THE REPUBLIC OF UGANDA

IN THE TAX APPEALS TRIBUNAL AT KAMPALA

APPLICATION NO. 11 OF 2023

ALLIED BEVERAGES LIMITED ..... APPLICANT

VERSUS

UGANDA REVENUE AUTHORITY..... RESPONDENT

BEFORE: MS. CRYSTAL KABAJWARA, MRS.KABAKUMBA MASIKO, MS. GRACE SAFI

RULING

This ruling is in respect of an application challenging a VAT assessment of Shs. 9,707,459,996. The assessment arises from the Respondent's characterisation of services treated as exports by the Applicant as local supplies on the basis that they were consumed in Uganda. The Respondent imposed VAT at the standard rate of 18% rather that the 0% rate that the Applicant had applied.

1. Background facts

The Applicant carries on the business of brand marketing and promotional services, including specific marketing- related research in Uganda.

By an agreement dated 6 July 2016 the Applicant was contracted by the Coca-Cola Export Corporation (TCCEC or Export) based in Atlanta, USA to provide marketing services. On 29 March 2022, the Applicant and TCCEC entered into an addendum (the Addendum) to further clarify that the place of use and consumption of the Applicant's services shall continue to be outside Uganda. The Addendum was effective from 4 November 2020.

The Respondent performed a returns examination on the Applicant's VAT returns for the period December 2020 to August 2022 and concluded that the Applicant had treated the sales made to TCCEC amounting to Shs. 53,930,333,308 as zero rated instead of VATable at the standard rate of 18%. The Respondent consequently issued an assessment of Shs. 9,707,459,995.

The Applicant objected to the assessment on the basis that the services provided to TCCEC are exported services and should be zero rated. Additionally, the addendum to the Service Agreement between the Applicant and TCCEC clearly specified that the place of use and consumption of the Applicant's services was outside Uganda in compliance with the VAT Regulations. The Applicant also objected on the basis that the Respondent did not consider the credit note for the period under review of Shs. 4,688,503,470.

The Respondent disallowed the Applicant's objections and upheld the assessment hence this application.

2. Representation

At the hearing, the Applicant was represented by Mr. Bruce Musinguzi, Mr. Ferdinand Tumuhaise and Mr. Thomas Kato of Kampala Associated Advocates. The Respondent was represented by Ms. Gloria Twinomugisha and Ms. Charlotte Katuutu from the Respondent's legal department.

3. Issues for determination

The key issue is whether the Applicant is liable to pay the tax assessed. Specifically, the Tribunal will determine whether the services provided by the Applicant amounted to an export of a service or not for VAT purposes.

The Applicant's sole witness was **Mr. Owen Desmond, a Senior Director of Supply and Point Planning and Organisation with the Coca-Cola company (AW1)**.

He testified that the Applicant provides market-specific research, marketing and promotional services. He stated that on 2 July 2016, the Applicant entered into a contract with TCCEC to provide brand marketing, market research and promotional services. The Applicant and TCCEC entered into an addendum clarifying that the services rendered by

the Applicant under the agreement continue to be wholly used and consumed outside Uganda.

AW 1 stated that TCCEC's role is to develop the overall marketing strategy to grow and protect the brands owned by the Coca Cola Company and to that end, requisitions local services from service companies such as the Applicant. Therefore, TCCEC and the concentrate manufacturers, who are based outside Uganda, are the beneficiaries of the marketing and promotional services provided by the Applicant.

During examination, AW1 was asked whether the services provided by the Applicant include running adverts on TV stations or radio stations in Uganda to which he replied in the affirmative. He was also asked whether the Applicant's services also include billboard advertising to which he replied in the affirmative.

He also stated that the Applicant provides brand marketing services, market research services, input on trends in the marketplace as well as provide information on anything that happens in the market that could impact the sale of concentrate.

With regard to the addendum, AW 1 testified that the addendum does not amend the original agreement but only clarifies that services are exported outside Uganda

The Respondent called two witnesses. The first witness (RW1) was **Jim Kagolo, a Supervisor in the Respondent's Large Taxpayers' Office.**

He stated that the Respondent carried out a returns examination and issued VAT assessment of Shs. 8,505,783,254 for the period December 2020 to August 2022 on the grounds that the Applicant misclassified its sales to TCCEC as zero-rate exports instead of as standard rated sales.

He also testified that the Applicant provided the Respondent with a service agreement executed in 2 July 2016 as well as an addendum executed on 29 March 2022 which stated that the services rendered are used and consumed outside Uganda.

RW1 further stated that the Applicant was assessed on the basis of marketing and promotion of the Coca-Cola products in Uganda which was done in various languages

including English and local languages through radio adverts, TV adverts and outdoor advertising.

