

THE REPUBLIC OF UGANDA

IN THE TAX APPEALS TRIBUNAL AT KAMPALA

MISC. APPLICATION NO.72/2024

(ARISING FROM TAT NO. 135/2023)

AIRTEL UGANDA LIMITED..... APPLICANT

VERSUS

UGANDA REVENUE AUTHORITY..... RESPONDENT

BEFORE: MS. CRYSTAL KABAJWARA, MR SIRAJ ALI, MS. CHRISTINE KATWE

RULING

This ruling is in respect of an application brought under Section 22(3) of the Tax Appeals Tribunal Act and Rule 30 of the Tax Appeals Tribunal (Procedure) Rules and O.1r.10(2), (13) and O. 52 r.1 and 3 of the Civil Procedure Rules. The application seeks the following orders;

- a) Global Voice Group (GVG) be added as the 2nd respondent in TAT Application No. 135 of 2023.
- b) Costs of the application be provided for.

1. Background facts

The application is supported by the affidavit of Mr. Hudson Katumba, the legal officer of the applicant which briefly states as follows:

- (i) Sometime in the year 2018, an amendment to the Excise Duty Act introduced a Local Excise Duty (LED) tax on OTT services. The Tax was provided for under paragraph 13(b) of the Second Schedule of the Excise Duty Act

2018(as amended) and it imposed a Local Excise Duty tax of Shs. 200 per user per day of access.

- (ii) The Applicant, alongside other telecommunication companies, Uganda Communication Commission (UCC), and the Respondent, came to the realization that there existed no established system for tax accountability or collection from users. Consequently, they reached a consensus that each telecommunication entity should implement distinct technologies and system configurations within their respective network.
- (iii) The Applicant implemented a successful system, filed returns, set up Online Virtual Accounts and remitted the amounts collected from each user of OTT services to the Respondent.
- (iv) The Applicant made monthly Local Excise Duty declarations through the adjusted monthly tax returns and attached accompanying accounting explanation of the money on the Respondent's OVA Account. This was necessary because the users are hosted and identified on the telecom system network.
- (v) For the period March 2020 to June 2021, the Applicant collected Local Excise duty on OTT services and remitted the same to the Respondent.
- (vi) The Applicant remitted all monies collected from each user who paid the OTT tax to access the OTT services and filed all returns and reconciliations satisfactorily.
- (vii) In 2022, the Respondent commenced a comprehensive tax audit on the Applicant for all tax heads from July 2019 to June 2022.
- (viii) During the pendency of the audit, the Respondent issued additional administrative assessments for Excise duty on OTT services between 31st March 2023 and 14th April 2023, in the sum of Shs.17,653,137,002, for the period March 2020 to June 2021.

- (ix) Additional administrative assessments were issued based on information received by the Respondent from Global Voice Group (GVG), which purported to show that the Applicant permitted users to access OTT services without paying the OTT tax.
- (x) The Applicant objected to the assessments and applied for review of the objection decision.
- (xi) GVG, as the party, which provided the Respondent with the information forming the basis of the Assessments is instrumental in this matter and consequently the decision of the tribunal in TAT Application No.135 of 2023 would be of legal interest to GVG.
- (xii) The interests of justice demanded the joinder of GVG as the second Respondent for the purpose of settling all the questions in and that it is in the interest of Justice for the Honorable Tribunal to join GVG as the 2nd Respondent for settling the questions involved in TAT Application No.135 of 2023.

The Respondent's position was set out in its affidavit in reply deposed by Grace Aine Ngabirano, the Respondent's Acting Manager, Special Projects. The affidavit which opposed the application, stated as follows;

- (i) The dispute in TAT Application No.135 of 2023, which relates to unremitted Local Excise Duty arising from OTT access to users, is unique to the Applicant.
- (ii) The orders sought by the Applicant in TAT Application No.135 of 2023 will in no way directly or legally affect the GVG, nor is it likely to result in a multiplicity of suits, nor is the presence of GVG necessary for the adjudication of TAT Application No. 135 of 2023.
- (iii) The Applicant has not demonstrated any interest that the GVG has in this matter.

- (iv) The information used by the Respondent was obtained from a Government of Uganda owned Telecom Management Information System (TIMS) and DMS and it belongs to the Government of Uganda.
- (v) The Respondent intends to call employees of the GVG as witnesses in this matter and the Applicant will have the opportunity to cross examine the said witnesses consequently, GVG does not need to be party to TAT Application No. 135 of 2023.
- (vi) The failure to grant this Application shall not render the main application before the Honorable Tribunal nugatory nor will it prejudice the Applicant in any way.

2. Representation

At the hearing of this Application, **Mr. Richard Agaba** and **Ms. Belinda Nakiganda** appeared for the Applicant while **Ms. Eseza Victoria Ssendege** appeared for the Respondent. Both parties made oral and written submissions.

