

THE REPUBLIC OF UGANDA
IN THE TAX APPEALS TRIBUNAL AT KAMPALA

TAT APPLICATION NO.33 OF 2020

CENTURY BOTTLING COMPANY LIMITED.....APPLICANT

VERSUS

UGANDA REVENUE AUTHORITY.....RESPONDENT

BEFORE: MR. SIRAJ ALI, MRS. CHRISTINE KATWE

RULING

This ruling is in respect of an application challenging an Administrative Additional Assessment of Shs. 58,141,883,181/- comprising Local Excise Duty of Shs. 23,232,727,633, VAT of Shs. 15,385,784,196 and Corporation tax of Shs. 19,523,371,352. The main dispute relates to whether discounts granted by manufacturers to their distributors ought to be included in deriving the Ex-factory price provided for under **Paragraph 2(1) and 2(2) of Part II, Schedule 2 of the Excise Duty Act, 2014.**

1. Background facts

The Applicant manufactures and sells non-alcoholic beverages of the Coca Cola brand under a franchise from the Coca Cola Company. In March 2019, the Respondent carried out an audit for the period January 2014 to December 2017. As a result of the audit, the Respondent issued assessments totaling to Shs. 58,141,883,181 whereby Shs. 23,232,727,633 was Local Excise Duty, Shs. 15,385,784,196 was VAT and Shs. 19,523,371,352 was Corporation tax. On 16th January 2020, the Applicant objected to the assessment and on 16th April 2020, the Respondent disallowed the objection.

2. Representation

At the hearing, the Applicant was represented by Mr. Ronald Kalema, Mr. Ernest Kalibala and Ms. Vanessa Irene Mbekeka. The Respondent was represented initially by Ms. Nakku Mwajuma, Mr. Robert Baluku, Mr. Alex Aliddeki Ssali and Ms. Tracy Basiima and later by Mr. Samuel Oseku and Mr. Derrick Nahumuza.

Following the elevation of Dr. Asa Mugenyi, to the Court of Appeal of Uganda, the parties elected under the provisions of **S. 13(3) (a) of the Tax Appeals Tribunal Act**, for the proceedings to be completed by the remaining members.

3. Issues for determination

At the scheduling, the following issues were set down for hearing.

1. Whether the Applicant is liable to pay the tax assessed?
2. What remedies are available to the parties?

Mr. John Mukiibi, the Applicant's financial controller testified that the Respondent undertook a comprehensive issue audit of the Applicant for the audit period January 2014 to December 2017 in respect of Local Excise Duty, VAT and Corporation Tax. The witness testified that at the conclusion of the audit, the Respondent issued an additional assessment of Shs. 58,141,883,181 comprising a principal tax of Shs. 32,814,130,619, penalties of Shs. 1,597,533,585 and interest of Shs. 23,730,218,977.

The witness stated that in arriving at the additional assessments in respect of Local Excise Duty, the Respondent derived notional average Ex-factory prices to arrive at additional tax liability on the basis that excise duty is calculated on gross sales amounts (inclusive of discounts). The witness testified that the term discounts is not mentioned in the Excise Duty Act as far as the determination of Ex-factory price is concerned. The witness testified that the Respondent used its ASYCUDA report for the audit period to exclude export sales which did not appear in the report and deemed them local sales and charged both VAT and Local Excise Duty on them. The witness testified that the Respondent did not avail the ASYCUDA report to the Applicant for the purposes of the reconciliation. The witness stated that as a result the additional tax liability for Local Excise Duty for the audit period was principal tax of Shs. 16,932,201,073, interest and penalties of Shs. 6,300,526,560 leading to a total of Shs. 23,232,727,633.

The witness testified that because of the adjustments to the notional Ex-factory price for the purposes of excise duty above, the taxable values for VAT were also inevitably adjusted as excise duty forms part of the VAT taxable value of manufactured goods.

The witness testified further that in arriving at the assessment, the Respondent's team computed excise duty payable and the other related taxes on the basis of a notional gross revenue figure. The witness testified that this figure which was applied by the Respondent is not the value at which the Applicant sells its products, and the Applicant does not receive this amount. The witness testified that it was incorrect for the Respondent to determine taxes based on a notional amount not charged to the Applicant's customers. The witness testified further that the Respondent took a uniform average Ex-factory price for all products to all customers of the Respondent during the audit period. Having the same price for all customers is not viable considering the business model operated by most mass manufacturers including the Applicant. The witness testified that after production, the Applicant distributes its products to the market mainly through two channels. The first channel is the KEY ACCOUNTS. The witness testified that these accounted for about 5% sales on average through 360 outlets. The witness stated that Key Accounts include major supermarkets and premium hotels that sell products to final consumers. The products are sold to the key accounts at a price less than the Recommended Retail Price (RRP), which is the price at which the public may purchase the product. The Key Accounts customers may sell the product to the public at the RRP or slightly above the RRP if they can find willing buyers. The witness testified that the Applicant delivers its products directly to the Key Accounts customers.

The witness testified that the second channel through which the Applicant goes to market is through the OFFICIAL COCA COLA DISTRIBUTOR (OCCD). The witness testified that during the audit period the Applicant had 184 OCCD customers and that the sales to OCCDS accounts for about 96% of total sales. The witness submitted that the Applicant provided a sales ledger listing the Applicant's customers and the volumes sold to them per year for the period 2014, 2015, 2016 and 2017 under exhibits A12 and A13 in the joint trial bundle. The witness explained that the total sales match what was reported in the official audited accounts of the Applicant for each year as well as its income tax returns for each period. The witness stated that the OCCD is an important player in the value chain of the Applicant's business. The witness stated that the OCCD contractually undertakes to make further distributions to whole sellers, retailers and cooler outlets in their geographical region. The witness stated further that the OCCD take business risk in order to distribute the Applicant's products. The

witness stated that as means of maximizing sales in the market, the Applicant has to supply its products to the OCCD at a price lower than the Key Accounts customers so as to encourage sales. The witness stated that the Applicant contractually requires OCCDs to maintain certain minimum standards in order to protect and preserve the brand of products. The Applicant, as a licensee of the Coca Cola Company has an obligation to maintain the quality of the licensed brands in the market. The witness clarified that the OCCDs are not expected to make sales to final consumers but to whole sellers.

The witness stated that the products are sold to the OCCDs at prices lower than the prices offered to the Key Accounts, to not only enable the OCCDs make a profit but also keep the Applicant's products competitive in the market generally given that prices for non-alcoholic beverages in the market are notoriously inelastic. The witness stated that in limited cases, the Applicant will sell at reduced prices to some of its Key Account customers, in circumstances where the products are about to expire or during seasonal promotions. These reduced prices to Key Accounts are not significant and did not materially contribute to the assessment by the Respondent during the audit period. The witness testified that the Applicant calculates its Excise duty liability based on the actual sales value at which the Applicant supplies its products to its customers. The witness clarified that because of the route-to-market strategy explained earlier, the Applicant supplies the same products at different prices to its two main consumer categories, namely the Key Accounts and the OCCDs.

The witness stated that the Applicant achieves this by making a lower margin on products sold to the OCCDs based on the role they play in the value chain as compared to the margin the Applicant makes on sales to the Key Accounts. The Applicant therefore earns a smaller profit on sales to OCCDs in order to enable OCCDs achieve a larger volume of sales and to stay competitive in the market as compared to the sales made through the Key Accounts. The witness testified that it followed that the Excise duty payable on the Ex-factory price sale to the OCCD will be different from the Excise duty payable on the sale to the Key Account. The witness stated that this state of affairs was relied upon by the Respondent to uplift the Applicant's Ex-factory price to make it the same for all customers, by applying the higher price.

By way of illustration the witness stated that a 24 bottle crate of 300ml Coke is sold to the Key Accounts customers at a VAT inclusive price of Shs. 18,500 while the same product is sold to the OCCD customer at Shs. 17,200 inclusive of VAT. The witness emphasized the point that since the profit that the Applicant recognizes on the sale to each customer category differs, the Ex-factory price is also different and consequently, the taxes payable namely Excise duty and VAT will also be different. The witness testified that in accordance with the law, the Applicant includes all its production and selling costs in the determination of the Ex-factory price. The witness testified that the production costs for both the sale to the OCCD and the Key Accounts is the same at Shs. 9,265 per case.

The witness testified further that the Respondent uplifted the price on the sale of the product to the OCCD by Shs. 975 and applied additional Excise duty and VAT on this amount. The OCCD's Ex-factory price was therefore uplifted from Shs. 12,899 to Shs. 13,874. The witness disagreed with the above approach on the ground that taxes are made payable on an amount that the Applicant did not charge to the customer and that the said approach is also contrary to the law. The witness stated that the excise duty act requires a manufacturer to include all the costs of production plus the margin in order to determine the ex-factory price. The witness testified that the Applicant does not derive any tax benefit on the reduced margins, nor does it claim any credit or tax deduction for it. The witness stated further that the approach adopted by the Respondent would lead to taxes being computed not on the actual sales proceeds received by the Applicant but on a deemed notional price determined by the Respondent which is different to what the Applicant offers its customers.

The witness testified that some of the Applicant's products are sold to customers in South Sudan and parts of the Democratic Republic of Congo. The witness stated that during the audit, the Respondent computed variances between its ASYCUDA reports and the Applicant's records of exports. The Respondent then reclassified the positive variances and imposed both VAT and LED on them and ignored the negative variances for the years 2015-2017. The witness stated that the Applicant disagreed with the above position on the ground that the Respondent refused to provide the Applicant with the details of their ASYCUDA system and did not take the negative variances into consideration while imposing taxes on the positive variances.

Destruction of stock

The witness testified that as a producer of non-alcoholic beverages, the Applicant subjects its products to high standards of post-production quality control in order to meet the minimum health standards set by regulators including the Uganda National Bureau of Standards. The witness testified that for the above reason certain products have to be destroyed from time to time for reasons relating to expiry dates, under-fills, over-fills, leakages, returns from the market etc. The witness stated that as a proportion of total production in liters declared to the Respondent, the destroyed stock formed less than 0.1 % of the liters produced meaning that the Applicant achieves a production yield of more than 99.9%. The witness stated that during the audit period (2014-2017) the Applicant destroyed stock worth Shs. 4,601,364,016, approximately 697,724 liters of product.