In addition, RW1 stated that the Applicant uses advertising agencies in Uganda to whom it subcontractors the performance of the marketing services. These include Scanad Uganda Limited, Exp. Momentum Uganda Limited and Swivel Marketing Limited, among others.

RW1 stated that the services, rendered through radio and TV adverts and outdoor advertising were all consumed in Uganda and the addendum to the agreement could not change this fact. Further, the Coca-Cola brand was promoted in Uganda in local languages.

Regarding the credit note, the witness stated that at the time of assessing, the Applicant had not issued any credit note and therefore, the Respondent did not consider it. However, all credit notes which had been issued prior to the assessment were considered.

The Respondent's second witness **was Mr. Fred Kyomuhendo, an Officer in the Domestic Taxes Department of the Respondent (RW2).**

He stated that the Applicant raised an EFRIS credit note of Shs. 4,688,503,470 during the period under review and the same was incorrectly reflected as sales value in the EFRIS report.

During cross examination, the witness stated that if the credit note had been considered, it would have reduced the Applicant's tax liability provided that it was approved.

He also stated that the Applicant issued a credit memo on 29 September 2020 instead of a credit note, which had the effect of increasing the Applicant's sales. However, when the Applicant objected and brought the error to the attention of the Respondent, the witness stated that he did not consider the credit note or the explanation provided by the Applicant.

4. Submissions of the Applicant

The Applicant submitted that it is not in dispute that the Applicant rendered services to TCCEC. However, the contention between the Applicant and the Respondent is with

respect to the applicable VAT rate to such services depending on whether the services rendered were used and consumed in Uganda or used or consumed outside Uganda.

Under Section 24(4) of the VAT Act, the rate of tax imposed on supplies specified in the Third Schedule is zero. The Schedule 4 of the VAT Act provides for zero-rated supplies. Paragraph 1(a) provides:

"Zero-Rated Supplies

1. The following supplies are specified for the purposes of Section 24(4);

A supply of goods or services where the goods or services are exported from Uganda as part of the supply"

Further, the Value Added Tax Regulations S.I 349-1, as amended (hereinafter referred to as VAT Regulations) elaborate on export of services. They state in Regulation 12:

"Where services are supplied by a registered taxpayer to a person outside Uganda, the Services shall qualify for zero rating only if the taxpayer can show evidence that the services are used or consumed outside Uganda, which evidence can be in the form of a contract with a foreign purchaser and shall clearly specify the place of use or consumption of the service to be outside Uganda..."

A service will therefore be deemed to be exported where there is evidence that the use or consumption of the service was outside Uganda. This evidence can be by contract between a registered taxpayer and a foreign purchaser that supports that the services are used or consumed abroad.

The Applicant further submitted that the relationship between the Applicant and TCCEC is governed by the Service Agreement marked. The Service Agreement stipulates that it is between TCCEC principal office is located at One Coca-Cola Plaza N.W, Atlanta, Georgia 30313, USA and Allied Beverages Company Limited, with its offices in Uganda. The fact that TCCEC is located outside Uganda is not a contested fact.

The Applicant also stated that the Addendum to the Service Agreement clarifies that the services rendered under the Service Agreement continue to be used and consumed

outside Uganda. The place of use and consumption is where TCCEC is located, which is in Atlanta, Georgia (in the United States of America (USA)).

The Applicant concluded that it is evident from the Service Agreement and its Addendum that the services rendered by the Applicant are generally related to advice and market studies conducted for consumption by the foreign purchaser, who in this case is TCCEC located in Atlanta, USA, which is the place of use and consumption of the exported services.

The Applicant relied on the case of ***Allied Beverages Limited v URA, HCCA Civil Appeal No. 39 of 2022*** whose facts are similar to the case before us. This case was an appeal against the decision of if this Tribunal in the consolidated applications TAT Application No. 1 of 2019 and TAT Application 40 of 2021. On appeal, the decision by the Tribunal that the services were consumed in Uganda was overturned by the High Court on appeal. The High Court held that the determining factor is the location where the services supplied are finally consumed or used not where they are performed. As a result, the High Court found that the questioned services were used and consumed by the TCCEC to assist in the determination of the brand concentrate to be used by the manufacturers of The Coca-Cola Company.

The Applicant submitted that the decision of the High Court is binding on the Tribunal as it dealt with the same facts that are on all fours with those in current dispute. Therefore, the Applicant's services are consumed outside Uganda and, therefore, zero-rated for purposes of VAT.

Application of the OECD Guidelines

The Applicant also submitted that their position is supported by the OECD Guidelines which state in Guideline 3.2 that where two companies are located in different jurisdictions, the cross border business -to-business services should be taxed where the consumer or recipient of the service is situated. Accordingly, the country with the taxing rights over the services should be the USA. Consequently, the export of the services by the Applicant should be zero rated.