3. Submissions of the Applicant

The Applicant submitted that the presence of the GVG before the Tribunal was necessary for the Tribunal to effectively and completely adjudicate and settle all questions involved in TAT Application No. 135 of 2023.

The Applicant relied on the decision of the Tribunal in ***Uganda Revenue Authority v ILISO Consulting (pty) Limited Miscellaneous Application No.34 of 2023*** where the Tribunal found that it was necessary for the 2nd Respondent to be joined to the proceedings to effectually and completely adjudicate and settle all questions involved in the Application. The Applicant also relied on paragraph 5(3) of the statement of reasons, where the Respondent stated that the information to support its findings and the eventual issuance of assessments to the Applicant were obtained from the GVG.

4. Submissions of the Respondent

The Respondent opposed the application and relied on the decision of the Supreme Court in ***Departed Asians Property Custodian Board v Jaffer Brothers Limited, SCCA No.9 of 1998*** where the following grounds were set out as being necessary for a party to be added to a suit;

- a) That it is necessary for the effectual and complete settlement of all questions involved in the suit;
- b) For the avoidance of multiplicity of suits;
- c) The orders sought in the suit would legally affect the interests of the party sought to be added.

The Respondent submitted that GVG does not need to be a party for it to give evidence. In paragraph 11 of the affidavit deposed by Mr. Grace Aine Ngabirano, the Respondent stated that they intend to call employees of GVG as witnesses in this matter and the applicant will have the opportunity to cross examine them.

The Respondent submitted further that paragraph 9 of the affidavit in reply in which the respondent stated that the information was obtained by the Government of Uganda owned Telecom Management Information System. The Respondent submitted that the lack of property rights by GVG left them at pains to see how a suit could be sustained against GVG as they only used data belonging to the Government.

The Respondent further submitted that the orders sought by the applicant would not legally affect the interest of GVG as the applicant seeks an assessment issued against it by the Respondent set aside.

5. Applicant's submissions in rejoinder

In rejoinder, the Applicant relied on the decision of *Kanyeihamba, J.S.C, in Departed Asians Property Custodian Board v Jaffer Brothers Limited* (supra) where, His Lordship, relying on the English case of *Amon v. Raphael Tuck & Sons Ltd (1956) 1 ALLER p.23* stated:

"...a party may be joined in a suit, not because there is a cause of action against it, but because that party's presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all the questions involved in the cause or matter".

The Applicant submitted further that GVG managed the Government's system known as TIS and analyzed the raw data and was able to determine the access to over-the-top taxes. The Applicant submitted that their presence was therefore material to this case and without it the Respondent would not be able to ably explain the assessments made. The Applicant submitted further that GVG cannot be compelled as a witness to

testify before the tribunal. It can only be compelled if it is made a party to the Application. Furthermore, the Applicant submitted that GVG is crucial to the matter because the people who accessed and analyzed the system are employed by it.

6. Resolution of the application by the tribunal

We have carefully read and considered the affidavits on record and submissions of both parties. We have also perused the authorities provided by the parties.

This application has been brought under O. 1. Rule 10 (2) of the Civil Procedure Rules. It states as follows;

“(2) The court may at any stage of the proceedings either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

It is clear from the submissions before us that the main thrust of the Applicant's case is that GVG's presence before the tribunal is necessary to enable the Tribunal effectually and completely adjudicate upon and settle all questions involved in TAT Application No. 135 of 2023.

The criteria for determining whether the presence of a person is necessary under O.1 r.10 (2) of the Civil Procedure Rules was set out by **Mulenga J.S.C**, in **Departed Asians Property Custodian Board v Jaffer Brothers Limited** (supra). A relevant excerpt from his ruling is reproduced here below;

“However taking a leaf from authorities in other jurisdictions having similar, and even identical rules of procedure, I would summarize the position as follows: For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions involved in the suit, one of two things has to be shown. Either it has to be shown that the orders, which the plaintiff seeks in the suit

would legally affect the interests of that person, and that it is desirable, for avoidance of multiplicity of suits, to have such person joined so that he is bound by the decision of the court in that suit. Alternatively, a person qualifies, (on application of a defendant) to be joined as a co-defendant, where it is shown that the defendant cannot effectually set up a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind that person. (See Mulla on the Code of Civil Procedure of India) 14th Ed. By J.M. Shelat, Vol.11 pp. 858 and 864-5 and **Amon vs. Raphael Tuck & Sons Ltd (1956) 1 All ER 273 at p.290**). ``

The criteria for determining whether the presence of a person is necessary under O.1 r.10 (2) of the Civil Procedure Rules, are, firstly, that the orders which the plaintiff seeks in the suit would legally affect the interests of that person, and that it is desirable, for avoidance of multiplicity of suits, to have such person joined so that he or she is bound by the decision of the court in that suit.

Alternatively, a person qualifies, (on application of a defendant) to be joined as a co-defendant, where it is shown that the defendant cannot effectually set up a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind that person.