The witness stated that the Respondent unreasonably disallowed the deduction of the destroyed stock for tax purposes, re-characterized it as deemed sales and imposed Excise duty, VAT and Income tax on the said deduction on the basis that the Respondent's officers did not witness the destruction evidenced by a stock destruction certificate. The witness stated that on several occasions during the audit period the Applicant routinely invited the Respondent's officers to witness the destruction of the expired beverages. The witness stated that the Respondent's officers invariably failed to attend the destructions and in some cases they came months after the destruction had been completed. The witness stated that it is impracticable for the Applicant to compromise the health and safety of its production facility by accumulating expired beverages as they await for the Respondent to attend the destruction of expired beverages. The witness stated that prior to the year 2014, the Respondent maintained a full-time officer at the Applicant's plant whose duty was to monitor the manufacturing and destruction process. The witness stated that after some time the Respondent recalled the officer so that no officer of the Respondent was stationed at the Applicant's factory during the audit period.

Arithmetic errors in computing additional assessments

The witness testified that the Respondent made arithmetic errors in computing the additional assessments. The witness stated that in the VAT computation the Respondent derived sales as a result of adjustments to the notional Ex-factory price.

The witness stated that whenever the derived sales produced a negative variance as per the Respondent's tabulation no credit or over-declaration was given to the Applicant. The witness stated that a negative variance would mean that the Applicant over-declared sales and subsequently over-declared taxes. The witness stated that the Respondent's failure to take into account negative variances was a grave error. The witness testified that the Respondent imposed taxes whenever their `derived sales` gave rise to positive variances as undeclared sales. The witness stated that this biased approach led to an incorrect assessment. The witness stated that if the Respondent had considered the negative variances as over-declared sales they would have found that the Applicant had in fact overpaid VAT by Shs. 1,138,773,168 for the audit period.

Determination of taxable value of juice

The witness testified that with respect to juice the Respondent used the notional Ex-factory prices to determine the taxable value of juice. The witness stated that this was an error because prior to 1st July 2017, there was no excise duty due and payable on juice. The witness stated that as such there was no rational or legal basis for the Respondent to derive notional sales prices for juice. The witness stated that actual invoice values should have been used instead.

Carried forward losses

The witness testified further that in the adjusted computation for corporate Income tax, the Respondent failed to carry forward the assessed loss for the Applicant. The witness stated that even after adjusting for `undeclared income` which the Applicant disagreed with, the Applicant had an unutilized loss of Shs. 2,635,615,090 for the year 2016. The witness stated that the failure by the Respondent to carry this loss forward to the year 2017 as required under S. 38 of the Income Tax Act was an unjustified computational error. The witness stated that the Applicant availed all relevant information including sales records and ledgers, export entries and documentary proof of destruction of expired beverages but in their objection decision the Respondent claimed not to have received it.

Export sales

The Applicant's second witness was its clearing agent Mr. Lawrence Okoth. The witness stated that his company Westend Logistics Ltd was the Applicant's clearing agent during the audit period. The witness testified that the Applicant made sales outside Uganda to customers in Democratic Republic of Congo, Sudan and Rwanda. The witness stated that his knowledge of this fact was based on the fact that he helped the Applicant clear these goods as exports. The witness stated that sometime in the year 2019, he was informed by the Applicant that following a comprehensive audit the Respondent had stated that there were variances between exports in the ASYCUDA report provided by the Respondent and the Applicant's export records. The witness stated that he had been informed that one of the causes of the variance was that some export sales made by the Applicant which had been processed by the witness did not appear in the Respondent's ASYCUDA report. The witness stated that it was not true that the entries in question did not appear in the Respondent's ASYCUDA report. The witness stated that his own search of the ASYCUDA showed that these entries which were admitted in evidence as exhibit A23 did not only form part of the ASYCUDA records but had been validated by the Respondent as completed exports.

The witness stated that in order to deal with any customs clearing work, a clearing agent must be licensed by the Respondent. The witness stated that the license helps the clearing agent access the ASYCUDA interface for clearing agents. The witness stated that in case of an export, all relevant information namely invoices, packing lists, cargo manifests and details of the truck and the customer are entered into the system to generate an entry form. The witness stated that the entry document for exports outside the East African Community is known as EX8, and EX1 for exports within the East African Community for local goods. The witness stated that all the documents listed as exhibit A24 are forms EX8 which were exports to countries outside the East African Community at the time with the exception of exhibit A24 which are EX1 forms because they were exports to Rwanda, who joined the East African Community in the year 2014. The witness testified that once the entry has been generated, the customs officer at the export desk generates a transit document known as Form T1, which enables the goods in transit to move from the point of loading to respective border stations as indicated in the entry. The witness stated that it is therefore vital that every form EX8 must have a corresponding form T1 which shows that the goods moved to

the border post and actually exited. The witness stated that a summary of EX8 forms with their corresponding T1 forms was admitted in evidence as exhibit A25.

The witness stated further that the T1 has a time limit and the exporter is typically given 3 days to exit the country failing which the export will be incomplete. The witness stated that in such a case the taxes due for failure to complete the export is deductible from the clearing agent's bond. The witness confirmed that all the T1 forms in question were validated and completed and that no bond enforcement has ever been carried out by the Respondent in respect of the exports in question. The witness clarified that in the case of exports no exit notes are issued by the Respondent with respect to EX8 exports. The witness stated that exit notes are issued for imported goods meant for home consumption and are issued after taxes have been paid in full. The witness stated that for exports within the East African Community the document generated are known as release orders and not T1 forms.

The Respondent's witness testimony

The Respondent's first witness was Kironde Henry, an officer in the Respondent's Domestic Taxes department. The witness testified that during the audit, it was established that discounts were given to customers as incentives in terms of exceeding certain sales targets for the official Coca Cola Distributors (OCCD), promotional campaigns for new products and stock clearances, volumes purchased and other discount policies. The witness stated that a comparison between the discounts reported for soda, water and juice in the sales ledger and the trial balance indicated a variance of Shs. 38,871,688,221 which was never reconciled. The witness stated that in determining the tax payable under local excise duty, VAT and Income tax, the discounts as reported in the sales ledgers were used. The witness emphasized that discounts reflected in SAP sales ledgers were used in adjusting for the tax payable. The witness stated that in determining the ex-factory price for local excise duty, the discounts allowed were included in the taxable value of the excisable items. The witness stated that in respect of VAT and income tax, all discounts given to clients were allowed before arriving at the taxable value or the chargeable income respectively. The witness stated that at the commencement of the audit the Applicant had conceded that their local excise duty returns were erroneous and could not be relied upon. The witness pointed to exhibit REX 12 which are the Minutes of a meeting

held between the parties on 23rd July 2019, as proof of the above statement. The witness stated that with the exception of the 300ml Coke RGB brand, the Applicant failed to provide the break-down of the ex-factory price for the different products namely soda, juice and water, in spite of the fact that the Applicant has several categories of products. The witness stated that based on the Applicant's failure to provide this information the Respondent used an average ex-factory price. The witness stated that in computing the Ex-factory price, the Respondent relied on the gross revenues from the Applicant's sales ledgers to determine the monthly Ex-factory prices of the excisable goods per liter, adjusted for taxes and arrived at the net Ex-factory price which was then used to compute the local excise duty on soda, mineral water and juice sold per month. The witness stated that based on the above findings, the Respondent considered and utilized cumulative tax losses brought forward of Shs. (18,923,430,582) and raised administrative additional assessments on 31st December 2019, amounting to Shs. 58,141,883,182.

Variances between ASYCUDA and the Applicant's SAP data

The Respondent's second witness was Mr. Edward Jesse Bazira, an officer in the Domestic Taxes Department of the Respondent. The witness testified that in March 2019, the Respondent conducted a compliance review of the Applicant's tax affairs for the period January 2014 to December 2017, to verify the completeness of sales declared in the Applicant's tax returns as well as Ex-factory prices and discounts. The witness testified that during the compliance review the Respondent reviewed records furnished by the Applicant relating to sales, stock movements, discounts, sample invoices, audited financial statements and trial balances. The witness testified further that the Respondent conducted several reconciliations with the Applicant and established that the Applicant's computation of Ex-factory prices was not in accordance with the Excise Duty Act, there were variances in the Applicant's sales.

The witness stated that due to the said variances, the net sales variances were charged to excise duty, VAT and income tax in accordance with the law. The witness stated that a review of the evidence of exports shared by the Applicant showed that while entries initially not considered by the Respondent were found to be existent in the ASYCUDA, it was noted that the export variances still existed. The witness testified that the quantity captured in ASYCUDA was lower than the quantity of exports

declared by the Applicant in their SAP sales system leading to a variance of 3,801,762 liters which was unaccounted for by the Applicant in their tax returns for VAT, Local Excise Duty and Income tax. The witness testified further that the alleged destruction of stock worth Shs. 4,601,364,016 was disallowed owing to the Applicant's failure to furnish evidence relating to destruction of the said stock. The witness stated that based on the findings of the audit, the Respondent considered and utilized cumulative tax losses brought forward of Shs. 18,923,430,582 and raised administrative additional assessments of Shs. 58,141,883,182.

Incorrect computation of Ex-factory prices

The witness testified that the Applicant filed excise duty returns for the period under review and provided Ex-factory prices for all excisable product brands which they later claimed to be false. The witness stated that the Applicant has since neither amended their tax returns nor submitted information confirming the correct ex-factory prices. The witness stated that the Applicant claimed to use an SAP system to compute local excise duty however no records of the formula used or a demonstration of how the Applicant's SAP system works were shown to the audit team. The witness stated that Ex-factory price is based on gross revenue derived from the price before discounts divided by the number of liters sold to different clients as per the company's sales ledger.