Failure to consider credit note of Shs. 4,688,503,470

The Applicant submitted that they also objected to the assessment on the grounds that the Respondent did not take into account the above credit note.

The Applicant stated that they erroneously raised a credit memo instead of a credit note, an error, which the Respondent recognized. They were advised by the Respondent to rectify the error; however, attempts to rectify were futile as the Respondent did not open up the relevant period on the EFRIS system to allow the Applicant correct the error.

The Applicant also submitted that RW1 confirmed that the credit memo was issued prior to the assessment of 29 September 2021 and that the Respondent advised the Applicant to rectify the error.

The Applicant submitted that since the Respondent had denied them the opportunity to rectify the error, the Tribunal should find that the credit note issued by the Applicant should be applied towards the reduction of the Applicant's tax liability for the period in issue.

5. Submissions of the Respondent

The Respondent submitted that the Applicant through various advertising agencies runs adverts on Ugandan Radio stations, TV Stations and Billboards on behalf of TCCEC in respect of final consumer products such as Coca-Cola, Minute Maid, Ades Nutri Bushera, Fanta, among others. A review of invoices from the Applicant to TCCEC indicates that all the invoices were for marketing and promotion services rendered in Uganda (See page 1 to 24 of the Respondent's Trial Bundle (RTB)).

Further, the invoices from the advertising agencies to the Applicant indicate that they are for Radio Billings, TV Billings, Digital Billings, Outdoor Billings, Telemarketing and Sales Promotion. The service providers are companies based and providing broadcasting services in Uganda such as Sanyuka Television Limited, Capital Radio 2015 Limited, Crooze FM, Buganda Broadcasting Services Ltd (BBS), Buddu Broadcasting Services Limited, Radio Simba, The New Vision Printing & Publishing Company Limited, Monitor Publications, Africa Broadcasting Uganda Limited, Scanad Uganda Limited, Exp.

Momentum Uganda Limited, Radio East Limited, Fabrication Media Uganda Limited, among others.

Further the remarks of the actual adverts or promotions which were done include Fanta Schools Activations, Coke Adverts, Coke Family Dinner Adverts, Coke Uplift Adverts, Minute Maid Juice Tips, Airing, Coke Uplift Campaign, Nutri Bushera double face (billboard), Adverts for Minute Maid Run, Minute Maid Arua One FM Sponsorship, Rental of Billboards for Ades Nutri Bushera, Rental of Billboards for Coca-cola Billboard rental services- Coke Campaign Nutri Bushera adverts on Capital FM, Minute Maid Delight Adverts, Coke Sponsor Cheza.Com on Spark, Fanta Sponsor T-Nation on NTV, Coca Cola Sponsor the Beat on NTV, among others.

The Respondent also submitted that the services are delivered or made available in Uganda when the TV and Radio adverts are run and when the Billboards are put up and that it matters not that TCCEC is not physically in Uganda.

The Respondent relied on the case of ***Aviation Hanger Services Ltd Vs. URA, TAT Application No. 21 of 2019*** where the Tribunal held that the consumption of the maintenance services is completed when the supply or delivery is made and that once the spare parts were replaced, oil is changed or engines are overhauled, the maintenance service is complete and the service is deemed to have been consumed.

Similarly, in the present case, TCCEC contracted the Applicant to run adverts, and as such the marketing and advertising services are consumed the moment the adverts run on radio, television or when the billboards are put up which happens in Uganda.

On whether the services were exported, the Respondent submitted that the VAT Act is clear and unambiguous about exportation of services:

Paragraph 1(a) of the Fourth schedule to the VAT Act is further explained in Paragraph 2(b) of the Fourth schedule to the VAT Act that for the purpose of paragraph 1(a), services are treated as exported from Uganda if they were supplied for use or consumption outside Uganda as evidenced by documentary proof acceptable to the Commissioner General.

In this case, the VAT Act is clear in its provision that the test for export of services is in "use or consumption" outside Uganda which should be backed by documentary evidence that is acceptable to the Commissioner. The Respondent has already demonstrated that the services in question were performed and consumed in Uganda and the services in question do not qualify as having been exported.

Regarding Regulation 12 of the VAT Regulations, the Respondent submitted that the use of the words "which evidence can be in the form of a contract" cannot be interpreted to mean that in every case where there is a contract specifying a place of use or consumption, that then such place shall be the place of consumption. Regulation 12 does not serve to imply that even in circumstances where the services are clearly and factually supplied and consumed in Uganda, that a taxpayer can, by agreement, choose another place of consumption.