In this case, the orders sought by the applicant will not legally affect the interests of GVG. The applicant's primary reason for adding GVG to these proceedings is that GVG provided the data, which was relied on by the Respondent, in issuing the additional assessments against the Applicant. (See paragraph 12 of the affidavit in support of the application by Hudson Katumba). It is apparent therefore that the Applicant seeks to add GVG as a party not because the orders sought by the Applicant in TAT 135 of 2023 will legally affect the interests of GVG but because the Applicant considers that GVG being the party which provided the Respondent with the

information used in arriving at the additional assessments, is best placed to explain how it came up with the information, which it provided to the Respondent and which in turn formed the basis of the additional assessments.

The alternative condition only applies where a defendant seeks another party to be joined as a co-defendant, so that the defendant can effectually set up a defence, which it would not be able to set up, without that person being added to the suit as a co-defendant or unless the order to be made is to bind that person added as a co-defendant. In the present case, although the Applicant is defending an assessment issued against it by the Respondent, which places it in the position of a defendant, it does not seek to join GVG as a co-defendant for the purpose of setting up its defence, rather it seeks to join GVG as the party best placed to explain the basis of the additional assessments issued by the Respondent. The term 'co-defendant' implies persons sued in the same litigation or charged with the same crime. Apart from providing the information which gave rise to the Additional Assessment, GVG has no connection whatsoever with the assessment or with the Applicant, which would place it in the position of a co-defendant. GVG, in our opinion, does not come within the ambit of the criteria set out above.

The scope and purpose of O.1.R 10(2) of the *Indian Code of Civil Procedure* which is *in pari materia* with O.1. R.10 (2) of our Civil Procedure Rules was explained as follows in the Indian decision of *Ramesh Hira Chand Kundan Mittal Mal v. Municipal Corporation of Greater Bombay*, AIR (1992) SCW 846:

“It cannot be said that the main object of the rule is to prevent multiplicity of actions though it may incidentally have that effect. But that appears to be a desirable consequence of the rule rather than its main objective. The person to be joined must be one whose presence is necessary as a party. What makes a person a necessary

party is not merely that he has relevant evidence to give on some questions involved; that would only make him a necessary witness. It is not merely that he has an interest in the correct solution of some question involved and has thought of relevant arguments to advance. The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party. The line has been drawn on a wider construction of the rule between the direct interest or the legal interest and commercial interest. It is, therefore, necessary that the person must be directly or legally interested in the action in the answer, that is, he can say that the litigation may lead to a result which will affect him legally that is by curtailing his legal rights". (Emphasis Added) (See Mulla, The Code of Civil Procedure 18th Edition Vol. 2 p.1525).

In the present case, the Applicant seeks to join GVG to TAT 135 of 2023 because it believes that GVG has relevant evidence to give in respect of the information that it provided to the Respondent. Applying the above decision to the facts of our case, such a situation would only make GVG a necessary witness and not a necessary party.

We believe that the proper course of action for the Applicant is to apply to the tribunal, at the appropriate time, under S. 24(2) (a) of the Tax Appeals Tribunals Act, for the tribunal to summon GVG to appear before it to give evidence. The above provision gives the tribunal the powers of the High Court to summon a person to appear before it to give evidence or to produce books, documents or things in the possession, custody or control of the person named in the summons.

The decision in ***Uganda Revenue Authority vs. ILISO Consulting (PTY) Ltd and Another, Misc. Application No. 34 of 2023***, is distinguishable from the present case. In the ILISO case, the Applicant, ILISO Consulting, objected to the assessment issued against it by the Respondent on the grounds that it had been issued against the wrong party and that the correct party was ILISO South Africa. Uganda Revenue Authority sought to join ILISO South Africa, as a necessary party because the orders sought by ILISO Consulting would affect the legal interests of ILISO South Africa as it would be required to pay the taxes assessed. The ILISO case therefore fell squarely within the criteria set out in the ***Jaffer Brothers*** case. In this case, however, the orders sought

will not legally affect the interests of GVG as its presence is only required for giving evidence.

The statement by *Kanyehamba, J.S.C*, in the *Jaffer Brothers* case, to the effect that a party may be joined in a suit, not because there is a cause of action against it, but because that party's presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all the questions involved in the cause or matter, is of no help to the Applicant's case, as it is merely a reiteration of the position of the law, as explained in detail by *Mulenga J.S.C*, in the same decision and on the basis of which the conclusions in this matter have been reached.

For the above reasons we find that the conditions to add GVG as the Second Respondent to these proceedings have not been met. This application is accordingly dismissed with costs.

Dated this ^{8th} day of ^{July} 2024.

Crystal Kabajwara

MS. CRYSTAL KABAJWARA
CHAIRPERSON

Siraj Ali

MR. SIRAJ ALI
MEMBER

Christine Katwe

MS. CHRISTINE KATWE
MEMBER

RULING