The witness stated that the audit team relied on the gross revenues from the SAP sales ledger to determine the monthly sale process of products per liter adjusted for taxes in the sale price per liter and arrived at the ex-factory price which was then used to compute Local Excise duty on soda, water and juice sold per month. The witness also stated that the Respondent used an established ex-factory price to derive undeclared sales from the variance in the stock analysis. The witness stated that the Respondent reviewed the Applicant's production reports and sales ledger from the SAP accounting system for soda, mineral water and juices for the period under review. The review established that while the SAP sales reports indicated 755,110,671 liters, the SAP production reports amounted to 788,520,545 liters which led to a variance of 33,409,873 liters. The witness stated that in arriving at the Net under-declaration of 15,972,961 liters of soda, juice and mineral water the Respondent made adjustments for exports sales made by the Applicant as per ASYCUDA.

The witness testified that a comparison of export sales in ASYCUDA to the export sales in the ledger and the Applicant's returns for soda, mineral water and juice for the period under review revealed a variance of 2,923,827 liters in 2014, 1,085,345.58 liters in 2016. The witness stated that the over-claimed exports in liters were re-classified as local sales using the average monthly prices from the SAP sales ledger.

Failure to provide destruction certificates

The witness stated that the Applicant did not provide destruction certificates for alleged destruction of product and did not ensure that the said destruction was witnessed by the Respondent's officers as required by the law. The witness stated that as a result destruction of product worth Shs. 4,601,364,016 relating to the period under review was disallowed for tax purposes.

4. Submissions of the Applicant

The Applicant submitted that it is not liable to pay the additional assessment of Shs. 58,141,883,182 for the period 2014 to 2017. The Applicant submitted that the major dispute between the parties is the computation of the ex-factory price that was used as the basis to determine the tax liability of the Applicant. The Applicant submitted that the Respondent applied a made-up price to determine the base for Local Excise Duty (LED) by assuming that the Applicant ought to charge the same price for all products to all consumers. The Applicant submitted that the ex-factory price is the actual price charged at the factory and includes all actual costs and an actual margin.

Ex-factory price

The Applicant submitted that the definition of ex-factory price under **Paragraph 2(1) of Part II Schedule 2 of the Local Excise Duty Act** does not precisely define the normal ex-factory price but indicates what ought to be included in calculating such a price. The Applicant submitted that the term `cost` should be given its ordinary meaning since the Act does not define what a `cost` is. The Applicant cited the following definition of the term `price` in Black's Law Dictionary 8th Edition;

"The amount of money or other consideration asked for or given in exchange for something else; the cost at which something is bought or sold".

The Applicant cited the decision of the Supreme Court of India in ***Union of India v. Bombay Tyre International Ltd (1984) 1 SCC 467***, where the court held that the Ex-factory price is the price at which goods are sold by the manufacturer at the factory gate. This price must include the cost of production and manufacturing profit but should exclude any post-manufacturing expenses such as transportation, handling charges and sales tax.

The Applicant also relied on the following definition of the term `cost` as set out in ***Black's Law Dictionary, Abridged 5th Edition, page 182;***

“An expense and the sum or equivalent expended, paid or charged for something”.

The same dictionary defines the term `expense` at page 298 as *“a cost or that which is expended, laid out or consumed”.*

The Applicant submitted that the above definition points to the fact that costs for an ex-factory price have to be actual costs incurred, and the profit has to be the actual profit made.

The Applicant also cited ***International Accounting Standard 38(8) on Intangible Assets***, wherein a `cost` is defined as:

“The amount of cash or cash equivalents paid or the fair value of other consideration given to acquire an asset at the time of its acquisition or construction or, when applicable, the amount attributed to that asset when initially recognized in accordance with the specific requirements of other IFRSS”.

The Applicant submitted further that ***IAS 2 (10) on Inventories*** defines the cost of inventories as all costs of purchase, costs of conversion, and other costs incurred in bringing the inventories to their present location and condition. The Applicant submitted further that the standard under paragraph 15 and 16 further provides that other costs included in the cost of inventories include abnormal amounts of wasted materials, labour or other production costs, storage costs, unless those costs are necessary in the production process before a further production stage, administrative overheads that do not contribute to bringing inventories to their present location and condition, selling costs. The Applicant submitted further that under ***IAS 16 on Property, Plant and Equipment***, a cost is defined as the amount of cash or cash equivalents paid or the fair value of the other consideration given to acquire an asset

at the time of its acquisition or construction or, where applicable, the amount attributed to that asset when initially recognized in accordance with the specific requirements of other IFRS.

The Applicant submitted that the above definitions show that the ex-factory price is the price actually incurred by the Applicant in producing the excisable goods that must include all actual costs incurred and the actual margin (profit) charged by the manufacturer to the customer. The Applicant submitted that the Respondent has not at any time alleged that there were any actual costs that were not included by the Applicant in computing its Ex-factory price. The Applicant submitted that the Respondent is obliged to accept the manufacturer's price for the purposes of LED liability if the price fulfils the components discussed above namely; if the price includes all actual costs, direct or incidental, plus a margin. The Applicant submitted that the only exception would be in a case where the Respondent's allegation or determination is that the price is not at arm's length.

The Applicant submitted that while the Respondent has powers under the law to determine an ex-factory price in certain cases where the price is not at arm's length, no allegation has been made by the Respondent, whether at assessment, objection or in these proceedings that the Applicant's prices are not at arm's length. The Applicant submitted that its customers are neither its associates nor related parties for the purposes of the Excise Duty Act.

The Applicant submitted that during cross examination, the Respondent's witness Mr. Edward Jesse Bazira confirmed that he was aware that the price used in the Respondent's calculation of the ex-factory price was not the actual price charged by the Applicant to its customers. The Applicant submitted that whereas it recorded the actual revenue received under net revenue, the Respondent used the gross revenue, which included `discounts` to calculate the ex-factory price and assess further excise duty liability. The Applicant submitted that according to the testimony of Mr. Bazira, the Respondent derived the ex-factory price by adding `discounts` to the net revenue or the actual revenue paid by the customers. The Applicant submitted that the Respondent's witnesses confirmed that they were aware that the prices they used were not the actual prices charged and that indeed the Applicant had charged different prices to different customers.

The Applicant submitted that while it includes all the costs of production and sale in arriving at the price, it charges different margins to different customers. The Applicant submitted that the margin charged to the key accounts is higher than the margin charged to the OCCDS, because the OCCDS account for bigger volumes of sale and they are independent distributors or wholesalers. The key accounts which include supermarkets and hotels pay a higher price because they charge a higher price for the same product. The Applicant invited the Tribunal to take judicial notice of the fact that the price of a bottle of coke at a roadside stall is not the same price for the same bottle of coke at the Serena hotel. The Applicant submitted that it keeps track of the difference between these two values in its sales ledger and that while it concedes that the said difference is labelled in its sales ledger as a 'discount'. This 'discount' represents the margin ceded to the OCCDS to push sales volumes.

The Applicant submitted that the revenue declared by it for tax purposes is not the gross revenue as recorded in the sales ledger but the net sales revenue which is the actual revenue charged and received. The Applicant submitted that this was apparent from the Audited Financial Statements issued by the Applicant's auditor for the period 2014-2017. The Applicant submitted that the sales in the audited accounts tally with the net sales in the Applicant's sales ledger for the period under audit.

The Applicant submitted that it accounts for excise duty on the ex-factory price recorded as net sales in its sales ledger. The prices charged are also laid out in the invoices issued to the Key Accounts. Upon completion of the sales, the Applicant records its net sales in its sales ledger and accounts for excise duty, VAT and Income Tax on the actual revenue/sales made. The Applicant submitted that the Respondent calculated the excise duty payable by relying on the gross revenue in the Applicant's sales which includes the 'discounts'. The Applicant submitted that the so-called discount is the difference between the prices at which the same product is sold to different customers. The Applicant stated that this difference is not a discount properly so called as it does not make it onto the Applicant's invoice. To illustrate this point further the Applicant stated that, if one bottle of soda is sold to a wholesaler called Bugembe distributors at Shs. 1,000 but the same bottle is sold to Serena Hotel at Shs. 1,500, the difference between the two prices of Shs. 500 is not a discount merely because the seller keeps track of it in his sales ledger. The Applicant submitted that it is not right for the Respondent to insist that for tax purposes, the Applicant should

have sold to Bugembe distributors at the same price of Shs. 1,500 instead of Shs. 1,000. The Applicant submitted that it had found no legal basis to support the Respondent's decision to impose taxes on the Shs. 500 which the tax payer neither charged nor received. The Applicant submitted that the difference between the two prices is neither revenue nor a cost which ought to be included in the Ex-factory price as defined.

The Applicant relied on the definition of the term `discount` in the decision of the Tribunal in ***Tugende Limited v. Uganda Revenue Authority, TAT Application No. 42 of 2021***. The Applicant submitted on the basis of the above decision that the `discount` in question is not an actual cost incurred by the Applicant, which is why it does not form part of the Ex-factory price. The Applicant submitted that the amount invoiced to the clients does not include the fictional discount and that the customers are not even aware of the price discrimination as evidenced by the invoices under exhibits A9 and A10 of the Applicant's trial bundle at pages 143 to 152.

The Applicant submitted further that the `discount` does not meet the definition of a cost both in ordinary English and in accounting. The Applicant reiterated that it did not incur any cost that ought to be included in the Ex-factory price with respect to the `discount`. The Applicant stated that the discount is fictional and should not be taxed as hypothetical sales or hypothetical costs as contended by the Respondent. The Applicant submitted further that it has not claimed the said `discount` as an expense for income tax purposes for the reason that it is not an actual loss, cost or expense that would pass the criteria in S. 22 of the Income Tax Act.

The Applicant submitted that the so-called difference in prices is not a discount and that the definition under ***Paragraph 2(2) Part II, Schedule 2 of the Excise Duty Act*** does not mention discounts that should be included as part of an Ex-factory price. In support of this position the Applicant relied on the decisions in ***Cape Brandy Syndicate v. Inland Revenue Commissions (1921) 1 KB 64, Russel v. Scott (1948) 2 All ER 5*** and ***Jafferli M. Alibhai v. The Commissioner of Income Tax 1961 EA 610 at page 614***.