The Respondent cited the case of ***The Elma Philanthropies (EA) Limited Vs. URA, HCCA No. 0062 of 2020***, which concerned the interpreted Regulation 12 of the VAT Regulations. The High Court noted that while the Appellant adduced evidence of a contract with a foreign purchaser, however, the Appellant was expected to adduce evidence informing that the place of use or consumption of the said services was outside Uganda. Simply put, that the purpose of usage of those services rendered by the Appellant must be outside Uganda.

Regarding the decision of the High Court in ***Allied Beverages, HCCA No. 0039 of 2022 (supra)***, the Respondent submitted that there are good reasons for departing from the Allied Beverages High Court Appeal Decision namely:

(i) There is a more recent decision of the same court in ***The Elma Philanthropies (EA) Limited Vs. URA, HCCA No. 0062 of 2020*** on the same issue. As such, this Tribunal is enjoined to consider both decisions and come to a position in the present case.

(ii) Secondly, whereas Counsel for the Applicant has extensively submitted that the present case is on all fours with the facts in HCCA No. 0039 of 2022, this is not true. The services provided in the previous cases were brand marketing and market research. (Refer to the Ruling in TAT No. 1 of 2019 and 40 of 2022). However, in

the present case, all the assessments are in respect of invoices relating to brand marketing on Uganda Radio Stations, TV stations and Billboards.

(iii) The Learned Appellate Judge in determining the question of consumption of the services based her decision on "concentrates" and stated *"... the services supplied by the Appellant are used by the TCCEC to determine the perception on the brands of The Coca-Cola Company to enhance the sale of concentrates by its Concentrate manufacturers. At this point, the services of the Appellant are consumed and used by the TCCEC i.e. put to a particular purpose, which is the determination of the proprietary concentrate for each brand sold to the bottlers".* However, the present case has nothing to do with concentrates but adverts on Ugandan Radio stations, TV stations and Billboards in respect of final consumer products such as Coca-cola, Fanta, Minute Maid and Ades Nutri Bushera, among others. The said adverts have nothing to do with concentrates. As such, the facts and the basis of the decision differ and accordingly, the said decision cannot apply to the present case.

(iv) Lastly, the decision of the High Court is per incuriam as it did not address the effect of Section 16 of the VAT Act, which deals with place of supply, read together with Regulation 12 and the implication of the two provisions on exportation of services. This was ably done by the same Court in the more recent decision of ***The Elma Philanthropies***.

Submissions on the credit note

Concerning the credit note, the Respondent submitted that that the credit note in respect of which approval was sought, would have no effect on the tax liability in question. According to the evidence of RW2, a credit note is accounted for after it is approved because for one to claim a transaction in the VAT return, they must have a Fiscal Document Number (FDN). An FDN for a credit note is issued after the credit note has been issued. Therefore, a credit note issued and approved after August 2022 could not affect the period of the returns examination which was December 2020 to August 2022 because it would be outside the period of the returns examination.

6. The determination of the issues

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

The main issue for determination is whether the services rendered by the Applicant to TCCEC were an export of services thus liable to VAT at a rate of 0%. The Applicant's position is that the services were exported for the following reasons:

(i) The use and consumption of the services was outside Uganda as TCCEC and the concentrate manufacturers, who are based outside Uganda, are the beneficiaries of the marketing and promotional services provided by the Applicant; ; and
(ii) The contract specified that the services would be consumed outside Uganda.

This is as per the requirement of Sectio 24 (4) of the VAT Act, read together with Regulation 12 of the VAT Regulations, 1996.

In addition to the above, the Applicant contends that a recent decision of the High Court, involving the same parties, wherein the High Court held that the services rendered by the Applicant were exported services, is binding on this Tribunal ***(See Allied Beverages Company Ltd v Uganda Revenue Authority, Civil Appeal No. 0039 of 2022).***

On the other hand, the Respondent argues that the services were not exported for the following reasons:

(i) The services were performed and consumed in Uganda;
(ii) Regulation 12 does not serve to imply that even in circumstances where the services are clearly and factually supplied and consumed in Uganda, that a taxpayer can, by agreement, choose another place of consumption.

Regarding the High Court decision, the Respondent argued that the facts are distinguishable from the present facts. In addition, the case was superceded by a more recent decision in ***The Elma Philanthropies (EA) Limited Vs. URA, HCCA No. 0062 of 2020***.

The Respondent has also argued that section 16 of the VAT Act, which deals with place of supply of services, takes precedence over Regulation 12 VAT Regulations, which lays down the conditions that should be met for a supply of services to qualify as an export.

Analysis

There is no contention as to whether services were performed or whether the services are VATable. The contention is whether the services qualify as an export which makes them VATable at 0% or not, which would make them VATable at the standard rate of 18%.

First, we must look at the services that are at the heart of the dispute.

