. The VAT paid at importation of the hard drive does not have an impact on the VAT due.

(ii) The Applicant is liable to pay the assessed Withholding tax of Shs. 301,003,860.

(iii) The Applicant is not liable to pay PAYE of Shs. 160,032,399.

(iv) Applicant is liable to pay Shs. 168,780,000 arising from the disallowance of the expense incurred in respect of Phaz Motion Pictures.

(V) 80% of costs are hereby awarded to the Respondent.

Dated at Kampala this.....29th.....day of.....November.....2024.

PROCOVIA R. NAMBI	**CHRISTINE KATWE**	**STELLA NYAPENDI**
CHAIRPERSON	**MEMBER**	**MEMBER**