Relying on ***Paragraph 44(1) of Halsbury's Laws of England 4th Edition***, the Applicant submitted that to express one thing is by implication to exclude the other. The Applicant stated that if the legislature intended discounts to be considered as part

of the Ex-factory price, they would have expressly provided for it. In support of this contention the Applicant cited the decision in ***Mount Kenya Bottlers Limited and Others v. The Attorney General and Others, Civil Appeal No. 164 of 2014.***

The Applicant submitted that the business practice of charging different prices to different customers is widely known and fairly common and is referred to as price discrimination. In support of this contention the Applicant cited a paper entitled '***Price Discrimination***' by ***Mark Armstrong, Department of Economics, University College London***, who broadly defined the concept as existing when two similar products that have the exact marginal cost to produce are sold by a firm at different prices identifiable different consumer groups. The Applicant submitted that the OCCDs, and the key accounts are different members of the Applicant's consumer groups and are offered products at different prices based on the Applicant's economic model. The Applicant submitted that the position taken by the Respondent that irrespective of the actual prices charged by the Applicant, Excise duty, VAT and Income Tax, should be levied based on the higher amounts charged to the Key customers irrespective of the amounts actually paid by the OCCDs, is oblivious of economic realities and is not supported by the law.

The Applicant submitted that the Respondent does not have the powers to determine prices for businesses in the circumstances of this case. The Applicant submitted that the Local Excise Duty assessment of Shs. 23,232,727,633 is fundamentally flawed as it was based on notional or fictitious sales figures that were not reflected in the Applicant's invoices, bank accounts, audited financial statements or ledgers.

The Applicant submitted that while the Ex-factory price is a concept of the Excise Duty Law, its misapplication by the Respondent affected both the VAT and Income Tax Assessments. The Applicant submitted that Excise duty forms part of the taxable value for VAT purposes and that as such incorrectly computed additional LED liability was used to compute additional VAT liability. The Applicant submitted that since the LED liability was based on an incorrect Ex-factory price, the VAT liability should automatically collapse on this point alone. The Applicant submitted that in determining VAT, only the taxable value should be considered. The Applicant submitted that the actions of the Respondent contradict the **VAT Act** and violates **Article 152** of the **1995 Constitution**, which prohibits the levying of taxes unless authorized by Parliament.

The Applicant submitted that by subjecting the VAT assessment on gross revenue that had `discounts` in it, the Respondent assumed legislative powers by imposing a tax law that levies taxes on sales that never occurred.

The Applicant submitted that the Respondent imposed additional income tax on the basis that the Applicant had under-declared its sales. The Applicant submitted that the difference between the derived Ex-factory price and the actual sales is what the Respondent deemed as undeclared sales. The Applicant submitted that it did not under-declare its sales for the period 2014-2017 and that its audited financial statements are in tandem with its net revenue in the sales ledgers and the income tax returns submitted for that period. The Applicant invited the Tribunal to reverse the VAT and Income Tax assessments as raised by the Respondent on the basis of fictitious income.

Export variances

In respect of the Excise duty and VAT on export variances the Applicant submitted that the Respondent based its assessments on incorrect variances. The Applicant submitted that during its review the Respondent noted variances between the exports declared in ASYCUDA and the Applicant's sales ledger and concluded that these exports were non-existent because the ASYCUDA system had no record of them. The Respondent accordingly reclassified these exports as local sales and imposed on them Excise duty, VAT and Income Tax. The Applicant submitted that during cross examination and re-examination the Respondent's witness could not confirm the specific taxes resulting from the discrepancies between the exports listed in the sales ledger and those recorded in ASYCUDA. The Applicant submitted that the above violated the principle of tax certainty. The Applicant submitted that during the trial it presented its witness, Mr. Okoth Lawrence who confirmed that the Applicant exported its products to the DRC, Congo, Sudan and Rwanda, where he assisted with customs clearance. The Applicant submitted that during the trial, Mr. Okoth was able to demonstrate that the missing export entries did in fact exist and that the same fact was confirmed by the Respondent through their own verification.

Destruction of stock

The Applicant submitted that the Respondent's reclassification of destroyed stock as sales was based on the fact that since no destruction certificates were produced by the Applicant as evidence of destruction, no destruction had in fact taken place. The Applicant submitted that the destroyed stock was reclassified as sales by the Respondent and charged with VAT, LED and Income Tax. The Applicant submitted that as a large producer of consumable products, the Applicant is required to maintain high quality post-production control to meet the health standards set by the authorities.

The Applicant submitted that in order to meet these standards it is required from time to time to destroy products which are not fit for human consumption. The Applicant submitted that in comparison to the total liters produced for the audit period 2014 to 2017, it produced 197,130,136 liters of soda, water and juice. 174,431 liters of which were destroyed as evidenced by the stock destruction forms. The Applicant submitted that in terms of percentage, the stock destroyed in comparison to the total stock produced was 0.1%. The Applicant submitted that under the law, a person is entitled to a deduction for a year of income of all expenditures and losses incurred by the person during the year of income to the extent to which the expenditure or losses were incurred in the production of income included in gross income. The Applicant submitted that the said destruction expenditure is a revenue expenditure that is allowable as a deduction. The Applicant cited the decision in ***Vallambrosa Rubber Co. Ltd v. Inland Revenue (1910) SLR 488***.

The Applicant submitted that the expenditure in question is a permitted allowance for the reason that the destruction certificates required by the Respondent were not required by law at the time of the audit. The Applicant submitted that the records required to be kept by a gazetted manufacturer under S. 8 of the Excise Duty Act, does not include destruction certificates. The Applicant submitted that for the period 2014-2017, there was no legal requirement for destruction certificates as the only proof of destruction. The Applicant submitted that the requirement was for a manufacturer to keep records of stock. The Applicant submitted that it kept these records using internal forms and presented them to the Respondent, who rejected them. The Applicant submitted that the requirement imposed by the Respondent to notify the Commissioner of any destruction, only became law on 1st July 2024 as **S. 18A** of the **Tax Procedure Code (Amendment) Act, 2024**. The Applicant submitted further that the law cannot act retrospectively.

The Applicant submitted that during the locus in quo visit by the Tribunal the Applicant's production team demonstrated the stock destruction process and how often it occurs during the production process.

The Applicant submitted that the Respondent issued two varying assessments. The assessment communicated in the management letter varied from what was issued on the Applicant's URA portal. The Applicant submitted that the inconsistency between the two amounts was Shs. 26,188,969,104 which shows the lack of care applied by the Respondent in coming up with the assessment in question. The Applicant submitted that during the trial, the Respondent's first witness could not explain under cross examination why there was a difference between the notice of assessment for LED at page 1 of the Respondent's trial bundle which has principal tax of Shs. 14.4bn (REX1) and his workings at page 21 of the Respondent's trial bundle which shows a principal tax liability of Shs. 16.9 bn. The Applicant submitted that the tax demanded in the demand letters is much higher than the tax contained in the actual notices of assessment, in REX1.

The Applicant submitted further that the Respondent failed to show the carry forward losses the tax payer is entitled to, incorrectly added back destroyed stock for lack of destruction certificates, disregarded the carry forward loss from 2016, added back derived notional sales based on incorrect Ex-factory prices that were not charged or earned by the Applicant and penalized the Applicant for under provisioning.

Assessments are time barred

The Applicant submitted that it is entitled to waiver of interest and penalty under S.40C of the Tax Procedures Code Act 2014. The Applicant submitted further that the LED assessments for the period 2014 to 2016 are time barred. The Applicant submitted that before the enactment of the Excise Duty Act of 2014, Excise duty was governed under the East African Excise Management Act, 1970 (EAEMA) and the Excise Tariff Act. The Applicant submitted that S. 58 of the EAEMA provided a limitation period barring the Respondent from making demands for short paid levy after a period of 12 months from the date of payment except in the case of fraud. The Applicant submitted that the assessment in question was raised after a period of 12 months and was therefore out of time.

The Applicant submitted further that under S. 23 of the TPCA, an additional assessment may only be raised within three years from the date that the taxpayer furnished the self-assessment return to which the original assessment relates, except in the case of fraud, gross or wilful neglect or if relevant information has been discovered. The Applicant submitted that in the absence of these exceptions, the Respondent is time barred from issuing additional assessments in December 2019 relating to periods up to November 2016. The Applicant submitted that the Respondent was only entitled to assess for the 12 months from December 2016 to December 2017. The Applicant invited the Tribunal to reverse these assessments.

The Applicant prayed for orders that the application be allowed in full, that the assessment be set aside and vacated, that the Respondent refunds the 30% of the tax in dispute paid by the Applicant with interest from the date of payment until refund in full and that the Respondent pays the costs of the application.

5. Submissions of the Respondent.

The Respondent cited Paragraph 2(1) of Part II, Schedule 2 of the Local Excise Duty Act and submitted that Ex-factory price refers to the price at which an item is sold at the factory. The Respondent submitted that whatever does not fall under the scope of Paragraph 2(2) of the above provision ought to be excluded in determining the Ex-factory price. The Respondent cited the decision in ***Union of India v. Bombay Tyre International Ltd (Supra)*** and submitted that the question for determination before the Tribunal is whether the Respondent computed the Ex-factory price in accordance with the provisions of the Local Excise Duty Act.

Ex-factory price

The Respondent submitted that its witness Edward Jesse Bazira testified that the formula used in deriving the Ex-factory price was based on the extract of sales ledgers of the Applicant which was consistent with the LED Act. The Respondent submitted that it derived the Ex-factory by working backwards from the net revenue value provided by the Applicant in their sales ledgers and added back the discounts declared in the sales ledgers to the net revenue to obtain the Ex-factory price. The Respondent submitted that the above evidence was not controverted at trial.

The Respondent submitted that a perusal of Paragraph 2(2) of Part II, Schedule 2 of the Local Excise Duty Act, makes no exclusion of discounts given in the computation of the Ex-factory price. The Respondent submitted that to exclude discounts given in the determination of the Ex-factory price would amount to reading into the statute what is not actually there. The Respondent submitted that by deriving the net revenue value provided by the Applicant in their sales ledgers and adding back the discounts declared in the sales ledgers to the net revenue to obtain the Ex-factory price, the Respondent had followed the method provided for in **Paragraph 2(2) of Part II Schedule 2 of the Local Excise Duty Act**. The Respondent submitted that the use by the Applicant of the term `discount` in its sales ledger did not change the true nature of the item as one which ought to have been added in the computation of Ex-factory price.