According to the contract between the Applicant and TCCEC, the Applicant was contracted to provide services in relation to marketing and promoting the Brands as required by EXPORT(TCCEC):

(a) *Working with third party marketing service provider in the areas of marketing, advertising and promotion within the strategic guidelines developed by EXPORT.*

(b) *Recommendations to EXPORT with respect to its affiliate's participation, if any, in the bottlers' marketing or promotion expenditures and / or in the conduct of EXPORT's own marketing or promotion expenditures;*

(c) *Performance of other marketing and related services to EXPORT, including gathering information and preparing documentation related to researching and determining economic, regulatory, technical and marketing conditions that impact upon the promotion and marketing of the brands.*

(d) *Advice and guidance in connection wit management information services....as well as legal, administrative or financial services ...and other services considered ancillary to the main service.*

(e) *Advice in coordinating the technical and quality control services to ensure that the beverages, bearing the brands are manufactured to the specification of Coca-Cola, SHL and AI in the territories..."*

The above should also be read together with the preamble to the service agreement. The preamble states:

"WHEREAS, EXPORT having the right to engage in brand marketing throughout the Territory (ies) for purposes of implementing the marketing strategy of the brand owners with respect to such brands owned by or licensed to the Coca-Cola Company....WHEREAS, EXPORT desires to engage the services of ABC in the Territory(ies) for purposes related to, and in support of, advice with respect to the brand marketing to be undertaken in the Territory (ies) by ABC with respect to the brands..."

For context, it is worth pointing out that the term "Bottler" as used in the agreement, refers to manufacturers of Coca-Cola, SHL or AI branded products. The Tribunal hereby takes judicial notice of the fact that In Uganda, the relevant bottler is Century Bottling Limited, which produces several Coca-Cola and related branded products such as Coke, Fanta, Minute Maid, EDES Bushera etc. This fact is generally known and can be readily verified.

In resolving this dispute, it is important for one to understand the nature, purposes and objective of the services rendered by the Applicant.

Having reviewed the contract, it is reasonable to conclude that the primary purpose of the contract is the provision of marketing and promotional services of Coca-Cola and related brands in Uganda, being one of territories in which the Coca-Cola and related branded products are bottled and consumed.

What are brand marketing services and what purpose do they serve?

According to the Encyclopedia Brittanica, a comprehensive, multi-volume, English-language encyclopedia that provides general knowledge on a wide range of topics, "brand marketing" is defined as follows:

***"brand (marketing)**, a set of words, images, and associations that represent and distinguish a product or service in the marketplace. Strong brands elicit an emotional response from consumers and add value to the products and services they represent. Manufacturers have identified their products with names or symbols for thousands of years, and in the 20th century brands became not only critical to the promotion of goods and services but valuable assets in themselves. With the shift toward digital commerce in the 21st century, brands continue to be valuable but face new challenges because of the greater accessibility of information about products and services, the companies that produce or offer them, and the performance history of the branded offerings." (https://www.britannica.com/money/brand)*

The following conclusions can be drawn from the above:

(i) Brand marketing / promotion is aimed at distinguishing a **product** or service in the **marketplace**. Bringing this definition closer to home, what is the product? It is the products manufactured and sold by the Bottler (CBL) in Uganda, namely coke, fanta, minute maid products. The Respondent stated that the marketing campaigns promote the sale of concentrate. However, concentrate is not sold or marketed in Uganda as no evidence has been adduced to this effect. (For the avoidance of doubt, concentrate is the preflavored mixture, or syrup, that is sold to authorized bottlers to manufacture Coca-Cola branded products). What is the **marketplace**? This is the place where the products are sold, in this case, Uganda.

(ii) The purpose of brand marketing is to elicit an emotional response from **consumers.** Who are the consumers? The persons who purchase and consume the bottled products – in effect, the customers who are located in the Uganda marketplace.

(iii) Brand marketing is critical for the promotion of goods and services – what goods are being promoted? The goods being promoted are coke, fanta, minute maid and Edes bushera branded products, manufactured by CBL, the bottler.

It is primarily as a result of the above objectives, namely, the need to distinguish the products, connect with the consumer and promoting the goods, that the Applicant subcontracted advertising and marketing agencies to place billboards, carry out promotions and several marketing campaigns in Uganda, targeting the Ugandan consumer of products manufactured and bottled by CBL, bearing the Coca-Cola brands.

Now, one must ask the one million dollar question – who directly benefits from the brand marketing and promotion services?

Is it EXPORT and the foreign based relater parties? Is it the Applicant? Is it the Bottler?

The Applicant's witness, AW1, stated:

"TCCEC's role is to develop the overall marketing strategy to grow and protect the brands owned by the Coca Cola Company and to that end, requisitions local services from service companies such as the Applicant. Therefore, TCCEC and the concentrate manufacturers, who are based

outside Uganda, are the beneficiaries of the marketing and promotional services provided by the Applicant."