The Respondent cited the decision of the Supreme Court of India in **A.K Roy vs. Voltas Limited 1973 AIR 225**, and submitted that whereas courts the world recognize discounts as a business model, it should be noted that the said discounts are only permitted if they are expressly ascertainable and determinable. The Respondent submitted that in the instant case the `discount` in question are neither ascertainable nor determinable and the same were not granted by the Applicant at arm`s length. The Respondent submitted therefore that it correctly added back the `discounts` in the computation of the Ex-factory price.

The Respondent distinguished the facts of the decision in **Tugende Limited vs. Uganda Revenue Authority** above from the facts of the instant case. The Respondent submitted that in the **Tugende** case the Tribunal was concerned with the question as to whether discounts issued to customers and claimed by the Applicant were allowable deductions under the Income Tax Act, while in the instant case, the Tribunal should only be concerned with whether the item captured in the Applicant`s sales ledger as `discounts` falls within the purview of **Paragraph 2(2) of the Second Schedule of the Excise Duty Act**. The Respondent submitted that in spite of the Applicant`s assertions the `discounts` constituted a cost of production incurred by the Applicant as an incentive to maximize sales.

The Respondent submitted that owing to the Applicant`s failure to maintain proper and detailed records of all costs and margins to enable it compute and declare the correct

Ex-factory prices for each product manufactured, the Respondent rightfully derived the correct Ex-factory price by relying on the information as captured in the Applicant's sales ledger.

The Respondent illustrated the Applicant's sales model as constituting sales to its customers at for instance Shs. 800 where the cost of production is Shs. 1000 thus leaving the customer with a profit margin of Shs. 200. The Respondent submitted that the sale of the soda at Shs. 800 does not change the fact that the costs of manufacturing the soda includes the profit margin of Shs. 200 which totals to Shs. 1000. The Respondent submitted that the 'discount' of Shs. 200 was correctly added back in deriving the Ex-factory price.

The Respondent submitted that Mr. John Mukiibi, one of the Applicant's witnesses conceded under cross examination that in some cases, the Applicant gives discounts to key accounts who directly interface with customers to avert near expires. The Respondent submitted that the Applicant would grant the so-called 'discounts' to different customers with restrictions and upon them satisfying certain conditions such as exceeding sales targets, stock clearances and volume purchases. The Respondent submitted that this mode of operation by the Applicant clearly violated the arm's length principle as it exercised favouritism in dealings with its clients.

The Respondent submitted that the so-called 'discounts' were not actual discounts in the ordinary meaning but were incentives given to the Applicant's customers and do not constitute the items which ought to form part of the Ex-factory price. The Respondent submitted that the Ex-factory was correctly computed by considering all the costs of production including the incentives granted by the Applicant to its clients as part of secretive internal arrangements or agreements between the Applicant and its favoured customers.

The Respondent submitted that it correctly made adjustments to allow for discounts given by the Applicant to its customers as verified from the Applicant's SAP sales ledgers and the under-declared sales were accordingly charged to VAT in line with S. 21(1) of the VAT Act. The Respondent cited the decisions in ***Card Protection Plan v. Commissioner of Customs & Excise Case C-349/96, Golden Leaves Hotels and Resorts Ltd and Apollo Hotel Corporation v. Uganda Revenue Authority CA 64***

of 2008 and Metcash Trading Limited v. The Commissioner for the South African Revenue Service CCT 3 of 2000.

The Respondent submitted that the testimony of Mr. Jesse Bazira should be looked at in totality and that the Applicant should not be permitted to cherry-pick parts which suited it. The Respondent invited the Tribunal to find that the taxable value under S. 21 of the VAT Act was correctly arrived at by the Respondent by deriving the value of the goods from the gross sales as captured in the sales ledger of the Applicant before raising the impugned VAT assessments.

The Respondent submitted that a person who derives chargeable income from a vocation or trade ought to be taxed unless exempted. The Respondent submitted that having established that the Applicant derived chargeable income from the under-declaration of sales, the taxes assessed against the Applicant were lawfully levied under S. 4 of the Income Tax Act. The Respondent submitted that having established that the Applicant failed to maintain proper and detailed records for all costs and margins to enable it compute and declare the correct Ex-factory prices for each product, it followed that the Income Tax declarations of the Applicant are incorrect and do not reflect the true earnings of the Applicant as evidenced by the Respondent's audit. The Respondent submitted that mis-declaration and under-declaration of sales and transactions is not proof that the sales did not in fact happen and consequently it does not vitiate a person's liability to pay tax when it is established that the person had derived chargeable income from its business.

Export variances

The Respondent submitted that the dispute in respect of exports variance relates to a comparison of export sales in ASYCUDA to export sales in the sales ledger and the Applicant's tax returns for declarations of soda, water and juices. The Respondent submitted that it established that whereas the Applicant's SAP accounting sales report reflected 20,004,578 liters, ASYCUDA data had 17,205,940 leading to a variance of 2,798,637 liters. The Respondent submitted that it reclassified the over-claimed liters to local sales using the average monthly Ex-factory prices from the Applicant's sales ledger and charged tax accordingly. The Respondent submitted further that the Applicant did not declare all goods exiting the country leading to the conclusion that these goods were local sales. The Respondent submitted that there was no evidence

on record to confirm the submission by the Applicant that the Respondent had verified and confirmed that the entries in question existed in ASYCUDA.

Destruction of stock

The Respondent submitted that no evidence was adduced by the Applicant in proof of their assertion that they had destroyed goods worth Shs. 4,601,364,016. The Respondent submitted that while it acknowledges that some goods are destroyed by the Applicant as part of its quality control process, it was important that the destruction must be proved to have taken place. The Respondent submitted that S. 8(6) of the Excise Duty Act makes it mandatory to maintain a stock book. The Respondent submitted further that despite its repeated requests the Applicant failed to provide quality assurance reports, condemnation reports, returns from the filed reports, detailed reports on who had made the returns and quantities of goods destroyed at the factory premises. The Respondent submitted that although the Applicant submitted samples of transfer stock forms, standard operating procedures for control of non-conforming goods, trade rejects, analysis reports, these did not prove that the goods in question had actually been destroyed. The Respondent submitted further that the Waste Discharge permits issued to the Applicant by the National Environmental Management Authority, and submitted by the Applicant did not prove that the Applicant had carried out destruction of the goods in question. The Respondent submitted that the purported destruction was carried out in the presence of the Respondent's officers and that during the *locus in quo* visit the Applicant failed to demonstrate that it had the capacity to destroy such large volumes of goods.

The Respondent submitted that the assessments in question were arithmetically correct and that the argument by the Applicant that the assessments had been raised without due care and skill were misplaced.

Time barred assessments

The Respondent submitted that the allegation by the Applicant that the assessments for the period 2014-2016 was time barred was never pleaded by the Applicant nor did it form part of the objection decision. In support of this position the Respondent cited the decision in ***Interfreight Forwarders Uganda v. East African Development Bank SCCA 33 of 1992*** and S. 14(4) of the Tax Appeals Tribunal Act. The Respondent

submitted that the issue relating to the assessments being time barred is outside the jurisdiction of the Tribunal as this issue did not form part of the objection decision and because the Applicant did not exercise its right to seek leave to have the said issue added so as to provide the Respondent with the opportunity to defend itself. The Respondent invited the Tribunal to find that the assessment of Shs. 58bn was justifiably issued and that the application be dismissed with costs.

On 17th May 2024, the Tribunal made a *locus in quo* visit to the Applicant's plant at Namanve. The Applicant was represented by Ronald Kalema, Vanessa Irene Mbekeka and Gerald Ndobya while the Respondent was represented by Mr. Sam Oseku and Mr. Simon Peter Orishaba. Mr. John Bundi, Finance Director, Ms. Prossy Jjumba, Tax Manager, Mr. Michaelangelo Salabwe, Safety Health Environmental and Quality Manager, Mr. Denis Mucunguzi, Environmental Occupational Safety and Health Manager, Ms. Sanyu Musiige, Treasury Accountant, Mr. Mugume Osbert, Production Scheduler, Mr. Turyagenda Kenenth, Manufacturing Manager, Mr. Peter Obong, Logistics Director and Mr. Mawere Ashraf, Stock team leader warehouse, attended on behalf of the Applicant.

The Tribunal was taken to production line 2, which produces the Applicant's glass products. The Tribunal was able to see the different stages at which products are rejected. The Tribunal observed products being rejected at the filler stage for non-conformities like under-fills, at the labelling stage for non-conformance with labelling standards. At the quality laboratories, the Tribunal witnessed quality analysis of the products at different stages of production. Non-conformities discovered in the lab are isolated for destruction. At production line 4, which is the Applicant's, juice production line, the Tribunal witnessed rejection of products, post-filling and post-labelling. The Tribunal also witnessed a temporary quarantine storage of products suspected of having defects. 560 cases of juice were isolated because of an unexpected stoppage on the line. The Tribunal visited the product quarantine cages where products unfit for consumption are stored before destruction. At the logistics yard, the Tribunal witnessed market/trade returns brought back for various reasons. We witnessed the sorting of the day's return comprising a large volume of 250 pallets of products. At the destruction facility, we witnessed the destruction of the rejected products. The rejected goods are destroyed by decanting the products down the drain of the effluent plant in order to avoid the risk of contamination, rodents and other food safety risks.

In rejoinder, the Applicant reiterated its earlier submissions.

6. Determination of the Issues

(i) Whether the respondent used correct ex-factory prices in deriving the assessment?

The main dispute between the parties, is whether the Respondent computed the Ex-factory price, in accordance with the provisions of ***Paragraphs 2(1) and (2) (2) of Part II, Schedule 2 of the Excise Duty Act, 2014.***

From the submissions of the parties, it is the position of the Applicant, that an item known as a `discount`, should be excluded in deriving the Ex-factory price. The Respondent on the other hand argues that the `discount` ought to be included in deriving the Ex-factory price. Each of the parties have their own understanding of the term `discount`. According to the Applicant, the `discount` mentioned in its sales ledger, refers to the difference between prices charged by it to different sets of its distributors. The Applicant however hastens to add, that this amount is not a discount, in its proper sense, as it is not included in the Applicant's invoices and that it constitutes neither revenue nor a cost. The Respondent on the other hand, takes the position, that these amounts are discounts properly so called, as they are granted by the Applicant to its distributors as incentives to facilitate sales.

The argument, in respect of the term `discount` as per the Applicant's submissions, is completely at odds, with the position set out in the Applicant's pleadings. Therefore, in order to determine this dispute, we must first determine, what it is, that is sought to be included or excluded by the parties, in deriving the Ex-factory price.

Relevant excerpts from the Application filed by the Applicant on 21st April 2020 and its attachments are reproduced below for ease of reference.

Excerpt of Application at page 7 paragraph 6(a) (i).

"The Respondent's use of theoretical Ex-factory price and failure to apply the provisions of the Excise Duty Act by ignoring discounts given to the Applicant's dealers led to the incorrect assessment".

Excerpt of Application at page 10 paragraph 15(b).

“The Respondent’s interpretation of what constitutes the Ex-factory price for purposes of LED, VAT and CIT is erroneous in law. The Ex-factory price as defined by law includes margins and by extension discounts offered to customers that must be taken into account. The Respondent should not impose taxes based on notional prices that are never received by the Applicant”. (Underlined for Emphasis).

Excerpt from exhibit A3 (Applicant’s objection dated 16th January 2020), at page 3 under heading **Detailed Grounds for Objection and Technical Analysis.**

“The URA team derived their Ex-factory prices and ignored CBC’s Ex-factory prices. In deriving the Ex-factory prices, URA ignored discounts given to customers and therefore used theoretical prices to determine excise duty liability. This matter was extensively discussed during the reconciliation meetings and CBC exhaustively discussed the business model and how pricing is determined..... In deriving the Ex-factory price, it is our understanding that the normal Ex-factory price should be determined on the negotiated price between independent parties as this is within the normal ordinary course of business, since the price is set between CBC and independent person (i.e. OCCD) dealing at arm’s length. As the discount impacts on the profit realized, one cannot isolate the discount from the profit margin. A profit margin would be the profit realized on a transaction. It also implies that as profit margins and discounts vary across various customers, the Ex-factory price cannot be the same across the country”. (Underlined for Emphasis).

Excerpt from **exhibit A7 (ii) (Minutes of Meeting held between URA, Century Bottling Company and Ernst & Young on 27th November 2019)**, at page 56,-57 and 60 of Applicant’s trial bundle is reproduced below.

Pages 56-57

“The business initially only had a Direct Sales Distribution (DSD) model with Company own Depots being used as the main avenue through which products will be sold to retail outlets and/or served direct from the Company plant. However, over time the cost structure of this model became a huge burden to the company and this was replaced with an Official Coca-Cola Distributor (OCCD) model. This was achieved by the company getting rid of Company Depots and appointing OCCDs for the different markets/districts/regions. This resulted in the ex-gate prices of our products being adjusted to cater for this new player in the company value chain as these OCCDs took over the role of distributing our products to the final retail outlets. However, because of the existence of various products and channel players the discounts offered varied depending on what the company considered was adequate for the OCCD to

remain profitable and competitive in the market place. Where the company continued to use a DSD system the discounts also got adjusted accordingly e.g. direct sales to say Game, Shoprite, hotels, etc. Hence the existence of different discounts and margin structures which are operated on an arm`s length basis.

Therefore, disallowing these discounts would disadvantage the taxpayer as these monies have been paid to the OCCDs to sell the products to retail outlets in their localities”.

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“After all the submissions above, the URA Manager, in her view informed the meeting that excise duty is charged on the Ex-factory price which price does not include discounts. This price being the actual price of the liquid (computed as costs incurred to produce plus a margin). (Underlined for Emphasis).

The taxpayer requested URA to confirm the sections of the Excise Act they were applying to disallow discounts to OCCDS. E&Y team went on to read several sections of the Act to get the URA team`s confirmation and the URA team was noncommittal on the exact section of the Act they were using in this regard”.

Excerpt from **exhibit A7 (iii) (Minutes of the Meeting between URA Objections and Appeals Unit and Century Bottling Company Limited dated 12th February 2020, at page 64 of Applicant`s trial bundle under heading 2002: Change in CBC`s Operating model.**

“Prior to 2002, CBC operated a Direct Sales Distribution (DSD) model whereby the company owned depots across different parts of the country from which bulk wholesale and retail sale of products were made. At the depots, CBC owned the assets and inventory and used its own employees to manage the operations.

Effective 2002, the use of the DSD model was stopped in Uganda in line with the group`s international policy. It was replaced with the Official Coca Cola Distribution (“OCCD”) model which required the use of third parties as wholesalers, distributors and retailers. This decision was driven by the group`s desire to focus on its primary business and to stimulate the growth of local entrepreneurs in Uganda.

To incentivize the participants under the OCCD model, the company had to sell its products at a price slightly lower than the recommended retail price (“RRP”) to allow the resellers make a profit.

The selling price from CBC to the resellers considers factors such as their order volumes, their market location and sales potential, their premises, their capacity and risk profile, mode of transportation of the goods to them among others.

Therefore, since each reseller's profile is different, the profit margin that CBC recognizes on sales to them varies. Consequently, the Ex-factory price on the products supplied will vary in line with the definition of "normal Ex-factory price" in the Excise Duty Act which requires the inclusion of a profit margin in the calculation.

Notwithstanding, the resellers can sell over the RRP provided they are willing to take the risk that their clientele will still buy the products. For instance, a product reseller at a 4-star hotel or restaurant may recover a higher premium over the RRP compared to a retailer at a large supermarket in the city or a reseller located in a village in the rural areas.

The above excerpts show, that the Applicant granted discounts, properly so called, to its distributors and included these discounts, in deriving the Ex-factory price.

Having made the above clarification, the question which arises and upon which the resolution of this issue turns, is whether discounts granted by manufacturers to their distributors, ought to be included, in deriving the Ex-factory price? In order to answer this question, we must construe the provisions of **Paragraph (2) (2) of Part II, Schedule 2 of the Excise Duty Act, 2014**, above.

Paragraphs 1, 2(1) and 2(2) of Part II, Schedule 2 of the Excise Duty Act, 2014, provide as follows:

"1. Calculation of excisable duty payable

The excise duty payable by a person in respect of excisable goods or services whose excise duty is expressed as percentages shall be calculated by using the following formula;

A X B where

A is the value of the excisable good or the excisable service; and

B is the rate of excise duty applicable to the goods or service.

2. Determination of value of excisable goods and services

(1) The value of an excisable good shall be the normal Ex-factory price of the good exclusive of any tax on that good.

(2) *The normal Ex-factory price of the good shall include raw material costs, manufacturing costs, labour costs, profit margin, bank charges and interest and all other costs, charges and expenses incidental to the factory, production and sale.*”

The rule of statutory interpretation, which seems appropriate to us, for the purpose of construing **Paragraph 2(2)** above, is the rule known as *ejusdem generis*.

In ***Words and Phrases Legally Defined, Volume 2: D-J Third Edition***, the following definition of the term *Ejusdem Generis* has been attributed to (***Halsbury's Laws of England (4th edn) para 1526***).

“Where the particular things named in a document have some common characteristic which constitutes them a genus, and the general words following an enumeration of specific things or classes of things can be properly regarded as in the nature of a sweeping clause designed to guard against accidental omissions, then the rule of ejusdem generis will apply, and the general words will be restricted to things of the same nature as those which have already been mentioned;

The decision of the Supreme Court of India in ***Amar Chandra Chakraborty v. Collector of Excise, 1972 Supreme Court***, laid down the following essential conditions for the application of this rule;

1. The statute should contain an enumeration of specific words;
2. The subjects of enumeration should constitute a class or category;
3. That class or category is not exhausted by the enumeration;
4. The enumeration is followed by general terms; and
5. There is no indication of a different legislative intent.

It will be seen from a reading of the above provision, that there is an enumeration of specific words, namely; *‘raw material costs, manufacturing costs, labour costs, profit margin, bank charges and interest’*.

These specific words constitute a class or category, of costs and expenses.

The use of the word *‘include’* at the start of the enumeration of the specific words, shows that this class or category is not exhausted by the enumeration.

The enumeration of specific words, is followed by the following general terms *“and all other costs, charges and expenses incidental to the factory, production and sale”*.

Finally, from a perusal of the Excise Duty Act, there is no indication that a different legislative intention is intended. It is clear that it was the intention of the legislature to restrict the general words by means of the specific ones through the application of the *ejusdem generis* rule.

The main objective of the *ejusdem generis* rule, in the interpretation of statutes, is to restrict the general words appearing in a provision to things of the same class or genus as those which have already been mentioned. In the instant case, in order to determine the items, which should form part of the general words, we must restrict the general words to costs, charges and expenses incidental to the class of things specifically mentioned, namely; raw material costs, manufacturing costs, labour costs, profit margin, bank charges and interest.

In order to do this, we must determine, to what class or genus of things these specifically mentioned costs, charges and expenses belong.

A perusal of **paragraph 2(2) of Part II, Schedule 2 of the Excise Duty Act, 2014**, shows that these carefully chosen items belong to a class of costs, charges and expenses, deemed essential for the manufacture of goods and their sale at the manufacturer's premises. This can be seen from **Paragraph 2(1)** above which excludes taxes from the Ex-factory price. Further, costs like delivery, to a customer or advertising, which are normally incurred after the removal of goods from a manufacturer's premises have not been included in the above class of costs. It will also be observed that the only cost or charge related to the sale of goods which has been included in the above provision is the profit margin, without which the manufactured goods cannot be sold at the manufacturer's premises. This is deliberate and is intended to limit the costs constituting the Ex-factory price and therefore the value of the excisable goods, to costs, charges and expenses deemed essential for the manufacture of goods and their sale of the goods at the manufacturer's premises.

The above reasoning, is borne out by the provisions of **S.4 (3)** of the **Excise Duty Act**, which states as follows;

“(3) A manufacturer of an excisable good becomes liable to pay excise duty on that manufactured excisable good when the manufactured good is removed from the manufacturer's premises.”

S. 4(3) of the *Excise Duty Act*, and the inclusion of a profit margin, as part of the Ex-factory price, under **Paragraph 2(1)** above, ensures that the excise duty point (the point at which a taxpayer becomes liable to pay excise duty), is contemporaneous with the sale of the excisable goods at the manufacturer`s premises.