However, the agreement states otherwise. The agreement states in the Preamble that "*EXPORT engages in brand marketing for purposes of "implementing the marketing strategy of the brand owners*"

To implement means to put a plan or something into effect. In the context of the agreement, it would mean to put the marketing strategy into effect.

According to Investopedia (https://www.investopedia.com/terms/m/marketing-strategy.asp), a global financial media website that is a widely recognized source for financial education:

"A marketing strategy refers to a business's overall plan to convince customers to buy its products or services. A marketing strategy determines how to reach prospective consumers and turn them into buyers. It contains the company's value proposition, key brand messaging, data on target customer demographics, and other high-level elements."

Therefore, TCCEC / EXPORT is supported by the Applicant to implement a marketing strategy in Uganda, which is aimed at convincing Ugandan customers to buy Coca-Cola branded products. The implementation of this strategy also aims at turning prospective Uganda consumers into buyers of Coca-Cola branded products. Since these branded products are manufactured by CBL, the bottler in Uganda, CBL is the direct beneficiary of the implementation of the marketing strategy. This is because the strategy creates awareness of the products, which in turn drives sales of CBL's products in the Ugandan market place, especially, when Ugandan consumers are successfully convinced into buying Coca-Cola and related branded products.

TCCEC and the brand owners also benefit from the marketing support provided by the Applicant. However, they are not the primary beneficiaries, but rather secondary beneficiaries.

It is misleading to state that the marketing services benefit the concentrate manufacturers. In the first place, nowhere in the agreement is "concentrate manufacturers" mentioned. But also, the Applicant has not provided any evidence of concentrate mass marketing to

support the assertion that the marketing and promotional activities promote the sale of concentrate. Yes, while eventually, there might be an indirect benefit to the concentrate manufacturers arising from increase demand from CBL due to increase sales as a result of the marketing services provided by the Applicant, these benefits are remote and not direct.

Instead, in the present case, the Applicant, contracts advertising agencies in Uganda to support TCCEC's market strategy implementation involving:

(a) Bill board adverts in Uganda, targeting Ugandan consumers
(b) TV adverts on TV stations
(c) Radio adverts across the country
(d) Marketing / promotion campaigns in schools for fanta products
(e) Coca-cola adverts
(f) Minute maid juice tips on radio stations

All the above target Ugandan consumers, with the objective if turning them into buyers of Coca-Cola and relayed branded products, which are manufactured and sold by CBL, a Coca-Cola bottler. The direct beneficiary is CBL, the bottler and not the TCCEC or the concentrate manufacturers as the Applicant would like to have us believe.

Having established the immediate beneficiary of the services is CBL, a bottler, located in Uganda, we now turn to the legal principles and case law pertaining to export of services.

Analysis of the VAT law concerning the supply of services

There is no doubt that there was a supply of services by the Applicant. **Section 11** of the VAT Act provides that a supply of services means any supply which is not a supply of goods or money, including the performance of services for another person.

In the present case, the Applicant performed services for TCCEC involving the provision of marketing and promotional support services.

Further, **section 16** of the VAT Act provides that a supply of services shall take place in Uganda if the business of the supplier from which the services are supplied is in Uganda.

In the present case, the marketing and promotional support services were supplied by the Applicant, whose business is located in Uganda. Therefore, the place of supply of the services is in Uganda.

Turning specifically to export of services, **section 24** (4) of the VAT Act provides that the rate of tax imposed on taxable supplies specified in Schedule 4 is zero. Schedule 4 provides as follows in paragraph (1):

"The following supplies are specified for the purposes of Section 24(4) –

(a) a supply of goods or services where the goods or services are exported from Uganda as part of the supply"

Further, paragraph (2) of schedule 4 states as follows:

"For the purposes of paragraph 1(a), goods or services are treated as exported from Uganda if: -

...in the case of services, the services were supplied by a person engaged exclusively in handling of goods for export at a port of exit or were supplied for use or consumption outside Uganda as evidenced by documentary proof acceptable to the Commissioner General."

Therefore, for a service to qualify as an export, the test is whether it was used or consumed outside Uganda.

At the heart of this dispute is the debate as to whether export of services is evidenced by place of supply / performance (section 16) or place of use or consumption (Schedule 4).

Schedule 4 deals specifically with export of services and it is trite law that where there is a specific provision, it prevails over the general provision. Section 16 deals generally with place of supply for all services and in all cases, services, (save for imported services) whether exported or local will have their place of supply in Uganda. However, schedule 4 deals with proof of export and what it effectively states is that for a service to be considered as having been exported, one must satisfy the Commissioner that the services were consumed outside Uganda. Therefore, the primary test for export of services is use and consumption outside Uganda as explicitly stated in Schedule 4, paragraph 2.