By making the excise duty point, contemporaneous with the sale of the excisable goods, the manufacturer is able to pay the excise duty after the sale of the goods. An onerous burden would be placed on the shoulders of manufacturers, if they were required to pay excise duty for excisable goods not yet sold by them. Further, by making manufacturers liable to pay excise duty at the point of removal, the Government ensures, that excise duties are collected at the point where the goods leave the controlled environment of the manufacturer, thereby reducing the risk of tax evasion and simplifying the administration and enforcement of excise duties.

The sale and removal of the excisable goods from the manufacturer`s premises and the payment of the requisite excise duty, are all dependent on the Ex-factory price. The Ex-factory price, should therefore be able to capture, the basic cost of producing the goods, up until the point they leave the factory. For this reason, it is vital that the only costs, which should be included in the Ex-factory price, are the costs which are essential for the manufacture of the goods and their sale at the manufacturer`s premises.

Having determined that the costs, charges and expenses, specifically mentioned under **Paragraph 2(2)** above, belong to a class or genus of costs, charges and expenses, essential for the manufacture of goods and their sale at the manufacturer`s premises, we will proceed to determine, whether the discounts granted by the Applicant to its distributors fall under the general words appearing in that provision namely; "*all other costs, charges and expenses, incidental to the factory, production and sale*"

For a discount, to fall under the general words, appearing under **Paragraph 2(2)** above, the discount must qualify as a cost, charge or expense, incidental to the factory, production and sale. For this to be the case, the discount must belong, to the same class or genus as the costs, charges and expenses specifically mentioned under **Paragraph 2(2)**, above. The discount, should in other words, be essential for the manufacture of goods and their sale at the manufacturer`s premises.

While it is clear, that the costs, charges and expenses, specified under **paragraph 2(2)** above, are essential for the manufacture of goods and their sale, at the manufacturer's premises, the same cannot be said for a discount. The reason for this, is that, while discounts facilitate the sale of goods, they are neither essential for their manufacture nor for their sale. Goods can and are usually sold without discounts. For this reason, costs, charges and expenses incidental to a discount do not belong to the class or genus of items specifically mentioned under **paragraph 2(2)** above, and they ought not to have been included by the Applicant, in deriving the Ex-factory price, for its excisable goods.

The inclusion of unnecessary costs, translates into unnecessarily high Ex-factory prices, which in turn, lead to high excise duties for manufacturers. On the other hand, since discounts are granted, through the reduction of the manufacturer's profit margin, the inclusion of discounts in deriving the Ex-factory price, leads to a lower than expected excise duty, which affects the collection of revenue by the Government.

The Applicant misapplied the provisions of **paragraph 2(2)** above, in computing the Ex-factory price, by factoring-in, the discounts it had granted to its distributors through the reduction of its profit margin. The Respondent was therefore justified, in adding back the amounts discounted, so as to arrive at the correct Ex-factory price.

While it is true, that the amounts added back by the Respondent, constituted amounts, which as a result of the discounts, were not received by the Applicant. It must be realized, that excise duty is not charged on the price at which a manufacturer sells its excisable goods, but on the Ex-factory price, which is the price, at which the manufacturer is required to sell its excisable goods under paragraphs 1 and 2 of **Part II, Schedule 2 of the Excise Duty Act, 2014**.

Paragraph 2(2) above, envisages that a manufacturer will sell its excisable goods, at the correct Ex-factory price, which ensures that excise duty, is charged on the amount actually received by the manufacturer from its customers.

A manufacturer, who misapplies the provisions of **paragraph 2(2)** above, and sells its excisable goods at a discount, and as a result, forfeits part of the Ex-factory price due to it, cannot prevent the Respondent from applying excise duty, on the correct Ex-

factory price, by stating that the correct Ex-factory price comprises amounts not received by it.

(ii) Whether the Excise Duty and VAT assessed on export variances is justified in law?

In respect of this issue the Applicant contended that the Respondent had based its assessments on incorrect variances. The Applicant submitted that during its review the Respondent noted variances between the exports declared in ASYCUDA and the Applicant's sales ledger and concluded that these exports were non-existent because the ASYCUDA system had no record of them. The Respondent accordingly reclassified these exports as local sales and imposed on them Excise duty, VAT and Income Tax.

The Respondent's contention was that the dispute in respect of exports variance relates to a comparison of export sales in ASYCUDA to export sales in the sales ledger and the Applicant's tax returns for declarations of soda, water and juices. The Respondent submitted that it established that whereas the Applicant's SAP accounting sales report reflected 20,004,578 liters, ASYCUDA data had 17,205,940 leading to a variance of 2,798,637 liters. The Respondent submitted that it reclassified the over-claimed liters to local sales using the average monthly Ex-factory prices from the Applicant's sales ledger and charged them, to tax accordingly. The Respondent submitted further that the Applicant did not declare all goods exiting the country leading to the conclusion that these goods were local sales and not exports. The Respondent submitted that there was no evidence on record to confirm the submission by the Applicant that the Respondent had verified and confirmed that the entries in question existed in ASYCUDA.

When the matter came up for hearing on 22nd July 2022, the Respondent's ASYCUDA system was set up in the Tribunal and the Applicant's witness, Mr. Lawrence Okoth, was asked to show whether the missing export entries existed in the ASYCUDA system. By using the transit numbers for each entry, the witness was able to show that the missing export entries indeed existed in ASYCUDA. The Tribunal was able to establish for a fact, through the above demonstration, that the entries in question, related to exports made by the Applicant during the period under audit. We accordingly

find that the Respondent was not justified in re-classifying these exports as local sales and imposing on them Excise duty, VAT and Income tax.

(iii) Whether the Respondent's reclassification of destroyed stock is correct?

It was the Applicant's contention that the Respondent's reclassification of destroyed stock as sales was based solely on the fact that the Applicant had failed to present destruction certificates as proof of destruction. The Applicant argued that there was no legal requirement during the period under audit for a manufacturer to provide the Respondent with a destruction certificate as proof of destruction of excisable goods.

The Applicant contended that **S. 8 of the Excise Duty Act** only required a gazetted manufacturer to keep records of stock. The Applicant argued that it kept these records using stock destruction forms which it presented to the Respondent but the Respondent rejected them. The Applicant submitted that the requirement imposed by the Respondent to notify the Commissioner of any destruction, only became law on 1st July 2024 as **S. 18A of the Tax Procedure Code (Amendment) Act 2024**.

The Respondent contended that no evidence had been adduced by the Applicant to prove that they had destroyed goods worth Shs. 4,601,364,016. The Respondent argued that the documents adduced in evidence by the Applicant namely; samples of transfer stock forms, standard operating procedures for control of non-conforming goods, trade rejects, analysis reports and Waste Discharge permits issued to the Applicant by the National Environmental Management Authority, did not prove that the goods in question had actually been destroyed. The Respondent contended that during the *locus in quo* visit of the Applicant's factory at Namanve, the Applicant failed to demonstrate that it had the capacity to destroy such large volumes of goods.

Mr. John Mukiibi, who testified on behalf of the Applicant stated that on several occasions during the audit period the Applicant routinely invited the Respondent's officers to witness the destruction of the expired beverages. The witness stated that the Respondent's officers invariably failed to attend the destructions and in some cases, came months after the destruction had been completed. The witness stated that given the cavalier attitude exhibited by the Respondent above, it was unsafe for the Applicant to compromise the health and safety of its production facility, by accumulating expired beverages as they waited for the Respondent to attend the

destruction of expired beverages. The witness stated that prior to the year 2014, the Respondent maintained a full-time officer at the Applicant's plant whose duty was to monitor the manufacturing and destruction process. The witness stated that after some time, the Respondent recalled the officer, with the result that no officer of the Respondent, was stationed at the Applicant's factory during the audit period.

As proof of the Respondent's above mentioned attitude, the Applicant relied on exhibit A20 (i) at pages 311-315 of the Applicant's trial bundle. Exhibit A20 (i) is a series of emails between officials of the Applicant and the Respondent. The emails relate to the period 2nd August 2021 to 18th August 2021. The first email was sent by Nicholas Karyeija, the Respondent's CRM-Foods and Beverages. It is dated 2nd August, 2021 and is addressed to Daniel Mwesige, one of the Applicant's officials. It refers to a discussion between Mr. Karyeija and Mr. Mwesige, about an intended destruction of products at the Applicant's factory. In the email Mr. Karyeija requests the Applicant to provide disposal documentation to facilitate the disposal of the Applicant's rejected products.

On the same day, the Applicant's Treasury Accountant, Sanyu Musiige, responded to the email, by attaching a letter for the destruction of the products and documents for the transfer of the products to the quality department. By the same email she informed Mr. Karyeija, of the Applicant's expectation that the Respondent's team would be able to attend the destruction at the Applicant's plant on 4th August 2021.

The next email was sent by Mr. Mwesige. It is dated Wednesday 11th August 2021. It is addressed to Ms. Charity Nahabwe, who is also one of the Respondent's CRM-Foods and Beverages. This email refers to a telephone conversation between Mr. Mwesige and Ms. Nahabwe about the overdue disposal of the Applicant's products, which Mr. Mwesige states is causing a threat to the Applicant's GMP. Mr. Mwesige reminds Ms. Nahabwe of the Respondent's request to speed up the process and attend the destruction by Friday 13th August 2021. Ms. Nahabwe acknowledges receipt of this email on the same day and promises to revert to Mr. Mwesige before the close of the day with feedback on when the Respondent's team would be in a position to attend the decanting activity at the Applicant's plant.

Ms. Nahabwe responded to Mr. Mwesige the following day and requested for certain documents. She promised that the Respondent would come to the Applicant's plant

for the decanting activity after receipt of the requested documents. The following day Mr. Mwesige wrote to Ms. Nahabwe attaching some of the requested documents. Ms. Nahabwe wrote back on Sunday 15th August 2021, acknowledging receipt of the documents and promised to revert to Mr. Mwesige after perusal of the documents by the Respondent's team.

On Tuesday 17th August 2021, Mr. Mwesige sent the remainder of the documents, to Ms. Nahabwe and asked for an update as to when the Respondent's team would come to witness the destruction of the products in question. On the following day, Mr. Mwesige sent another email to Ms. Nahabwe complaining that the Respondent was giving very little attention to the Applicant's request despite the fact that failure to destroy the products posed a health and safety risk to the plant.

Despite the fact that the above emails relate to discussions between officials of the Applicant and the Respondent in the year 2021, they show the bureaucracy involved in getting the Respondent to send a team to witness destruction of expired products at a manufacturer's facility. The above exchange shows that the testimony by Mr. Mukibi, to the effect that the Respondent's officials invariably failed to honor the Applicant's invitations to witness the destruction of expired beverages, is plausible. The Respondent's cavalier attitude, can also be seen from its recall of an officer, previously stationed at the Applicant's plant on a full-time basis, for the purpose of monitoring the manufacturing and destruction process.

Other evidence adduced by the Applicant in support of its position on this point is exhibit A15, which is the Applicant's Standard Operating Procedure for the handling and disposal of non-conforming imported product, product in process, from Warehouse and from the trade, Stock transfer forms (Exhibit A16), samples of the Applicant's trade reject analysis reports for the years 2015, 2016 and 2017 (Exhibit A17), Stock destruction forms for the years 2014, 2015, 2016, 2017 and 2018 (Exhibit A18). Other evidence adduced by the Applicant in this regard include internal approval paperwork on disposal of Trade marked materials dated 29th January 2020, 31st December 2019, 24th August 2012 (Exhibit A19), Applicant's Waste discharge permits for the period 2013 to 2016 (Exhibit A21(i) and A21(ii), Applicant's license to own/operate a waste treatment plant site for the period August 2015 to August 2016 (Exhibit A21(iii), Applicant's license to own/operate a waste treatment plant site for the

period November 2016 to November 2017 (Exhibit A21(iv), Waste discharge permits for the Applicant's service providers, namely; Luwero Industries Limited's license to own/operate a waste treatment plant for the period November 2015 to November 2016 (Exhibit A22(i), Array Services Limited's license to transport waste for the period November 2016 to November 2017(Exhibit A22(ii) and De Waste (U) Limited's license to transport waste for the period December 2017 to December 2018 (Exhibit A22(iii).

During the *locus in quo* visit, of the Applicant's plant at Namanve on 17th May 2024, the Tribunal was able to see for itself, the entire manufacturing process including the different stages at which manufactured products are rejected. At production line 2 products are rejected at the filler for non-conformities like under-fills. Off the production line products can also be rejected for not conforming with the labelling standards, for instance missing labels. Products failing the quality analysis tests at the quality assurance laboratories are isolated and become rejects. Further rejects were seen at production line 4, which is the Applicant's juices production line. At the product quarantine cages, products unfit for consumption are stored before being sent for destruction.

The sorting out of products brought back from the trade takes place at the logistics yard where expired products were isolated for destruction. Destruction of the products takes place at the destruction facility. The destruction is carried out by decanting the product down the drain of the effluent treatment plant where it is biologically treated into final effluent safe for discharge. The reasons given for the destruction of the rejected products by the Applicant was that destruction was necessary to avoid the risk of contamination, rodents and other food safety risks which could impact the safety of the Applicant's operations.

Having perused the Standard Operating Procedure manual, the stock transfer forms, the Applicant's trade reject analysis reports, the stock destruction forms, the internal approvals paperwork on disposal of Trade marked materials, the Applicant's Waste discharge permits, the Applicant's license to own/operate a waste treatment plant, Waste discharge permits for the Applicant's service providers to own/operate waste treatment plants and to transport waste for the period in question, and the evidence from the stock destruction forms, that the amount of stock destroyed by the Applicant in comparison to the total amount produced during the audit period, is only 0.1%, we

are satisfied that the Applicant has proved on a balance of probability that it destroyed stock worth Shs. 4,601,364,016/- during the audit period. We do not agree with the Respondent that no evidence was adduced by the Applicant to prove that the goods in question were destroyed.

Given the urgency, with which the Applicant is required to take measures, to avoid the risk of contamination and other food safety risks at the plant, and the fact that the requirement to notify the Commissioner of the destruction of excisable goods, only became law on 1st July 2024 as **S. 18A of the Tax Procedures Code (Amendment) Act 2024**, we find that the Applicant acted reasonably, in destroying the goods in question in the absence of the Respondent's officials. We agree with the Applicant that the value of the destroyed goods is a revenue expenditure which is allowable as a deduction to the Applicant.

(iv) Whether the Respondent's assessments are arithmetically correct?

The Applicant's witness Mr. John Mukiibi testified that the Respondent made arithmetic errors in computing the additional assessments. The witness stated that in the VAT computation the Respondent derived sales as a result of adjustments to the notional Ex-factory price. The witness stated that whenever the derived sales produced a negative variance as per the Respondent's tabulation no credit or over-declaration was given to the Applicant. The witness stated that a negative variance would mean that the Applicant over-declared sales and subsequently over-declared taxes. The witness stated that the witness's failure to take into account negative variances was a grave error. The witness testified that the Respondent imposed taxes whenever their `derived sales` gave rise to positive variances as undeclared sales. The witness stated that this biased approach led to an incorrect assessment. The witness stated that if the Respondent had considered the negative variances as over-declared sales they would have found that the Applicant had in fact overpaid VAT by Shs. 1,138,773,168 for the audit period.

The witness testified that with respect to juice the Respondent used the notional Ex-factory prices to determine the taxable value of juice. The witness stated that this was an error because prior to 1st July 2017, there was no Excise duty due and payable on juice. The witness stated that as such there was no rational or legal basis for the

Respondent to derive notional sales prices for juice. The witness stated that actual invoice values should have been used instead.

The witness testified further that in the adjusted computation for corporate Income tax, the Respondent failed to carry forward the assessed loss for the Applicant. The witness stated that even after adjusting for `undeclared income` which the Applicant disagreed with, the Applicant had an unutilized loss of Shs. 2,635,615,090 for the year 2016. The witness stated that the failure by the Respondent to carry this loss forward to the year 2017 as required under S. 38 of the Income Tax Act was an unjustified computational error. The witness stated that the Applicant availed all relevant information including sales records and ledgers, export entries and documentary proof of destruction of expired beverages but in their objection decision the Respondent claimed not to have received it.

The Respondent submitted that the assessments in question were arithmetically correct and that the argument by the Applicant that the assessments had been raised without due care and skill were misplaced.

We have carefully perused the evidence before us and the submissions of the Respondent. We note that the Respondent has not provided a sufficient response to the allegations raised by the Applicant that arithmetical errors were made by the Respondent in computing the additional assessments.

(v) Whether the local excise duty assessments are out of time?

It was the Applicant's contention that **S. 58** of the **East African Community Customs Management Act** provided a limitation period barring the Respondent from making demands for short paid levy after a period of 12 months from the date of payment except in the case of fraud. The Applicant contended that the assessment in question was raised after a period of 12 months and was therefore out of time.

The Applicant contended further that under **S. 23** of the **Tax Procedures Code Act**, an additional assessment may only be raised within three years from the date that the tax payer furnished the self-assessment return to which the original assessment relates, except in the case of fraud, gross or wilful neglect or if relevant information has been discovered. The Applicant submitted that in the absence of these exceptions, the Respondent is time barred from issuing additional assessments in December

2019, for periods up to November 2016. The Applicant submitted that the Respondent was only entitled to assess for the 12 months from December 2016 to December 2017. The Applicant invited the Tribunal to reverse these assessments.

The Respondent's position is that the above contention by the Applicant was not pleaded nor did it form part of the objection decision. In support of this argument, the Respondent cited the decision in *Interfreight Forwarders Uganda v. East African Development Bank SCCA 33 of 1992 and S. 14(4) of the Tax Appeals Tribunal Act*. The Respondent submitted that the issue relating to the assessments being time barred is outside the jurisdiction of the Tribunal as this issue did not form part of the objection decision and because the Applicant did not exercise its right to seek leave to have the said issue added so as to provide the Respondent with the opportunity to defend itself.

We have carefully perused the instant application, which was filed by the Applicant on 21st April 2020. We have also perused the objection and objection decision.

There is no mention in the application nor in the objection or objection decision, that the additional assessments in question were time barred. Further, no evidence in proof of the above assertion was led by the Applicant.

The question as to whether the Respondent was time barred from issuing additional assessments in December 2019, for periods up to November 2016, is not a pure question of law. The Applicant ought to have adduced evidence before the Tribunal to prove that three years had elapsed from the date that it had furnished its self-assessment return in respect of the original assessment. We agree with the Respondent that the Applicant cannot depart from its pleadings by raising a point that did not form part of its pleadings.

In the same vein, the Tribunal notes that the question as to whether the Applicant's transactions were at arm's length, did not form part of the dispute, as they were neither raised in the objection nor in the objection decision. The Respondent's pleadings are also silent on the same. We find that permitting the Respondent to raise this question in its submissions would also amount to the Respondent departing from its pleadings.

Having resolved as above, it is ordered as follows;

1. The assessments in question, are remitted to the Respondent for re-computation in accordance with the following findings of the Tribunal;
 - a) The Applicant incorrectly computed the Ex-factory price by including discounts granted by it to its distributors.
 - b) The Respondent wrongly re-classified export sales made by the Applicant as local sales.
 - c) The Respondent wrongly re-classified destroyed stock as local sales.
 - d) The Respondent failed to address the allegation by the Applicant that the assessments in question were riddled with arithmetical errors.
 - e) The questions relating to whether the transactions between the Applicant and its distributors, were at arm's length and whether part of the assessments were time barred, did not form part of the dispute between the parties and accordingly have no bearing on the conclusions arrived at by the Tribunal and shall not be taken into consideration by the Respondent in re-computing the assessments.
2. The re-computed assessment shall be filed in the Tribunal by close of business on 15th February 2025. The Applicant shall provide the Respondent with all necessary information required for the said re-computation.
3. The Applicant is granted half of the costs of this application.

Dated at Kampala this 22nd day of January 2025.



SIRAJ ALI
CHAIRMAN



CHRISTINE KATWE
MEMBER