We are also persuaded by the recent High Court decision in ***Allied Beverages (supra)*** where the High Court held that the physical location of the supplier cannot be the

overriding determinant of where the services are consumed. Further, in the subsequent decision of ***The Elma Philanthropy (supra)*** the High Court held that the purpose of which that service is provided should be outside Uganda for the service to qualify as an export of service.

Regulation 12 of the VAT Regulation

A lot has been said by both parties concerning Regulation 12. The provision states as follows:

"Where services are supplied by a registered taxpayer to a person outside Uganda, the services shall qualify for zero rating only if the taxpayer can show evidence that the services are used or consumed outside Uganda, which evidence can be in the form of a contract with a foreign purchaser and shall clearly specify the place of use or consumption of the service to be outside Uganda or that the service is provided for a building or premises outside Uganda."

The parties have raised to issues concerning this regulation. The first concerns conflict with section 16 of the VAT Act and the second with whether a contract that states the place of consumption is conclusive proof of export.

Is Regulation 12 in conflict with section 16?

The Respondent has submitted that Regulation 12 is in conflict with section 16 of the VAT Act and as such, section 16 takes precedence and overrides the regulation.

We do not agree with this school of thought. We already demonstrated that Section 24, read together with Para 1 (a) and 2 of Schedule 4, specifically deals with export of services, while Section 16 deals with place of supply. Further, Regulation 12 expounds on the kind of evidence that can prove that a service has been exported in line with Section 24 and Schedule 4. To that extent, there is no conflict but rather harmony with the principal act.

Is the contract conclusive proof of use or consumption of a service?

The Applicant has argued that the addendum to the contract dated 29 March 2020 and the added statement that the services are used and consumed outside Uganda is conclusive proof that the services were exported.

It is important to read Regulation 12 within the context of Para. 2 of Schedule 4.

Para. 2 states that the services must have been *supplied for use or consumption outside Uganda as evidenced by documentary proof acceptable to the Commissioner General.*

Therefore, there must be documentary proof of use and consumption outside Uganda. Regulation 12 states that this evidence can be in the form of a contract with a foreign purchaser and shall clearly specify the place of use or consumption of the service to be outside Uganda.

"Can" is a modal verb that expresses possibility. What this means in the present case is that a contract is one of the possible forms of evidence of export. Further, where a contract is adduced as evidence of export, it should state that the goods were for use or consumption in a place outside Uganda.

In the High Court decision in ***Allied Beverages (supra)***, the Court recognized the contract as having stated that place of consumption was in the USA and consequently held that the services were consumed in the USA

We believe that as far as the contract is concerned, the Applicant's contract met this requirement. However, while we agree that a contract which specifies place of consumption as being outside Uganda can be evidence of export, all evidence, when looked at in totality, must point to place or use / purpose of those services being outside Uganda.

To this end, we are persuaded by the High Court decision in the ***Elma Philanthropies,*** which was rendered post ***Allied Beverages.***

In that decision, the High Court held that while the Appellant met the requirement for the contract and was able to prove that a contract existed with a foreign purchaser, it failed to prove that the place of use / purpose of those services was outside Uganda.

In effect, the High Court in ***Elma Philanthropies*** took a substance over form approach.

This approach is particularly critical in tax matters as it requires that the actual economic substance and the real nature of transactions should take precedence over their legal or

contractual form. The doctrine entails the court looking at the substance of a transaction and not the form, to determine the legal and tax consequences of the transaction.

In this regard, the locus classicus, **WT Ramsay Ltd v IR Commrs (1981) 54 TC 101** is instructive. In that case which addresses substance over form, the court held:

"Given that a document or transaction is genuine, the court cannot go behind it to some supposed underlying substance. This is the well-known principle of ***Commissioners of Inland Revenue v Duke of Westminster [(1936) 19 TC 490]****. This is a cardinal principle but it must not be overstated or overextended. While obliging the court to accept documents or transactions, found to be genuine, as such, it does not compel the court to look at a document or a transaction in blinkers, isolated from any context to which it properly belongs."*

In the present case, while the contract states that the use and consumption of the services is in the USA, the context to which the service agreement belongs tells a different story as explained below.

What is the context?

In ***Coca-Cola Central East and West Africa Ltd v Commissioner of Domestic Taxes. Appeal No. 11 of 2013***, the terms "to consume" was defined as to "use up" and "use" to mean "to put to a particular purpose".

We've already demonstrated that the Applicant supports TCCEC implement a marketing strategy in Uganda and the objective of marketing strategy is to convince customers in the Ugandan marketplace to buy products to reach prospective Ugandan consumers and turn them into buyers.

The Applicant has told us that the services promote the sale of concentrate, however, there are no customers in Uganda buying concentrate. Instead, what we have is several billboards and marketing campaigns, promoting Coke, Fanta, Minutemaid, and Edes Bushera in Ugandan schools, Ugandan TV, in local languages etc. These products are manufactured, bottled and sold under their respective brands by CBL, a Ugandan producer and bottler of the branded products. The person who uses and benefits immediately and directly from the marketing campaigns is CBL through the promotion of its products, which translates into more sales revenue.

Therefore, the economic reality of the marketing services provided by the Applicant is that that they are performed in Uganda, their purpose is to turn Ugandan consumers into buyers of Coca-Cola/ AI/SHL branded products in Uganda. This in turn promotes the sale and consumption of the products in the Ugandan marketplace for the direct benefit of CBL. Neither the manufacturers of concentrate, who the Applicant alleges to be the consumers of the services, nor TCCEC are the immediate and direct beneficiaries or users of the Applicant's services.

It is worth noting that one of the activities for which the Applicant was invoiced by the advertising agencies is "sales promotion" (invoice from Golden Marketing at page 30 of Respondent's trial bundle) as well as "telemarketing", where telephone calls were made to potential Ugandan customers (see invoice from Exp. Momentum Uganda Limited at page 29 of Respondent's trial bundle).

In addition, it is important to note that use and consumption of services is a question of fact. Other than the Applicant's witnesses stating that the services are consumed by the concentrate manufacturers or TCCEC, the Applicant has not adduced any evidence, other than the contract, which demonstrates how the services were used and consumed by the concentrate manufacturers or TCCEC. No deliverables from the Applicant to TCCEC were adduced to show recommendations to TCCEC. Further, no evidence was adduced to show how TCCEC / concentrate manufacturers implemented the recommendations or made use of the support provided by the Applicant for their benefit,

On the other hand, there is overwhelming evidence that the services were Ugandan market focused and the only reasonable conclusion is that the services were used by the CBL, the bottler to promote the sale of its products in Uganda.

Therefore, the issue as to whether the services were exported is answered in the negative in favour of the Respondent. Consequently, the Applicant is liable to pay VAT at a rate of 18% and not 0%.

Credit note of Shs. 4,688,503,470

The issue of the credit note is simple and straightforward. The Applicant erroneously raised a credit memo instead of a credit note to rectify their sales position. The

Respondent acknowledged that there was an error and advised the Applicant to rectify the same.

There were several correspondences between the parties, specifically, on 21 September 2022, the Applicant informed the Respondent that they had attempted t correct the error and were not successful. The RW s confirmed that this was as a result of the Respondent's failure to open the period of the credit note. RW1 stated that there are timelines within which the error ought to have been rectified. However, when asked to explain the timelines and their legal basis, RW1 was unable to justify the timelines.

When RW2 was asked by the Tribunal why the credit note was not considered and approved at the objection stage, the witness stated that he didn't know why the credit note was not approved.

It is clear to this Tribunal that the Respondent does not dispute the existence of a credit note. The Respondent acknowledged that the Applicant erroneously raised a credit memo instead of a credit note. The Respondent advised the Applicant to rectify the matter. However, the Respondent denied the Applicant, the opportunity to rectify the matter by not opening up the period to allow the applicant correct the error. Therefore, the Respondent could not approve the credit note.

Moreover, during cross examination, RW2 stated that if the credit note had been considered, it would have reduced the Applicant's tax liability provided that it was approved. In the same breath, the Respondent has argued that the credit note had no effect on the Applicant's tax liability. However, how would the Respondent determine that if they didn't give the Applicant the opportunity to post the credit note? The full impact of the credit note can only be determined after it has been posted in the relevant period. Secondly, if indeed it had no effect on the tax liability, why then deny the Applicant the opportunity to correct the error by refusing to open the period to allow the Applicant raise the credit note?

The correct and right thing to do is to allow the Applicant post the credit note so that the same is reviewed by the Respondent. It is only after this is done can the Respondent speak to the effect of the credit note.

As a result, the credit note matter is remitted to the Respondent for proper consideration.

In view of the above, the Tribunal makes the following orders:

(i) The VAT assessment of Shs. 9,707,459,996 is hereby maintained subject to (ii) below;

(ii) The matter concerning the credit note is hereby remitted to the Respondent. The Respondent should open up the period to allow the Applicant post the credit note against the sales in the relevant period. The Respondent should review the same and determine the impact of the credit note on the assessed amount in (i) above. This should be completed by 25 June 2025.

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

Dated at Kampala this 30th day of May 2025.

CRYSTAL KABAJWARA	**KABAKUMBA MASIKO**	**SAFI GRACE**
CHAIRPERSON	**MEMBER**	**MEMBER**